

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION**

CHILKAT INDIAN VILLAGE (KLUKWAN), )  
AUDUBON ALASKA, LYNN CANAL )  
CONSERVATION, RIVERS WITHOUT )  
BORDERS, SOUTHEAST ALASKA )  
CONSERVATION COUNCIL, and )  
TAKSHANUK WATERSHED COUNCIL, )

*Requesters,* )

v. )

ALASKA DEPARTMENT OF )  
ENVIRONMENTAL CONSERVATION, )  
DIVISION OF WATER, and CONSTANTINE )  
MINING, LLC, )

*Respondents.* )

OAH No. 22-0887-DEC )

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**DECISION**

This is the Commissioner’s final decision on an administrative challenge to the issuance of a state permit for underground disposal of a specified quantity of adit drainage water from pre-mine exploration activities in a mining prospect. The permit has been under review since February 2019, in a process that has involved two remands and important refinements to the proposal. This decision affirms issuance of the permit but makes a modification to ensure proper compliance with water quality standards. The decision also directs the Division of Water (“Division”) to conduct an ancillary proceeding under the Department of Environmental Conservation (“Department”)’s *Guidance for the Implementation of Natural Condition-Based Water Quality Standards*, the outcome of which will be separately appealable by individuals or entities who participate in it.

**I. Background**

The Palmer Project is a mining prospect involving advanced exploration for copper, zinc, gold, and silver. It is operated by Constantine Mining, LLC in a glacial valley near the U.S.–Canada border, just southwest of the paved Haines Highway and about 20 air miles west of the village of Klukwan. The immediate surrounding area has a significant history of mineral exploration but no other current operations on the scale of the Palmer Project.

On July 17, 2019, the Division issued Waste Management Permit 2019DB001 (“WMP”) to Constantine for the disposal of wastes at the Palmer Project,<sup>1</sup> following notice and public comment in which each of the Requesters participated. The WMP authorized Constantine to construct and operate a Land Application Disposal (“LAD”) system for the treatment of non-domestic wastewater and discharge of the treated wastewater into the subsurface of the Glacier Creek valley.

Soon after it issued the WMP, the Division received a request from various entities, including most of the Requesters here, for informal review of its decision. Among the Requesters’ concerns was that discharges from the LAD system may reach waters that would trigger a requirement for an Alaska Pollutant Discharge Elimination System (“APDES”) permit for the project.<sup>2</sup>

An APDES permit is the Alaska equivalent of a Clean Water Act section 402 permit. In 2008–2012, the EPA transferred authority to Alaska to administer the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) program, including the authority to permit wastewater discharges. Since the APDES program implements the federal Clean Water Act, APDES permits are required when, and only when, a discharge affecting navigable waters is involved. Under the Clean Water Act and state law,<sup>3</sup> a facility may not discharge pollutants from any point source into navigable waters<sup>4</sup> in the state of Alaska without first obtaining an APDES permit.

In response to the request for informal review, the Division’s acting director remanded the decision to issue the WMP to Division staff, with the directive to evaluate the applicability of then-recent Ninth Circuit caselaw (since overturned) regarding the limits of Clean Water Act applicability. She also instructed her staff to evaluate a range of comments submitted during the public comment period on the permit, including an evaluation of the statistical methodology used to determine effluent trigger limits, and to update the Response to Comments document.<sup>5</sup>

While the Division was evaluating the WMP on remand, Constantine commissioned a groundwater dye tracing study, now known as the Phase 1 study, to improve understanding of

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<sup>1</sup> A.R. 5-30.

<sup>2</sup> A.R. 5289-90, 5294-95, 5317-26, 5346-49.

<sup>3</sup> 18 AAC 83.005(b) (APDES permit requirements “apply to the discharge of pollutants from any point source into waters of the United States); 18 AAC 83.990(77) (replicating pre-2015 federal regulatory definition of waters of the United States”).

<sup>4</sup> The Clean Water Act defines “navigable waters” as “waters of the United States.” 33 U.S.C. § 1362(7).

