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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA CENTER FOR THE)
ENVIRONMENT <i>et al.</i> ,)
)
Plaintiffs,)
)
vs.)
)
STATE OF ALASKA, DEPARTMENT)
OF ENVIRONMENTAL)
CONSERVATION)
)
Defendant,)
and)
)
NANA REGIONAL CORPORATION,)
INCORPORATED,)
)
and)
)
TECK ALASKA INCORPORATED,)
)
Intervenor-Defendants.)
_____)

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Case No. 3AN-11-07159CI

**ORDER ON DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY
JUDGMENT**

The Alaska Center for the Environment *et al.* ("ACE") filed a motion for summary judgment. The State of Alaska, Department of Environmental Conservation (the "ADEC") opposed and filed a cross-motion for summary judgment. NANA Regional Corporation, Inc. ("NANA") and Teck Alaska Incorporated ("Teck") filed a joint brief memorandum opposing ACE's motion and in support of ADEC's cross-motion. The Court heard oral arguments on April 2, 2012.

PARTIES

ACE is the lead plaintiff in this case, amongst a group of eight organizational entities which are represented together by common counsel. Plaintiffs claim that they were prohibited from participating in the development and finalization of the Interim Methods because they were illegally promulgated as “guidance.”¹

The defendant, ADEC, is a department of the Alaska state government. Under AS 46.03.080, ADEC’s director of the division of water has the exclusive authority to develop water quality standards , which include antidegradation implementation methods.²

NANA is an intervenor-defendant and owns the land and resources underlying the Red Dog Mine. The Environmental Protection Agency (the “EPA”) has issued a proposed permit for the Red Dog Mine. That proposed permit requires a certification from ADEC. The draft certification issued by ADEC references the Interim Methods that are challenged in this lawsuit.

Teck is an intervenor-defendant and operates the Red Dog Mine under an agreement with NANA. The Red Dog Mine discharges treated wastewater into Red Dog Creek pursuant to an NPDES permit issued by the EPA under Section 402 of the CWA.³

BACKGROUND

ACE filed this suit seeking declaratory judgment that the ADEC violated AS 44.03.880(a). ACE alleges that the ADEC failed to follow the procedures set out in the

¹ ACE Complaint at 5.

² ACE Complaint at 6.

³ 33 U.S.C. § 1342.

Alaska Administrative Procedures Act (the “APA”), AS 44.62.180 – AS 44.62.290, for adopting a regulation when it issued Interim Antidegradation Implementation Methods (the “Interim Methods”).⁴ Based on these allegations, the action seeks a judgment prohibiting ADEC from using the Interim Methods when issuing any future permits or certifications, and requiring ADEC to follow EPA antidegradation guidance until such time as Alaska’s antidegradation implementation methods are legally adopted.

Under the Clean Water Act (the “CWA”), certain treated wastewater discharges, such as the discharges from Red Dog Mine, require a permit issued by EPA pursuant to the National Pollution Discharge Elimination System (the “NPDES”). Section 401 of the CWA requires an applicant for an NPDES permit to provide the permitting agency with a certification from the state in which the discharge originates, or will originate, that the discharge will comply with applicable provisions of the CWA and state water quality standards (a “401 certifications”).⁵ In Alaska, ADEC issues 401 certifications.

EPA issued a five-year NPDES permit for the Red Dog Mine on January 8, 2010 (the “2010 Permit”). The 2010 Permit was challenged by some of the plaintiffs in this action on, among others, a similar basis as that claimed in this case. The 2010 Permit was withdrawn, but in April 2011 the EPA proposed to reissue the 2010 Permit. The plaintiffs commenced this litigation.

⁴ ACE Complaint at 2.

⁵ 33 U.S.C. § 1341.

STANDARD OF REVIEW

Summary judgment is proper where there is no genuine issue as to any material fact, and any party is entitled to judgment as a matter of law.⁶ In their briefing and at oral argument, all parties agreed that there are no genuine issues as to any material fact.⁷

Whether an agency action is a regulation is a question of law that does not involve agency expertise, which the Court reviews applying its independent judgment.⁸ Specifically, evaluating whether agency action falls within the statutory definition of a regulation is a question for the court's specialized knowledge and experience.⁹

The more deferential standards of review sometimes reserved for agency interpretations are inappropriate here. As explained in *Jerrel v. State*, “[T]he threshold question in this case is whether the APA applies to DNR's action [at all]. Because we must decide whether DNR's [action] is a regulation, we do not defer to the agency's interpretation.”¹⁰

DISCUSSION

Federal law requires that each state, as part of its program to protect water quality, adopt a statewide antidegradation policy and also identify methods for implementing the

⁶ *Interior Cabaret, Hotel, Restaurant & Retailers Ass'n v. Fairbanks North Star Borough*, 135 P.3d 1000 (Alaska 2006).

