IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COOK INLETKEEPER, et al., Petitioners, vs. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA P. JACKSON, Administrator of the U.S. Environmental Protection Agency, Respondents, and UNION OIL COMPANY OF CALIFORNIA and XTO ENERGY INC., Respondent-Intervenors.	)	No. 07-72420

RESPONDENTS' MOTION FOR VOLUNTARY PARTIAL REMAND

Respondents United States Environmental Protection Agency and Administrator Lisa P. Jackson (collectively, "EPA"), pursuant to Rule 27, Federal Rules of Appellate Procedure, move the Court for a partial remand of EPA's approval of the "National Pollutant Discharge Elimination System General Permit for Oil and Gas Exploration, Development and Production Facilities Located in State and Federal

Waters in Cook Inlet, Permit Number AKG-31-5000" ("General Permit"), issued pursuant to the Clean Water Act. EPA seeks this partial remand so that it may reconsider the inclusion of certain effluent limitations in the General Permit that were less stringent than those included in the prior general permit. Petitioners and Intervenors have stated that they will oppose this Motion.

INTRODUCTION

The Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1251, *et seq*., prohibits "the discharge of any pollutant by any person" into waters of the United States unless in compliance with certain permit and other provisions of the Act. 33 U.S.C. § 1311(a). On May 27, 2007, EPA approved the General Permit for the discharge of pollutants from oil and gas facilities in federal and state waters located in Cook Inlet, Alaska.

This petition for review, filed on June 15, 2007, by Petitioners Cook Inletkeeper, Cook Inlet Fishermen's Fund, the Native Village of Nanwalek, the Native Village of Port Graham, and the United Cook Inlet Drift Association pursuant to 33 U.S.C. § 1369(b)(1)(F), challenges EPA's approval and issuance of the General Permit. Among the asserted grounds is an argument that EPA improperly approved certain limitations on effluent discharges in the General Permit that were less stringent than the limits on those pollutants in the previous general permit. As described below,

in order for this "backsliding" to occur permissibly in waters that meet or exceed State water quality standards, such as Cook Inlet, the less stringent standard may be adopted "only if such revision is subject to and consistent with the antidegradation policy established" by the relevant State under the Act. 33 U.S.C. §§ 1342(o)(1), 1313(d)(4)(B). In this case, the "antidegradation policy" at issue is an Alaska regulation, part of Alaska's EPA-approved "water quality standards." See 18 AAC 70.015.

In their Opening Brief ("Pet. Br."), Petitioners assert that the new General Permit impermissibly allowed backsliding of "water-quality based effluent limits" for mercury, copper, total aromatic hydrocarbons ("TAHs"), total aqueous hydrocarbons ("TAqHs"), and "whole effluent toxicity" ("WET"). Pet. Br. at 16-17. The State of Alaska made an antidegradation authorization or finding that the limits included in the General Permit were consistent with its antidegradation policy. ER 594.[1/] Alaska included the antidegradation authorization as part of its "Section 401 water quality certification," a certification by the State that the proposed permit would not violate state water quality standards (such certification being a necessary prerequisite to issuance of an NPDES permit, 33 U.S.C. § 1341(a)(1)). Petitioners claim that the less

[1/] "ER" refers to the Excerpts of Record submitted by Petitioners with their opening brief.

stringent limits in the General Permit were improperly approved by EPA because (a) Alaska did not provide appropriate notice and opportunity for public comment on Alaska's draft antidegradation analysis supporting Alaska's authorization, and (b) Alaska did not have a separate antidegradation implementation procedures provision in its water quality standards, which Petitioners claim is a federal regulatory requirement. Petitioners conclude that, as a result of these alleged defects in Alaska's antidegradation policy, EPA violated its independent obligation to assure itself that including the less stringent limits was allowable under the "anti-backsliding" provision of 33 U.S.C. § 1342(o)(1). Pet. Br. at 15-20.