<sup>5</sup> A.R. 5403, 5515.

the area’s hydrology. The Phase 1 study detected low concentrations of dye from one portion of the proposed LAD area at one downgradient sampling station in Glacier Creek. Glacier Creek is a small creek emptying into the Klehini River, which flows into the Chilkat River, which in turn flows into the Chilkat Inlet. Although the dye did not appear at the downgradient station until many weeks after it was deposited at the LAD location, and it appeared in small amounts, the detection indicated at least some degree of hydrological connection between the disposal area and the creek.<sup>6</sup> In response to this test, Constantine asked the Division to withhold its approval of the LAD system design pending further study and possible design changes.<sup>7</sup> Shortly thereafter, a Phase 2 dye tracing study was conducted in a new potential LAD location east of the Phase 1 area, which resulted in no downgradient detections of dye in Glacier Creek.

Constantine retained consultants to incorporate information obtained from the studies into a revised design for the wastewater discharge system. In April 2022, Constantine submitted the revised design, referred to as *Appendix A Wastewater Discharge System Design Report Phase II – Underground Exploration Upland Mining Lease No. 9100759 April 2022 (Appendix A)*, as well as updates to the WMP and related materials. The Division conditionally approved the plans on May 27, 2022.<sup>8</sup> The approval was not posted publicly and the Requesters in this case were not notified of it directly.<sup>9</sup>

At a meeting attended by the Division Director on July 21, 2022, one of the Requesters referenced an analysis that had been prepared earlier in the month by California State University geochemist Jean Moran, setting out her view that Constantine’s consultants had drawn “too strong” a conclusion from the Phase 2 study.<sup>10</sup> This report was submitted to the record on July 29, 2022.<sup>11</sup> In the interim, on July 27, Requesters apparently first learned of the May 27 decision.<sup>12</sup>

On August 24, 2022, Chilkat Indian Village submitted a request for an adjudicatory hearing.<sup>13</sup> The Division opposed the request as untimely since, although it was submitted less than 30 days after the village apparently learned of the May 27 approval, it was submitted more

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<sup>6</sup> See A.R. 1596-98.

<sup>7</sup> A.R. 6597.

<sup>8</sup> A.R. 8924-25. This was an approval of both the revised LAD design and of the underlying WMP application, as amended.

<sup>9</sup> A.R. 10943; see also A.R. 7994, 9245-46.

<sup>10</sup> A.R. 9738-47.

<sup>11</sup> *Id.*

<sup>12</sup> See A.R. 10943-45.

<sup>13</sup> A.R. 9825 *et seq.*

than 30 days after May 27.<sup>14</sup> The Commissioner declined to take up the untimeliness contention,<sup>15</sup> and instead remanded this matter to the Division with the directives to expand its examination and explanation of certain issues, complete its work under the 2019 remand, and consider the Moran report.<sup>16</sup>

On October 4, 2022, in response to the Commissioner's directives, the Division issued a Conditional Approval to Construct and Adoption of New References at the Palmer Project, which approved the revised design for the LAD system as set forth in the revised Appendix A. The Division also issued a Response to Comments document addressing comments received on the WMP and evaluating the remaining issues from the 2019 and 2022 remands.<sup>17</sup> The document included the Division's determinations that the LAD System does not require an APDES permit and that the revisions to the LAD design do not have effects that require a new round of notice and public comment. The Response to Comments document also addressed the Moran Report, and revised and expanded on the Division's prior responses to comments received on the WMP in 2019.

On November 3, 2022, Requesters sought an adjudicatory hearing on the record and briefs on the following issues:

1. Whether DEC's October 4, 2022 decisions approving Constantine's revised wastewater management systems without requiring an APDES permit were arbitrary because the record indicates the system will create the functional equivalent of a point source discharge to Glacier Creek.
2. Whether DEC was required to publish public notice and provide a 30-day comment period on Constantine's revised permit application under AS 46.03.110(b) and 18 AAC 15.050(a)-(b).
3. Whether DEC's responses to comments about the integrity and reliability of the system were arbitrary because they do not actually address the concerns identified in the comments and because they ignore important and relevant factors to the decision.