⁷ ACE Motion for Summary Judgment at 29; ADEC's Cross-Motion for Summary Judgment at 1.

⁸ *Alaska Pipeline Serv. Co. v. State, Dep't of Env'tl. Conservation*, 145 P.3d 561, 564 (Alaska 2006) (“Whether an agency action is a ‘regulation’ requiring rulemaking under the Alaska Administrative Procedure Act is a question of law that does not involve agency expertise and that we therefore review applying our independent judgment.”); see also *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 867 (Alaska 2010); *Alaska Ctr. for the Env't v. State*, 80 P.3d 231, 243 (Alaska 2003); *Jerrel v. State, Dep't of Natural Res.*, 999 P.2d 138, 141 (Alaska 2000); *Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 821, 825 (Alaska 1997).

⁹ *Jerrel*, 999 P.2d at 141.

¹⁰ *Id.* (citing *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971)).

policy.¹¹ The State of Alaska, acting through ADEC, has adopted an antidegradation policy at 18 AAC 70.015, and EPA has approved that policy. The purpose of the Interim Antidegradation Implementation Methods (hereinafter “IM”), which are at issue in this case, is to describe the methods that ADEC staff should follow to implement the existing policy.

The APA defines “regulation” broadly in AS 44.62.640(a)(3) to include:

every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency.

Moreover, the label an agency attaches to the policy in question is not determinative:

“regulation” includes “manuals,” “policies,” “instructions,” “guides to enforcement,” “interpretative bulletins,” “interpretations,” and the like, that have the effect of rules, orders, regulations, or standards of general application, and *this and similar phraseology may not be used to avoid or circumvent this chapter*; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public.¹²

Although the statutory definition of “regulation” in the APA is broad, the Alaska Supreme Court has noted that “it does not encompass every agency practice or decision.”¹³ To determine whether the IM is a regulation, the Court must look to two indicia: (1) whether the IM implements, interprets, or makes specific the law enforced or

¹¹ 40 CFR § 131.12(a).

¹² AS 44.62.640(a)(3) (emphasis added).

¹³ Kachemak Bay Watch, Inc. v. Noah, 935 P.2d 816, 825 (Alaska 1997).

administered by the agency; and (2) whether the IM affects the public or is used by the agency in dealing with the public.¹⁴

A. The Interim Antidegradation Implementation Methods Do Not Violate the First Indicia

The parties dispute whether the IM “implement[s], interpret[s], or make[s] specific the law enforced or administered” by DEC.¹⁵

From the cases discussing this indicia, three principles emerge. An agency may use guidance to implement an existing regulation if:

- (1) It doesn’t add any substantive criteria to the regulation¹⁶
- (2) It doesn’t represent a sudden shift in the agency’s past practice;¹⁷ and
- (3) It is not exercised ad hoc.¹⁸

1. The Interim Antidegradation Implementation Methods do not add any substantive criteria to the regulation.

ACE points to two instances where they claim that the IM adds substantive criteria to the antidegradation (“AD”) policy regulation.

- a. *The parameter-by-parameter approach reflects the relief requested by the Plaintiffs, is the EPA’s preferred approach and thus reflects a common sense application of the regulatory language*

¹⁴ Id. (citing Kodiak Seafood Processors Ass’n v. State, 900 P.2d 1191, 1197 (Alaska 1995); Gilbert v. State, Dep’t of Fish & Game, 803 P.2d 391, 396 (Alaska 1990)); see also Burke v. Houston NANA, L.L.C., 222 P.3d 851, 867 (Alaska 2010); Alaska Ctr. for the Env’t v. State, 80 P.3d 231, 243 (Alaska 2003); Jerrel v. State, Dep’t of Natural Res., 999 P.2d 138, 143–44 (Alaska 2000). These criteria are derived from related language in the definition of regulation under the APA at AS 44.62.640(a)(3).

¹⁵ Kachemak, 935 P.2d at 825.