As described in greater detail below, EPA concedes on these particular facts that Alaska did not provide adequate opportunity for public comment on the State's antidegradation analysis, because Alaska's proposed finding did not include a statement of the reasons for the conclusions the State reached. EPA wishes to reconsider those portions of the General Permit allowing less stringent limits, based on a more complete antidegradation analysis to be prepared and submitted by Alaska. A partial remand of the General Permit, only as it relates to the less stringent effluent limits authorized as a result of the antidegradation analysis, is appropriate. The Court need not resolve the issue of Alaska's lack of antidegradation implementation procedures because, as set forth below, Alaska has agreed to identify implementation

procedures in guidance for its antidegradation policy by September 1, 2010. See Exhibit A, Declaration of Michael Bussell, with attached Letter from Lynn Kent, Alaska Department of Environmental Conservation ("ADEC") Water Division Director, dated February 24, 2010, to Mike Bussell, Director, EPA Region 10 Office of Water and Watersheds. Alaska has also agreed to provide public notice of a proposed antidegradation analysis regarding the less stringent effluent limits in the General Permit, based on the implementation procedures, by October 1, 2010; to allow a 30-day period, through November 1, 2010, for public comment on the new draft proposed analysis; and to issue a final Section 401 water quality certification and final antidegradation finding by December 1, 2010. *Id*.

Petitioners claim that the exception to the antibacksliding prohibition of 33 U.S.C. § 1342(o)(1), in cases in which antidegradation requirements are met pursuant to 33 U.S.C. § 1313(d)(4)(B), has not been satisfied. The proposed partial voluntary remand will resolve that claim because ADEC will perform another antidegradation review. EPA defends the General Permit against the remainder of Petitioners' claims in its Answer Brief, to be filed on March 15, 2010.

BACKGROUND

A. Statutory and Regulatory Background

1. Clean Water Act

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. § 1251(a).

The CWA focuses in large part on technology-based limitations on individual discharges from "point sources" (*i.e.*, discernible conveyances) into the navigable waters. The CWA provides that "the discharge of any pollutant by any person shall be unlawful," unless in compliance with a variety of requirements, including section 402, 33 U.S.C. § 1342. 33 U.S.C. § 1311(a). Section 402 establishes the "National Pollutant Discharge Elimination System" ("NPDES") permit program, under which EPA (or an authorized State) issues permits to individual point sources to allow the discharge of pollutants in compliance with effluent limitations and other standards. 33 U.S.C. § 1342. EPA is responsible for administering the NPDES permit program for oil and gas facility discharges in Alaska.

NPDES permits typically contain limitations that restrict the amount of pollutants that may be discharged into navigable waters. An "effluent limitation" is

"any restriction established by a State or [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11).

NPDES permits may contain two types of effluent limitations. First, NPDES permits implement technology-based effluent limitations guidelines, developed by EPA on an industry-by-industry basis, that reflect a specified level of pollutant-reducing technology available for the type of facility being permitted. 33 U.S.C. §§ 1311, 1314; 40 C.F.R. § 122.44(a)(1). These technology-based effluent limitations guidelines specify numerical amounts or concentrations of particular effluents that may not be exceeded in an NPDES permit.

Second, an NPDES permit may include "water quality-based effluent limitations." The Clean Water Act directs the States, with federal approval and oversight, to establish water quality-based standards to assure protection of the quality of state waters. 33 U.S.C. § 1313(c)(2)(A). Water quality standards are not technology-based standards, but are based on the desired uses and condition of the particular water body involved. 40 C.F.R. § 131.3(i). They are specific to a particular water body and consist of three principal elements: (a) "designated uses" for each water body, such as for public water supply, recreation, or fish propagation, 33 U.S.C.

§ 1313(c)(2)(A); (b) "criteria" specifying the amounts of various pollutants that may be present in water without impairing the designated use, *id.*; and (c) an "antidegradation policy" to protect existing uses and high-quality waters. 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. §§ 131.6(d), 131.12. If necessary to meet applicable water quality standards, NPDES permits must contain "water quality-based effluent limitations" ("WQBELs") more stringent than limitations that would be required to comply with the applicable technology-based effluent limitation guideline. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d). Such limitations "must control all pollutants or pollutant parameters" that EPA determines "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard . . . ." 40 C.F.R. § 122.44(d)(1)(i). NPDES permits are normally issued for individual facilities, but in some circumstances, a "general permit" may be issued for a group of facilities that involve the same or similar types of operations, discharge the same types of wastes, require the same type of effluent limitations, and so forth. 40 C.F.R. § 122.28.

An NPDES permit generally may not be renewed, reissued or modified to contain effluent limitations that are "less stringent than the comparable effluent limitations in the previous permit." 33 U.S.C. § 1342(o)(1). This requirement is known as the "anti-backsliding" provision. However, backsliding may be allowed in

an NPDES permit for discharges into waters in which the quality of waters exceed levels necessary to meet state water quality standards (such as Cook Inlet), but "only if such revision is subject to and consistent with the antidegradation policy established under this section." 33 U.S.C. § 1313(d)(4)(B).