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<sup>14</sup> A.R. 10146-47.

<sup>15</sup> The Division's 2022 understanding was that the WMP had remained in effect while on remand from the director, although Constantine could not discharge under the permit until the engineering plan was approved. *See* A.R. 10943; A.R. 7994. Under this view, approval of the engineering plan would make the permit fully operational but would not trigger posting or notice to parties. Insofar as parties wished to appeal the activation of the permit, they would need to do so in 2019 or, in any event, by June 26, 2022. *See* A.R. 10146. However, the Division had previously and correctly informed Requesters that they could not appeal the WMP until the reconsideration on remand was complete (A.R. 5515), an event that did not occur until October 2022. The Commissioner has honored the effective date and appealability model that the Division originally conveyed to Requesters.

<sup>16</sup> A.R. 10411-15.

<sup>17</sup> A.R. 10705-16. The Response to Comments also addressed comments on a related reclamation plan.

4. Whether DEC’s October 4, 2022 decisions comply with the rules and guidance for implementing water quality standards based on natural conditions.

The hearing request was conditionally referred to the Alaska Office of Administrative Hearings for a preliminary proceeding to evaluate whether it met the requirements of 18 AAC 15.200 that are a prerequisite to granting a hearing. The Division did not oppose the hearing request as framed by Requesters. Constantine opposed the hearing request. At the conclusion of the preliminary process, the Commissioner granted the hearing on the terms Requesters had proposed.<sup>18</sup>

Below, each of the four issues identified by Requesters is taken up in the order presented in the original hearing request.

## **II. The decision not to require an APDES permit is affirmed.**

In *County of Maui v. Hawaii Wildlife Fund*<sup>19</sup>—decided while the WMP was in informal review—the United States Supreme Court held that a permit is required under the Clean Water Act “when there is a direct discharge from a point source into a navigable water or when there is the *functional equivalent of a direct discharge*.”<sup>20</sup> The court translated this phrase to mean a situation where a point source “directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.”<sup>21</sup> *County of Maui*, of course, is premised on the existence of an affected “navigable water.”

Requesters originally contended, under now-superseded caselaw, that the LAD system fell under APDES jurisdiction because pollutants would reach navigable waters in greater than de minimis amounts that could be traced to the source. They now contend that an APDES permit must be obtained for the LAD system because its outflow waters will reach navigable waters so directly as to be the functional equivalent of a direct discharge.

“Navigable waters” is a term in the Clean Water Act denoting the extent of the Act’s jurisdictional coverage. It is further defined to mean “the waters of the United States, including the territorial seas.”<sup>22</sup> As the United States Supreme Court explained just last term:

Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read

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<sup>18</sup> Recommended Decision on Request for Adjudicatory Hearing (adopted December 29, 2022).

<sup>19</sup> 140 S. Ct. 1462 (2020).

<sup>20</sup> *Id.* at 1476 (italics in original).

<sup>21</sup> *Id.*

<sup>22</sup> 33 U.S.C. § 1362(7).

“navigable” out of the statute, holding that it at least shows that Congress was focused on “its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *SWANCC*, 531 U.S., at 172; *see also Appalachian Electric*, 311 U.S., at 406–407; *The Daniel Ball*, 10 Wall. at 563. At a minimum, then, the use of “navigable” signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans. *See Rapanos*, 547 U.S., at 734, 126 S.Ct. 2208 (plurality opinion).<sup>23</sup>

The Supreme Court has not yet identified the extent to which the term “navigable” in “navigable waters” confers or limits federal jurisdiction.<sup>24</sup>

The Department understands the term “navigable” as limiting the types of waters covered by the Clean Water Act to primarily those that are navigable in fact. The nearest waters deemed navigable in fact by the Alaska Department of Natural Resources are those of the Klehini River, about four miles below the Palmer Project along Glacier Creek. The parties appear to (potentially erroneously) assume that Glacier Creek itself, although not identified by the Alaska Department of Natural Resources or by any party as navigable, is nevertheless a “navigable water” because it is “a relatively permanent body of water connected to traditional navigable waters” by a “continuous surface connection”.<sup>25</sup> Navigability, in other words, was not a relevant consideration for either party, despite the Supreme Court’s repeated indications that the term “navigable” cannot be ignored.