¹⁶ See Messerli, 768 P.2d at 1117; Usibelli, 921 P.2d at 1149; Smart, 237 P.3d at 1017.

¹⁷ See Alyeska, 145 P.3d at 573; Squires, 205 P.3d at 335.

¹⁸ See Jerrel, 999 p.2d at 144.

The Court has examined the Interim Antidegradation Implementation Methods and agrees with the Defendant's characterization of the IMs. From the record before it, this Court concludes that the IMs are merely a tool to help agency staff implement the AD policy codified in regulation.¹⁹ The guidance structure follows the structure of the regulation, with its three tiers,²⁰ its five tier-2 findings,²¹ and its public notice requirement.²²

Nonetheless, ACE claims that the IM adds substantive criteria to the AD policy regulation. ACE point out that the IM directs DEC staff to apply a parameter-by-parameter approach to decide tier 2 (water quality) status. ACE claims that this amounts to making an improper choice of this approach over the alternative, the waterbody-by-waterbody approach. Such a choice, however, can be, and, in this case, is, still permissible.

ADEC's AD policy, set out in regulation, does not specify which method ADEC should use to decide tier 2 status. The IMs direct ADEC staff to use the parameter-by-parameter approach during the interim period while ADEC develops final guidance in regulation.

However, the Court's view is that the ADEC's directive (to utilize the parameter approach) is appropriate under reasoning similar to that of the Court in *Squires v. Alaska*

¹⁹ See second ¶ of IM.

²⁰ 18 AAC 70.015(a)(1)-(3)

²¹ 18 AAC 70.015(a)(1)(A)-(E).

²² 18 AAC 70.015(c).

Board of Architects.²³ In that case, a requirement which was not contained in the regulation, but in the application instructions from the board, was upheld based on two central factors. First, the application instructions from the board reflected a common sense interpretation of the regulation. Second, the application instructions did not represent a sudden shift in the board's prior practice. Both factors are strongly present in this case.

In light of the record, the Court finds that the IMs' application of the parameter approach to a tier 2 analysis is a common sense interpretation of the regulation. As a starting point, the parameter approach is actually the stricter of the two options which can be applied for conducting a tier 2 analysis. The parameter approach results in more waters receiving tier 2 protections. This approach is recommended by the EPA over the alternative, the waterbody approach.

EPA believes that it is best to apply antidegradation on a parameter-by-parameter basis. Otherwise, there is potential for a large number of waters not to receive antidegradation protection, which is important to attaining the goals of the Clean Water Act to restore and maintain the integrity of the Nation's waters.²⁴

Not only is the parameter approach more environmentally protective and recommended by the EPA, but part of the relief requested by the plaintiffs is the EPA's approach, which is the parameter-by-parameter approach.²⁵ Thus, the Court finds the parameter approach to be a common sense application of the regulatory policy.

b. The examples offered in the Interim Antidegradation Implementation Methods are not exclusive and do not prevent agency employees or the

²³ 205 P.3d 326 (Alaska 2009).

²⁴ EPA's Advance Notice of Proposed Rule-Making, 63 Fed. Reg. 36742, 36782-83 (July 7, 1998).

²⁵ See Plaintiff's Complaint at 9, Prayer for Relief #3.

public from considering other factors in evaluating the first prong of the tier 2 analysis.

Second, ACE claims that the interim methods offer examples of factors which staff should consider in evaluating the first prong of the tier 2 analysis, the economic or social development” inquiry.

At issue is the underlined sentence in the selection below:

How to do a "tier 2" analysis.

Tier 2 AD analysis is much more complicated than tier 1. Just compare 18 AAC 70.015(a)(1) with .015(a)(2). For a tier 2 analysis, you can only allow degradation of water quality if you first make five findings. This guidance will discuss the five findings in the order they are listed in the policy. See 18 AAC 70.0 15(a)(2)(A)-(E).

(A) Lowering water quality is necessary to accommodate important economic or social development in the area.

You should evaluate the economic and social consequences of the proposed project. For example, for a new operation, will it provide jobs for a community? For an on-going operation whose permit renewal triggers AD analysis: how important is its continued operation to the regional economy? Will the facility treat and dispose of sewage and reduce risk to public health? The essence of this prong is to force the department to consciously evaluate whether the proposed degradation is justified by the economic and social benefits the project would bring. Degradation of a tier 2 parameter for purposes other than those that have associated social and economic benefits is prohibited.²⁶

The Plaintiffs claim that the exemplars in the IMs are not specified in the antidegradation policy itself and that, therefore, the IMs “make specific” the regulation which DEC is to enforce, which would mean that it should have been adopted under the APA. This Court disagrees with this characterization.