EPA's regulations provide that "[t]he State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart." 40 C.F.R. § 131.12(a). The regulation requires that a state antidegradation policy and implementation methods provide at a minimum that existing water uses and the level of water quality necessary to protect existing uses be maintained and protected. *Id*. In addition, where the quality of waters exceeds levels necessary to support the propagation of fish, shellfish, and wildlife, and recreation, that quality must be maintained and protected unless the State finds "that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." *Id*. at (a)(2).

2. Alaska's Water Quality Standards and Public Process Requirements.

The State of Alaska has adopted water quality standards that have been approved by EPA. 18 AAC Ch. 70. The standards "specify the degree of degradation that may not be exceeded in a waterbody as a result of human actions." 18 AAC 70.010(b). Among other things, the water quality standards include water quality

criteria (18 AAC 70.020(b)) and Alaska's antidegradation policy (18 AAC 70.015). 18 AAC 70.010(b).

Alaska's antidegradation policy specifies that any application received to degrade a high quality water "is subject to the public participation and intergovernmental review procedures applicable to the permit," 18 AAC 70.015(c), and if Alaska is certifying a federal permit, the public participation and intergovernmental review procedures followed by the federal agency in issuing the permit will meet Alaska's requirements as well. *Id*. In the present case, because EPA issued the General Permit, Alaska was required to either certify or waive under CWA section 401. 33 U.S.C. § 1341(a)(1). Alaska's process for providing water quality certifications is set forth at 18 AAC 15.130 - .180.[2/] Public notice of the certification application must be published jointly with EPA's notice of permit actions under 40 C.F.R. § 124.10. 18 AAC 15.140(a). The Alaska Department of Environmental Conservation ("ADEC") will hold a public hearing "if it determines that good cause exists." 18 AAC 15.060(b); 18 AAC 15.150(a).

Alaska has established an antidegradation policy that closely mirrors the federal antidegradation policy. 18 AAC 70.015. Thus, "existing water uses and the level of water quality necessary to protect existing uses must be maintained and protected."

[2/] EPA's requirements regarding the contents of a state WQS certification are set forth at 40 C.F.R. § 124.53.

18 AAC 70.015(a)(1). The quality of waters whose quality exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation may be reduced only after a showing that "allowing lower water quality is necessary to accommodate important economic or social development in the area where the water is located," *id*. at (a)(2)(A); that reducing water quality will not violate water quality criteria or whole effluent toxicity; that the resulting water quality will fully protect the existing uses of the water; that methods of pollution prevention, control, and treatment that are most effective and reasonable will be applied; and that the wastes will be treated to "the highest statutory and regulatory requirements." 18 AAC 70.015(a)(2)(E)(i). An application to allow a reduction in water quality "is subject to the public participation and intergovernmental review procedures applicable to the permit" sought. 18 AAC 70.015(c). If ADEC is certifying a federal permit, the public participation and intergovernmental review processes followed by the federal agency in issuing the permit will meet these requirements. *Id.*

B. Factual Background

On February 17, 2006, in conjunction with EPA's issuance of a proposed general permit, ADEC submitted to EPA a draft Section 401 certification to be included by EPA in its notice of proposal and solicitation of public comment. ER 594-605. The EPA-proposed general permit included less stringent effluent limits for

mercury, copper, TAH, TAqH, and WET than those included in the prior general permit. As part of ADEC's draft Section 401 certification it included "a preliminary finding that any reduction in natural water quality of Cook Inlet [would] be in accord with the requirements of 18 AAC 70.015, Antidegradation Policy." ER 594. That statement was not accompanied by any further analysis.

EPA published notice of the proposed reissuance of the general permit in the Federal Register, 71 Fed. Reg. 10032 (February 28, 2006). EPA received numerous comments, including those submitted by Trustees for Alaska (ER 552-85), Cook Inletkeeper (ER 606-12), and Liberte Environmental Associates (ER 586-93).