While true that, under *Rapanos*, a continuous surface connection can extend coverage beyond navigable-in-fact waters, the limit of this extended coverage has never been articulated, nor even assessed, by the courts. Perhaps this is because this is an issue unique to, and most problematic for, Alaska—a state with countless miles of interconnected rivers, streams, tributaries, and headwaters not fairly characterizable as “bodies of navigable waters like rivers, lakes, and oceans.”<sup>26</sup> In Alaska, under an unlimited view of the surface-connection test, federal jurisdiction could erroneously and inappropriately snake across much of the state.

But there is a limit in caselaw: the *County of Maui* test. Reading *County of Maui*, *Rapanos*, and now *Sackett* together, the result is clear: to the extent—and *only* to the extent—

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<sup>23</sup> *Sackett v. EPA*, 143 S. Ct. 1322, 1337 (2023).

<sup>24</sup> *Id.* at 1344 (Thomas, J., concurring).

<sup>25</sup> *Id.* at 1341. One *Sackett* concurrence would draw the jurisdictional line at the Klehini River, since that is likely the nearest body of water that is, ever was, or ever could be “a highway of interstate or foreign commerce.” *Id.* at 1357 (Thomas and Gorsuch, JJ, concurring).

<sup>26</sup> *Sackett*, 143 S. Ct at 1337.

that a discharge into a non-navigable creek or tributary is the functional equivalent of a discharge into a navigable-in-fact water is that water is itself a “navigable water” subject to the Clean Water Act. This means that *Rapanos*’ “continuous surface connection” test is not the end of the jurisdictional inquiry: time, distance, and the other *County of Maui* factors must indicate that a discharge into a non-navigable creek or tributary surficially connected to a navigable-in-fact water) is the “functional equivalent of a direct discharge” into that navigable-in-fact water.

Requesters’ and the Division’s analyses assume without evaluation that Glacier Creek is a navigable water.<sup>27</sup> Because, as explained below, application of the *County of Maui* test does not indicate the functional equivalent of a direct discharge into Glacier Creek, deciding whether Glacier Creek is a “navigable water” is not necessary to decide this issue.<sup>28</sup> The Commissioner therefore does not reach and does not decide the question of whether Glacier Creek is itself a navigable water.

The Division, with prompting from the Acting Director and the Commissioner, produced a detailed and thoughtful evaluation of the degree to which any discharge from the LAD system would be connected to Glacier Creek.<sup>29</sup> It considered the recent Moran analysis and did not reject it, instead emphasizing the areas in which Moran and Constantine’s experts agreed. Because the chemistry and hydrogeology applied in the Division’s evaluation falls squarely within the Division staff’s expertise, the Commissioner has elected to give “due regard” to staff’s conclusions.<sup>30</sup> Lacking any demonstration that it is fundamentally misguided, its *factual* conclusions will be accepted. What remains is to fit these into the jurisdictional criteria.

*Maui* listed seven factors to determine Clean Water Act jurisdiction over a discharge affecting navigable waters:

- (1) transit time,
- (2) distance traveled,
- (3) the nature of the material through which the pollutant travels,
- (4) the extent to which the pollutant is diluted or chemically changed as it travels,
- (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source,
- (6) the manner by or area in which the pollutant enters the navigable waters, [and]
- (7) The degree to which the pollution (at that point) has maintained its specific identity.<sup>31</sup>

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<sup>27</sup> See A.R. 667-69; 18 AAC 83.990(77)(A)(v).

<sup>28</sup> Current APDES regulations, insofar as they are not superseded by *Sackett*, also frame the jurisdictional boundary in a pre-*Sackett* context.