²⁶ Interim Antidegradation Implementation Methods, Exhibit I, Plaintiff’s Motion Summary Judgment, at 6-7.

The IM language underlined above are clearly not an exclusive list. On the contrary, they are clearly listed as examples. These examples add nothing of substance to the regulation. Agency employees, upon review of a specific application, may identify other factors which fit the policy described in 11 AAC 70.015(a)(2)(A). The complained of language is not mandatory, but inquisitive. Therefore, the Court finds that the language is clearly a prompt for ADEC staff to help develop concerns which can then be addressed by the applicant, commented or expanded upon, or added to by interested parties.

2. The Plaintiff does not allege that the Interim Antidegradation Implementation Methods reflect a sudden change in agency policy; State's allegation that parameter approach reflects longstanding practice is not adequately supported.

This prong of the first indicia was not raised by the Plaintiffs in their motion for summary judgment. Instead, in the ADEC's cross-motion, the State alleges that the parameter approach reflects longstanding department practice and cites the Red Dog Mine as an example. But an allegation of a longstanding departmental practice supported by citation to a single mining permit does not create enough of a record for the Court to evaluate. Likewise, ACE's counter-argument, that the State has also, in the past, used the "waterbody-by-waterbody" approach, was also inadequately supported as ACE could only point to a single NPDES permit from 2007 as an exemplar.

Neither side contends that these permits raise a disputed issue of material fact. Nevertheless, the Court finds that the dearth of evidence precludes the Court from considering this aspect of the first indicia. Accordingly the Court draws no conclusions

from the proffered permits as to whether the IMs reflect either a longstanding departmental practice or a sudden change therefrom.

B. The Interim Antidegradation Implementation Methods Do Not Violate the Second Indicium

The second indicium—the degree to which agency action must affect the public to qualify as a regulation—poses a nuanced question. In order to answer this question, the *Nondalton* Court began by reviewing two prior cases that addressed this question: *Kenai Peninsula Fisherman's Cooperative Association, Inc. v. State* (“*Kenai*”),²⁷ and *Kachemak Bay Watch, Inc. v. Noah* (“*Kachemak*”).²⁸ From those cases, the *Nondalton* Court established several clarifications of the law regarding the second indicia.

[A]n agency action does not satisfy the second indicium if it “does not alter the rights of the parties, does not deprive any party of a fair opportunity for public participation, embodies no finding as to a particular application and does not establish criteria by which particular applications should be evaluated.”²⁹

The Interim Methods do not encroach upon any of these prohibitions.

1. The Interim Methods do not alter the rights of the parties.

The IMs “affect[] the public in a limited way,” but this is permissible because the IMs only “alter the manner in which the parties present themselves or their viewpoints to the agency – but [the IMs] do[] not in [themselves] alter the rights or interests of the parties.”³⁰ Rather than directly affecting the public, the IMs “will be implemented and

²⁷ 628 P.2d 897 (Alaska 1981).

²⁸ 935 P.2d 816 (Alaska 1997).

²⁹ *Nondalton* at 304.

³⁰ *Nondalton* at 305(internal quotations omitted).

affect the public chiefly through downstream administrative actions such as . . . permits.”³¹

As in *Nondalton*, the IM “is not itself ‘enforceable’ against the public in a meaningful way until implemented by further agency action.”³² Similar to the *Nondalton* case, the IMs do not “create legally binding commitments even though they guide and control future management actions.”³³ Even though the IM “reiterates duties the agency is already obligated to perform . . . [and] perhaps [contains] language [which] itself creates a commitment binding on the agency,”³⁴ the IMs are clearly “an interim measure that guides [ADEC’s] behavior, not that of the public.”³⁵

2. The Interim Methods do not deprive any party of a fair opportunity for public participation

Here, the Court must determine whether the IMs themselves deprive any party of a fair opportunity for public participation. On this point, the Plaintiffs argument is merely that Plaintiffs were not given an opportunity to comment on the creation of the IMs, even though there is no statutory requirement that the IMs be adopted by regulation. Even if substantiated, such a factual basis would not entitle the Plaintiffs to relief because the thrust of this prong is whether the IMs themselves deprive any party of a fair opportunity for public participation. On review of the IMs, the Court concludes that the IMs do not deprive any party of a fair opportunity for public participation.