On May 31, 2006, Trustees for Alaska, on behalf of Cook Inletkeeper and others, submitted comments on the Draft General Permit and on the Draft 401 Certification to EPA and ADEC . It claimed that the Draft 401 Certification (which included ACEC's antidegradation authorization) was "illegal," because "(1) the discharges violate antidegradation requirements, (2) the authorized mixing zones are based upon computer modeling that uses inaccurate assumptions, and (3) the backsliding analysis is legally flawed." ER 585. With regard to antidegradation, the commenters noted that EPA's antidegradation regulation provides that States are to "'identify the method for implementing such [antidegradation] policy.'" 40 C.F.R. § 131.12(a)(2); ER 566. They concluded that ADEC "has not, however, established

implementation procedures for its [antidegradation policy] as required by EPA, and as a result, it cannot perform an antidegradation analysis for revised permitting standards and limitations in the Permit." ER 567. They asserted that because ADEC had not established implementation procedures, there was no basis for ADEC's finding in the Draft 401 Certification that there were no violations of the antidegradation policy, "because no antidegradation implementation analysis could be performed." *Id*. Finally, they noted that the Draft 401 Certification did not include any discussion of the analysis behind ADEC's conclusion that the draft General Permit would not violate Alaska's antidegradation water quality standard. *Id*.

ADEC included in its final Section 401 water quality certification ("Final 401 Certification), dated May 18, 2007, an "Antidegradation Analysis Under 18 AAC 70.015." ER 77-81, AR 22906-10. ADEC made findings on each of the factors set forth in the antidegradation policy, including conclusions that: (1) allowing lower water quality is necessary to accommodate important economic or social development in the area where the water is located (ER 78); (2) except as allowed under the antidegradation policy, reducing water quality through the General Permit would not violate Alaska's water quality standards criteria or the whole effluent toxicity limits (ER 79); and (3) the water quality will be adequate to fully protect existing uses of the water (ER 80).

ADEC's final section 401 water quality certification, the "State of Alaska Department of Environmental Conservation Certificate of Reasonable Assurance" ("ADEC Certification"), was issued on May 18, 2007. ER 62-81. The final general permit, "Authorization to Discharge Under the [NPDES] for Oil and Gas Extraction Facilities in Federal and State Waters in Cook Inlet," was issued June 14, 2007, effective July 2, 2007, and expiring at midnight, July 2, 2012. ER 1-59.

ARGUMENT

EPA has determined that it should reconsider its issuance of those portions of the General Permit that authorize less stringent effluent limits than contained in the prior general permit. Pursuant to the anti-backsliding provisions of the Act, 33 U.S.C. § 1342(o)(1), backsliding in waters such as Cook Inlet is only allowed if the revision in effluent limits is consistent with the State's antidegradation policy. 33 U.S.C. § 1313(d)(4)(B). EPA has concluded that it should not have relied on ADEC's antidegradation analysis and authorization contained in the Section 401 water quality certification to justify the backsliding because the public was not given an adequate opportunity to comment on ADEC's proposed antidegradation finding. As we indicate below, however, the effluent limits included in the General Permit should not be vacated on remand.

A. Standards for Granting Voluntary Remand.

"A reviewing court has inherent power to remand a matter to the administrative agency." *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1127 (9th Cir. 1983). In addition, it is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the authority to reconsider its own decisions, *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002), although the reconsideration should occur within a "reasonable time" after the first decision. *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993). "[I]f the agency's concern is substantial and legitimate, a remand is usually appropriate." *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417 (6th Cir. 2004).

The courts have often found that an agency's failure to afford appropriate notice and opportunity to comment on agency action is sufficient reason to remand. *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 759 (9th Cir. 1992); *Chemical Waste Management, Inc. v. EPA*, 976 F.2d 2, 33 (D.C. Cir. 1992); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1212-13 (5th Cir. 1991).

In determining whether to remand to the agency or to vacate the agency's decision, the court considers "'the seriousness of the . . . deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.' *Allied-Signal, Inc. v. U.S. Nuclear*

Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C.Cir. 1993) (citations omitted)." *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006).

B. Partial Remand to EPA is Appropriate in this Case

The Court should remand those provisions of the General Permit that authorize less-stringent effluent limitations than were allowed in the previous general permit, but should not vacate those provisions.

As stated above, the General Permit includes certain water quality-based effluent limitations that are less stringent than those included in the prior general permit for Cook Inlet. Pursuant to the anti-backsliding provision of the Clean Water Act, 33 U.S.C. § 1342(o)(1), EPA could not issue the General Permit with those less-stringent limits unless the revision "is subject to and consistent with the antidegradation policy established" by Alaska under 33 U.S.C. § 1313. 33 U.S.C. § 1313(d)(4)(B).