<sup>29</sup> A.R. 666-70.

<sup>30</sup> *Cascadia Wildlands Project v. Div. of Spill Prevention & Response*, OAH Case No. 07-0496-DEC (Comm’r Env. Cons. 2011), at 15 (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=1968>).

<sup>31</sup> 140 S. Ct. at 1476-77.

The list is not exclusive—other factors could be relevant in particular situations. The court indicated that the first two factors would typically be the most important.<sup>32</sup>

In applying these factors and any other relevant considerations, one must bear in mind what the *Maui* decision rejected. It rejected a prior Ninth Circuit standard that drew the line at the “functional equivalent of a discharge,” and replaced it with the “functional equivalent of a *direct* discharge.”<sup>33</sup> And it discarded a “fairly traceable” standard in favor of a standard that weighs time, distance, and amounts.<sup>34</sup> Moreover, *Maui* must be read in light of the court’s most recent Clean Water Act case, in which it expressed horror at a statutory implementation that requires an expensive expert to divine whether there is jurisdiction.<sup>35</sup>

Since *Maui*, there have been a few federal decisions applying its new standard to particular types of discharges to groundwater. In the *Maui* case itself on remand, the District Court found the functional equivalent of a direct discharge, but in circumstances where 100 percent of the discharge reached navigable waters in only half a mile of underground travel, retaining its specific identity.<sup>36</sup> In an Alabama mining case, functional equivalency was found in the context of transit times as short at 1.5 days, with underground channels functioning “like a pipe.”<sup>37</sup> In a Colorado mining case, functional equivalency was found where the discharge had only 100 feet to travel, which it did in two days.<sup>38</sup>

To place the Palmer Project discharge under Clean Water Act jurisdiction would stretch *Maui* far beyond any of these applications. The LAD system discharge may never reach Glacier Creek, and even the Moran analysis projects transit times of 17 to 142 days.<sup>39</sup> Dilution appears to be substantial, and the primary pollutant of concern—suspended solids carrying metals, as opposed to dissolved chemicals—will be significantly attenuated by percolating the subsurface.<sup>40</sup> The same pollutant is present in natural waters at the site and, in light of the addition during the permitting process of more rigorous measures to settle out solids, the likelihood of an effluent entering Glacier Creek that is identifiably different from other water entering the creek is remote.

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<sup>32</sup>

*Id.*

<sup>33</sup> Compare *id.* at 1469 with *id.* at 1476.

<sup>34</sup> Compare *id.* at 1469 with *id.* at 1476-77.

<sup>35</sup> See *Sackett*, 143 S. Ct. at 1336.

<sup>36</sup> *Hawai'i Wildlife Fund v. City of Maui*, 550, F. Supp. 3d 871, 888-89 (D. Haw. 2021).

<sup>37</sup> *Black Warrior River-Keeper, Inc. v. Drummond Co.*, 579 F. Supp. 3d 1310, 1316-17 (S.D. Ala. 2022).

<sup>38</sup> *Stone v. High Mountain Mining Co.*, 627 F. Supp. 3d 1211, 1230 (D. Colo. 2022).

<sup>39</sup> A.R. 1536.

<sup>40</sup> See A.R. 666-70.



All things considered, the conclusion that the LAD system falls outside APDES jurisdiction is the more reasonable one.

There is, of course, a small element of uncertainty in any judgment about what will happen to discharges that occur underground. Requesters suggest the record is inadequate to resolve the jurisdictional issue, apparently seeking more study.<sup>41</sup> But here again, recent Supreme Court caselaw is instructive: the Court clearly disapproves a jurisdictional regime overly dependent on an applicant's ability to "retain an expensive expert consultant."<sup>42</sup> That bridge has already been crossed here—multiple consultants have been employed. But surely, after two dye studies and three analyses, it should not be necessary to retain another expert consultant simply to decide the threshold jurisdictional issue.

Accordingly, this decision upholds the Division's determination that the LAD system requires no APDES permit.

