Alaska Department of Environmental Conservation
Antidegradation Regulations Key Issues: Making Them Workable
FINAL 05-12-15

Key Issue	Description of Key Issue	How to Tee Up the Key Issue: Making the Regulations Workable	Additional Key Issue Information
401/404 permit approval & certification processes	• Draft antidegradation regulations having to do with ADEC 401 certifications of US Army Corps of Engineers' (USACOE) 404 permits (401/404 permits) will delay process in obtaining 404 permits • Draft antidegradation regulations having to do with 401/404 permits will block small development projects • Draft antidegradation regulations propose a process that is duplicative of the federal 404(b)(1) approval process	• Discussion points to find alternative language in the regulations: o Where can ADEC provide clarity and assistance to 404 applicants to know what the state requires for necessary and importance findings for the 401 certification process? o Where can ADEC provide clarity in regards to the 401 certification of 404 permits process to ensure adequacy of the antidegradation analysis and public participation? o Where or how does the Federal 404 and specifically the 404(b)(1) process fulfill all antidegradation requirements – necessary, importance, public participation, etc.?	• The proposed regulations state that the department will review the 404(b)(1) analysis to determine if it is sufficient to meet the state required necessary and important findings • The 404(b)(1) may not be sufficient to meet all state antidegradation requirements in all cases • Idaho regulations address 401/404 in the regulatory definition of a "permit or license" and in the associated guidance document. In summary, antideg is required for 401/404 by regulation, however the guidance document states "Under this approach, applicants who fulfill the terms and conditions of applicable 404 permits and the corresponding 401 water quality certification will have fulfilled the antidegradation requirements." And, "DEQ will coordinate with the ACOE and the applicant to ensure that the analysis conducted to fulfill the 404(b)(1) guidelines will also fulfill the antidegradation review requirements." • Washington regulations specifically state that antidegradation analysis is required for 401 certifications

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Alternative Analysis	• There is a concern about the use of the term "practicable" rather than "reasonable" for the range of alternatives
	• There is a concern that the range of practicable (or "reasonable") alternatives for existing facilities is smaller and that the regulations should address this as well as the "informality" of the process; the larger range of practicable alternatives analysis should only be applied to new facilities
	• There is a concern that an excess of documentation would be required to explain the less-degrading alternatives that were not selected
	• There is concern that the regulations require/do not require the least environmental degrading practicable alternative (LEDPA or LEDPA-like) to be selected/implemented
	• Comment requesting verification of applicant's submitted economic (fiscal) information
		Department discussion points:
		• Upstream/facility wide analysis is not part of the regulations
		• Where may department assistance be needed to simplify paperwork/documentation requirements
		• Discuss workable resolutions to LEDPA interpretation
		• Ask/discuss where the regulations may be revised to allow for additional flexibility in the required necessary finding, alternatives analysis, and/or least degrading practicable alternative language
		
		• Potential discussion::
		  o What regulatory language revision would clarify that ADEC will examine the submitted range of alternatives of discharge, but will/will not necessarily require least degrading practicable alternative as the selected alternative?
		  o Are concerns about the "least degrading practicable alternative" more that the necessary engineering requirements would be too expensive or that the demonstration of the different alternatives would take too much time and resources to document?
			• The department did not use the term "reasonable" to describe the range of alternatives. The department considered the term "practicable" more appropriate, as it is consistent with the Antidegradation Workgroup recommendations, consistent with state and federal terminology, and is already defined in the current regulations at 18 AAC 70.990(48)
			• Department finding must document "necessary" through the alternatives analysis to be defensible

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De Minimis provision	• The *de minimis* provision of the proposed draft antidegradation regulations is too narrow/restrictive or not sufficiently restrictive • The *de minimis* provision of the proposed draft antidegradation regulations were not part of the Antidegradation Workgroup recommendations • There was concern over how ADEC would implement, track and maintain *de minimis* discharges • The *de minimis* provision should not allow bioaccumulative and other specified compounds • General non-support of *de minimis* provision	• The *de minimis* provision is optional. It is up to the applicant to determine if the proposed discharge meets *de minimis* criteria and provide the necessary supporting documentation or to undergo the full Tier 2 antidegradation analysis • The department will develop and implement procedures to track and maintain *de minimis* discharges, which is especially relevant to multiple discharges to the same water • Potential discussion: ○ If a permittee had a discharge that they believed was close to the stated de minimis threshold, what would be the disadvantage of taking the de minimis option?	• *De minimis* is allowed per Federal policy and provided strictly as an option or additional tool for the antidgradation analysis • *De minimis* discharges are protective of human health and the environment without the additional rigor of a complete antidegradation analysis

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Antidegradation Analysis for General Permits	• Too many unique waterbodies for antidegradation analysis to apply to general permitting
	• Conducting an antidegradation analysis at the time of issuance of a general permit is difficult
	• Public participation (at NOI level) not present
		• The general permit process contains all of the necessary antidegradation requirements, explicitly stated so as to withstand scrutiny
		• The general permit process and antidegradation analysis has been determined to be compliant with the Clean Water Act and Federal law/policy (i.e. WA, ID regulations). Explain the purpose of the GP/NOI process as well as the administrative benefits
		• Potential discussion:
		  o Given that general permits are written for similar types of activities and waterbodies (e.g. Tier protection levels), what is it about the general permit process that would prevent an antidegradation analysis from being adequately performed?
		  o How can ADEC clarify that at the NOI stage, if the proposed discharge does not meet the antidegradation analysis criteria performed as part of the initial GP process (including public participation), the NOI will not be approved and possibly require a revised GP or individual permit?
		  o What specifically is proposed to revise the general permit – antidegradation analysis process that would provide added environmental protections and public transparency?	

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Complexity of Draft Regulations	• Draft antidegradation regulations are seen as imposing a new set of conditions onto an already established set of permitting requirements that are more than EPA requires • Regulations are not needed; interim guidance is sufficient	• Discussion points to find alternative language in the regulations: o Where in the wastewater discharge permitting process would the antidegradation regulations cause the greatest investment of time/resource for the permittees? o What specific solutions are proposed to clarify the proposed regulations, decrease complexity and still remain compliant with the Clean Water Act? o What Alaska Department of Environmental Conservation (ADEC) assistance would make the proposed regulations less burdensome and complex, while remaining protective of the environment? • What clarification would alleviate the perception/ interpretation that the antidegradation regulations imposes new, additional work, are more burdensome for permittees, or are insufficiently protective?	• ADEC has determined that the existing antidegradation interim guidance should be clarified in regulation to ensure transparency, consistency, legal defensibility, etc. • Possible option to discuss in regards to assistance would be Department developed questionnaires/checklists to guide permit applicants in the antidegradation analysis process