ADEC's draft antidegradation finding merely stated that ADEC made "a preliminary finding that any reduction in natural water quality of Cook Inlet to be in accord with the requirements" of Alaska's antidegradation policy, but did not include any analysis of whether the less stringent water quality-based effluent limitations were actually consistent with the State's antidegradation policy. ER 594. ADEC's bare

conclusion did not provide the public with meaningful opportunity to comment on its proposed decision, as required by Alaska's antidegradation policy regulation and EPA's antidegradation regulation at 40 C.F.R. § 131.12.

As a result of this deficiency, Alaska's authorization that the less stringent limits included in the General Permit are consistent with its antidegradation policy was legally deficient. Therefore, EPA concedes that it erred in relying on ADEC's antidegradation analysis and authorization in order to satisfy the anti-backsliding exception at CWA section 401(o)(1), 33 U.S.C. § 1342(o)(1), because the proposed antidegradation finding had not been subjected to meaningful public participation as required by Alaska's antidegradation policy. As we noted above, the courts frequently remand federal agency actions based on inadequate notice and opportunities for comment afforded by the agency itself. *See, e.g., Sequoia Orange Co. v. Yeutter*, 973 F.2d at 759. We believe that such is the appropriate course in the present circumstances as well.

It is not necessary for EPA or the Court at this point to determine the precise boundaries of what is sufficient notice and opportunity for comment offered by the State to satisfy EPA's obligations when relying on a State's antidegradation analysis to satisfy CWA 402(o)(1) – it is enough that in this situation the notice afforded the public by Alaska was plainly inadequate.

The Court should not vacate those portions of the General Permit that authorize less stringent effluent limitations pending EPA's reconsideration on remand. Certain permittees are operating pursuant to the General Permit and have been doing so since 2007. The "disruptive consequences of an interim change that may itself be changed," *Chamber of Commerce*, 443 F.3d at 908, outweigh the magnitude of the error to be reviewed by EPA on remand, and the Court should therefore exercise its discretion to remand the matter without vacating the provisions of the current General Permit. This is particularly so where one possible outcome is that Alaska will reaffirm its water quality certification following any public comment process. Upsetting long-settled expectations and reliance on the General Permit by vacating that Permit (the permittees having operated under the General Permit since 2007), where the public comment error is likely to be corrected on remand, would run counter to this well-established case law.

Remand is also appropriate despite Petitioners' claim that backsliding in the General Permit is not lawful because ADEC's antidegradation regulation does not include implementation procedures. As indicated above, Alaska has committed to develop procedures regarding implementation of its antidegradation policy by September 1, 2010, and to subsequently issue a new antidegradation analysis. Exhibit A. As a result, Petitioners' argument challenging EPA's approval of the current

antidegradation analysis for lack of implementation procedures will become moot after ADEC provides a new antidegradation analysis as part of a revised Section 401 water quality certification. Of course, Alaska may ultimately determine that the less-stringent effluent limits do not meet antidegradation requirements, so that backsliding is not possible in the General Permit pursuant to the Act, 33 U.S.C. § 1342(o)(2).

CONCLUSION

As a result, the Court should remand those portions of the General Permit that authorize less stringent effluent limits on mercury, copper, TAH, TAqH, and WET for further consideration by EPA. Because of the long-settled expectation and reliance of various parties on the General Permit and the likelihood that the procedural defects identified by Petitioners will be cured on remand, the General Permit should be left in place during the remand.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources
Division

Dated: March 15, 2010

By: /s/ Daniel Pinkston

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESPONDENTS' MOTION FOR VOLUNTARY PARTIAL REMAND by Notice of Electronic Filing using the Court's CM/ECF system, which will send notice of such filing via email to all counsel of record.

Said filing was made on or before the date set forth below.

Dated: March 15, 2010

By: /s/ Daniel Pinkston

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Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COOK INLETKEEPER, et al.,	)	
	)	No. 07-72420
Petitioners,	)	
	)	
vs.	)	
	)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and LISA P. JACKSON, Administrator of the U.S. Environmental Protection Agency,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
UNION OIL COMPANY OF CALIFORNIA and XTO ENERGY INC.,	)	
	)	
Respondent-Intervenors.	)	
	)	

DECLARATION OF MICHAEL BUSSELL

I, Michael Bussell, hereby declare that the following statements are true and correct to the best of my knowledge and belief, and are based on my personal knowledge, or on information contained in the records of the United States Environmental Protection Agency ("EPA") or supplied to me by current EPA employees under my supervision.