### **III. The revisions to the LAD system and the WMP do not trigger a new notice and comment period.**

Requesters' second hearing issue returns to the permit that was actually issued, the WMP under AS 46.03.100. It focuses on the proper application of 18 AAC 15.100(c), which provides:

A permit or variance authorizes only that operation specified in the permit or variance. Any expansion, modification, or other change in a facility process or operation which might result in an increase in emissions or discharges, or might cause other detrimental environmental impacts from the permittee's facility, requires a new permit or variance. Any other change requires an amendment to the permit or variance.

18 AAC 15.100(c) is a Department regulation which the Commissioner of the Department interprets de novo.<sup>43</sup>

The WMP at issue in this case was originally applied for in 2019, at which time a public notice and comment process occurred. Comments, further analysis, and new data led to revision of Constantine's proposal, including such adjustments as moving and reconfiguring the trenches for deposition of the effluent. There appears to be no dispute that adjustments and improvements are, in concept, a healthy outgrowth of the permit review process.<sup>44</sup> That said, the question

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<sup>41</sup> Opening Brief of Requesters at 32.

<sup>42</sup> *Sackett*, 143 S. Ct. at 1336.

<sup>43</sup> The argument for interpretive deference to the Division in this area, found in Constantine's Amended Response to Requesters' Opening Brief at 8 & n.9, is rejected. Staff technical judgments that bear on the *application* of the regulation may be given due regard.

<sup>44</sup> Notice and comment processes are an opportunity for an agency and applicant to educate themselves. Changes made subsequent to notice and comment can simply be an indication that the process is working, and by no

OAH No. 22-0887-DEC 9 Decision

Requesters raise is whether the adjustments to this WMP were changes to “a facility process or operation” that “might result in an increase in emissions or discharges, or might cause other detrimental environmental impacts.” If they were, the notice and comment process has to start over.

In briefing (but not in its original evaluation of this issue), the Division’s first answer to this challenge is to posit that the design changes in the treatment works are not changes to a “facility process or operation,” as that phrase is used in the second sentence of the regulation.<sup>45</sup> This effort to place an artificially narrow construction on this language is not wholly persuasive. The first sentence of § 100(c) also uses the word “operation,” and it plainly uses it broadly to encompass whatever the permit authorized. In this case, the permit granted authorization, in relevant part, “to land apply non-domestic wastewater.”<sup>46</sup> The remainder of § 100(c) addresses what kinds of changes to that “operation” trigger the need for a wholly new permit. In short, the issue is not whether the LAD redesign changes an operation—it certainly does, since it adjusts the location and methodology for exactly what was permitted—but whether it is within the subset of operational changes that the regulation classifies as needing a new permit.

There is one respect, however, in which the Division’s observation about the scope of § 100(c) has force. Requesters have raised the concern that *construction* of the revised LAD system will take longer and will bring with it associated construction related impacts such as temporary creek diversion, dust, and noise.<sup>47</sup> But construction operations to build the treatment works is not what the WMP authorizes, and therefore is not the “operation” for purposes of § 100(c). Construction is permitted under entirely different permits that are not at issue in this case, including the Final General Permit for Discharges from Large and Small Construction Activities<sup>48</sup> and United States Army Corps of Engineers Nationwide Permit 58.<sup>49</sup>

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means automatically trigger a new round of notice and comment. *See, e.g., Pennzoil Co. v. FERC*, 645 F.2d 360, 371 (5<sup>th</sup> Cir. 1981).

<sup>45</sup> Div. Response Brief at 14. This argument was further explained at approximately 1:07:00 in the oral argument. This is an argument advanced only by the Division’s counsel; the Division itself did not espouse it in its formal response to the Commissioner’s 2022 remand directive. *See* A.R. 10715.

<sup>46</sup> A.R. 7 at § 1.1. The permit was not framed to, and did not, authorize the exploration activity or the eventual mine. In addition to land application of non-domestic wastewater, the two “permittee is authorized” sentences in the WMP authorized storage and disposal of potentially-acid-generating (PAG) waste rock, an aspect of the permit that is not a focus of this appeal. *See* A.R. 7, 9.