³¹ *Nondalton* at 304 (internal quotations omitted).

³² *Nondalton* at 304.

³³ *Nondalton* at 304 n.93 (citation and quotation omitted).

³⁴ *Nondalton* at 304 n.93 (citation and quotation omitted).

³⁵ *Nondalton* at 305.

The argument advanced by the Plaintiffs is that even interim guidance for agency staff which describes how the State will interpret its own regulations needs to go through the public process. But in Alaska, the Supreme Court has explained that “[nearly every agency action is based, implicitly or explicitly, on an interpretation of a statute or regulation authorizing it to act. A requirement that each such interpretation be preceded by rulemaking would result in complete ossification of the regulatory state.”³⁶

If, and when, the ADEC decides to promulgate Antidegradation Implementation Methods as a regulation, and not as interim guidance, the Plaintiffs will be entitled to participate and comment on the regulatory embodiment of the Implementation Methods at that time.

3. The Interim Methods embodies no finding as to a particular application

The Plaintiffs have made no allegation that the IMs embody a finding as to a particular application. The Court conducted an independent review of the IMs and did not see any findings as to any particular application. Thus, the prong is unmet and the Court need not further address this prong.

4. The Interim Methods do not establish criteria by which particular applications should be evaluated.

The IMs evaluate all applications under the parameter-by-parameter approach. However, the IMs do not state that particular applications will be treated differently than others. In *Nondalton* case, the Court examined its previous decision in the *Kenai* case. The error in the *Kenai* case involved:

³⁶ Alyeska Pipeline Serv. Co. v. State, Dep't of Env'tl. Conservation, 145 P.3d 561, 573 (Alaska 2006).

a comprehensive management policy and a specific policy option implemented by the Board of Fisheries to address frequent competition over salmon stocks between commercial and recreational fishermen in the Cook Inlet. The management policy effectively partitioned the salmon fisheries by species and by time between the two groups, whereas the policy option directed the closure of the Kenai commercial fishery if its late-season catch was below average.³⁷

The *Nondalton* Court indicated that the fact that the policy was used to effectuate an emergency closure of the Kenai commercial fishery was sufficient to demonstrate that the policy affected the public.

Here, unlike the differentiation between commercial and recreational fishermen in the *Kenai* case, the IMs do not establish criteria by which particular applications are evaluated. Here, there is no allegation that anyone is affected differently than any other person. Instead, the IMs merely “alter the manner in which the parties present themselves of their viewpoints to the agency.”³⁸

CONCLUSION

The IMs do fall under the APA’s broad definition of a regulation. However, the Court finds that none of either indicia of a regulation are present in this case.

On the first indicium, the IMs simply direct staff to evaluate applications under the parameter approach – a common sense application of the existing regulatory

³⁷ *Nondalton* at 301.

³⁸ *Kachemak*, 935 P.2d at 825(quoting *Batterton v. Marshall*, 648 F.2d 694, 707(D.C. Cir. 1980)).

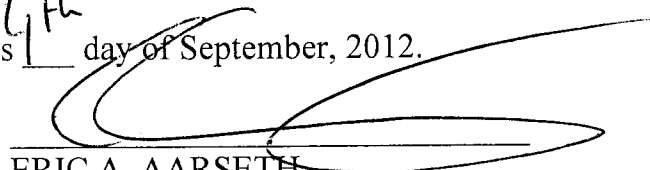
antidegradation policy, the EPA's preferred method of application evaluation, and the application evaluation method preferred by the Plaintiffs. The IMs, including the social and economic exemplars pointed to by the Plaintiffs, add no substantive criteria to the regulation.

On the second indicium, the IMs merely alter how the parties present their viewpoints to the agency. The right to public participation is preserved wholly intact because none of the *Batterton* criteria are met. The public continues to enjoy the right to publically participate in each antidegradation analysis and in the process of adopting the Antidegradation Implementation Methods into regulation.

Accordingly, ACE's Motion for Summary Judgment is DENIED and the State's Cross-motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 6th day of September, 2012.


ERIC A. AARSETH
Superior Court Judge

I certify that on 4 September, 2012, a copy was mailed to:

Leppe, Brisson/Clark, Leik, Leonard

Eric Land, Law Clerk