1. I am the Director of the Office of Water and Watersheds, in Region 10 of the EPA. I have held this position since January 20, 2009. Region 10 includes the states of Alaska, Idaho, Oregon, and Washington.

2. In this position, I have supervisory responsibility for implementing programs in EPA Region 10 under the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1251, *et seq.*, concerning, among other things, the issuance of National Pollutant Discharge Elimination System ("NPDES") permits in the State of Alaska. In particular, I have management authority over matters involving EPA's June 14, 2007, re-issuance of the *Authorization to Discharge Under the Nationl Pollutant Discharge Elimination System (NPDES) for Oil and Gas Extraction Facilities in Federal and State Waters in Cook Inlet* ("General Permit").

3. On February 24, 2010, I received a letter from Lynn J. Tomich Kent, Director of the State of Alaska's Department of Environmental Conservation ("ADEC"), Division of Water. A copy of that letter is attached hereto. Ms. Kent's letter, quoted below, expressed ADEC's commitment to do the following:

- Develop interim procedures (staff guidance) for how the State implements its anti-degradation policy found at 18 AAC 70.015. ADEC anticipates having the interim guidance available by September 1, 2010.

- Participate in EPA's public notice on the Cook Inlet Oil and Gas Exploration General Permit, or conduct a separate public notice and

comment period on the State's draft Section 401 certification and draft anti-degradation analysis of the General Permit with a goal to start the minimum 30-day comment period by October 1, 2010.

- Depending on the volume and nature of comments received, plan to issue a final Section 401 certification and final anti-degradation analysis by December 1, 2010.

4. On remand, if granted by the Court, EPA Region 10 will re-propose two sets of effluent limits for the parameters that received less stringent limits in the current General Permit compared to the previous Cook Inlet general permit. Pursuant to CWA section 303(d)(4)(B), such less stringent limits are those that would rely on ADEC's antidegradation analysis (*i.e.*, those limits in the current General Permit that are *less stringent than* corresponding limits for the same parameters in the previous general permit). If ADEC participates in EPA's public notice period, as described in the first part of the second bullet in Ms. Kent's letter, EPA Region 10 will re-propose *both* the less stringent limits in the current General Permit *and* the corresponding effluent limits as they existed in the previous general permit concurrent with ADEC's draft antidegradation analysis. In the alternative, if ADEC conducts a separate public notice and comment period on the State's draft CWA section 401 certification and draft antidegradation analysis, as described in the second part of the second bullet in Ms. Kent's letter, EPA Region 10 will re-propose *both* the less stringent effluent limits in the current

General Permit *and* the corresponding effluent limits as they existed in the previous general permit as soon as practicable after ADEC's public notice period begins. In either event, EPA Region 10 will provide a minimum 30-day comment period.

5. EPA Region 10 will finalize its re-proposal as soon as practicable after ADEC submits to EPA its final CWA section 401 certification and final antidegradation analysis.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of Region 10 of the EPA.

Dated: March 9, 2010

Michael Bussell
Director, Office of Water and Watersheds
U.S. Environmental Protection Agency
Region 10

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
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February 24, 2010

Michael Bussell, Director
Office of Water and Watersheds
US EPA Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

Re: Anti-degradation Implementation and the Cook Inlet Oil and Gas Exploration General Permit

Dear Mr. Bussell:

Per our recent conversation regarding the appeal of the Cook Inlet Oil and Gas Exploration General NPDES Permit, the Department of Environmental Conservation (DEC) plans to do the following:

- develop interim procedures (staff guidance) for how the State implements its anti-degradation policy found at 18 AAC 70.015. We anticipate having the interim guidance available by September 1, 2010.

- participate in EPA's public notice period on the Cook Inlet Oil and Gas Exploration General Permit, or conduct a separate public notice and comment period on the State's draft Section 401 certification and draft anti-degradation analysis of the General Permit with a goal to start the minimum 30-day comment period by October 1, 2010.

- depending on the volume and nature of comments received, DEC will plan to issue a final Section 401 certification and final anti-degradation analysis by December 1, 2010.

I understand that time is of the essence and DEC will proceed with these steps as quickly as possible.

Sincerely,

Fd Lynn J. Tomich Kent
Director

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