<sup>47</sup> Opening Brief of Requesters at 20.

<sup>48</sup> Permit AKR100000.

<sup>49</sup> *See* A.R. 9667-95.

The kind of operational changes that cause the permitting process—including notice and comment—to start over are changes to what the permit authorizes that “might result in an increase in emissions or discharges” or that “might cause other detrimental environmental impacts from the permittee’s facility.”<sup>50</sup> This standard is designed to avoid the illogic of a situation where an applicant has to go back to square one whenever it simply makes improvements growing out of public comment or out of other aspects of the interactive permitting process. It must be applied with a rule of reason: encouraging applicants, for example, to make changes providing a net improvement of the impact of their projects, notwithstanding that the overall improvement might come with a minimal side effect or a speculative risk that the new protections will not be administered in accordance with the permit.

The evaluation of whether a new technical measure presents a reasonable risk of greater emissions or discharges, or a reasonable risk of new environmental impacts, is a specialized engineering and scientific judgment of precisely the kind that the Division’s staff is hired to evaluate. This is the kind of judgment on which a Commissioner may “give due regard to the expertise of his staff.”<sup>51</sup> While the Commissioner is free to substitute his judgment for that of staff, and will not approach these questions with the formal and inflexible deference a court must apply,<sup>52</sup> the agency’s technical staff may receive the benefit of the doubt for assessments involving their technical expertise. To meet their burden of proof in the present hearing on the written record, Requesters need to show the Commissioner a basic bias, flaw, or oversight in the Division’s technical analysis.

They have not done this.

Requesters’ lead-off point in this area focuses on the increased-discharges prong of § 100(c). They contend that the new LAD system design adds capacity to “accommodate[] Constantine’s maximum predicted flow of 900 gpm, which represents an increase from the maximum 800 gpm that the previous design accommodated.”<sup>53</sup> This is only half correct. The revised design does add surge capacity, slightly increasing the safety factor built into the system should flows from the adit surpass the projected level. But improving the system’s ability to properly handle high flows does not increase the actual flows; those are determined by the

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<sup>50</sup> 18 AAC 15.100(c).

<sup>51</sup> *Cascadia Wildlands Project v. Div. of Spill Prevention & Response*, OAH Case No. 07-0496-DEC (Comm’r Env. Cons. 2011), at 15 (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=1968>).

<sup>52</sup> See, e.g., *Quality Sales Foodservice v. Dep’t of Corrections*, OAH No. 06-0400-PRO (Comm’r Admin. 2006) at 11 (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=4732>).

<sup>53</sup> Opening Brief of Requesters at 18.

characteristics of the adit, which have not been changed. Also unchanged is the permit's 500 gpm limit found in its provision 2.2.6.1.<sup>54</sup> Contrary to Requesters' arguments, the discussion of higher flow rates in the revised Appendix A does not override provision 2.2.6.1; the 2019 version of Appendix A, which was "incorporated" in the original WMP, likewise discussed higher flows, showing that a discussion of such contingencies was never considered inconsistent with a 500 gpm cap.<sup>55</sup> Since the LAD redesign does not change discharge volume in comparison to what it would have been under the old design, the issue of increased capacity cannot trigger a new permit under 18 AAC 15.100(c).

Requesters also raise the concern that the projected pH of the discharge is closer to neutral than previously thought, now estimated at 7.9 rather than 8.9.<sup>56</sup> A basic flaw of this argument is that Requesters have used figures for projected discharge from the adit portal, prior to treatment that can include pH adjustment.<sup>57</sup> The figures are, in fact, part of a more refined assessment of the circumstances the LAD is being built to address, not an indication of a change brought about by the adjustments in its design. But, in any event, nothing in the record suggests that a discharge with a pH of 7.9—a non-acid level well within Alaska's water quality standards—might add a new "detrimental environmental impact," the threshold required to trigger starting over with the permit process. Under these circumstances, even if the Commissioner were not inclined to give due regard to staff expertise, the record in this matter regarding pH would not support initiating a new process under 18 AAC 15.100(c).

Lastly, Requesters observe that the redesigned system will use certain common water treatment chemicals to settle suspended solids, which might otherwise clog the system and which, if left in suspension, could carry metal constituents into the wastewater.<sup>58</sup> These flocculants and coagulants are a type of treatment chemical that is exhausted during treatment, binding to the removed solids. The Division has made a reasoned finding that adding this dimension of water treatment will reduce the concentration of pollutants in the discharge and represent an overall improvement in the system's efficacy.<sup>59</sup> Requesters have not, simply by

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<sup>54</sup> A.R. 11, provision 2.2.6.1.

<sup>55</sup> See A.R. 8, 11, 2836.

<sup>56</sup> Opening Brief of Requesters at 20-21.

<sup>57</sup> This can be seen, *e.g.*, via the text in A.R. 7716.

<sup>58</sup> Also included in Requesters' spectral list of dangerous-sounding chemicals was sulfuric acid, which is used for pH correction rather than settling. Opening Brief of Requesters at 21. This chemical is only for use when grout is being applied, and its projected usage is zero kilograms per day. A.R. 1654. At the risk of stating the obvious, a record showing this level of usage does not support reopening notice and comment on the project.

<sup>59</sup> A.R. 672.

citing the data safety sheets, created a basis for calling this judgment into question, and the Commissioner will rely on the expertise of the water staff on this issue. Accordingly, there is no basis to require a new notice and comment round under 18 AAC 15.100(c).

#### **IV. The permit and related materials adequately address the concerns highlighted by Requesters.**

Requesters point to three areas of concern which they raised in comments, contending that the Division did not adequately consider those factors in approving the permit.

##### *A. Freezing Temperatures and Snow Cover*

Requesters commented in 2019 that the site has average temperatures below freezing for about half the year, and that there was not enough information to evaluate whether freeze-ups might impair the functioning of the LAD system.<sup>60</sup> In fact, however, the permit application that is incorporated into the permit, as well as the LAD Revised Design document, show extensive consideration of freezing temperatures, with special attention to depth of burial needed to prevent freezing and adequate housing for pumps.<sup>61</sup> While not addressed in a separate, labeled section—perhaps because cold is such a fundamental design constraint in Alaska—the needs related to freezing run through the whole design. There is no basis to discredit the engineering expertise of the Division in determining that the response to this design criterion was adequate.

##### *B. Avalanches, Floods, Earthquakes, Landslides, Mudflows, Land Slippage, and Deep Snow – Effect on Facility*

Requesters go on to list the whole panoply of natural events that can occur in an alpine valley, and posit that these have not been adequately accounted for in the permit. Under 18 AAC 60.215(a)(8), the Division may consider the risk of such events insofar as they might affect the “long term stability of the facility.”

Avalanches are a particular concern in the Glacier Creek Valley, and, once again, the record is replete with evidence that the Division and Constantine focused on and addressed this issue.<sup>62</sup>

In addition to claiming the plan does not address avalanches, Requesters also fault the purported plan “to use solid waste as structural fill” to build the very large avalanche berm that

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<sup>60</sup> A.R. 3946-47 (SEAC), 3877 (Takshanuk).

<sup>61</sup> A.R. 43-45, 64, 621-27. 2019 correspondence with a member of the public, pointed to by Requesters, is additional evidence of the Division’s attention this overarching concern, although it relates to a prior, less protective system design. See A.R. 4392-93..

<sup>62</sup> A.R. 44, 622, 700-707, 1962. Some of this attention occurred before the redesign, but carries over to unchanged aspects of the proposed treatment works.

Constantine has proposed.<sup>63</sup> This, they contend, triggers all the requirements of 18 AAC 60.008, governing solid waste. But this argument ignores 18 AAC 60.005(c)(6), which exempts from Chapter 60’s requirements “domestic wastewater, nondomestic wastewater, and other wastes that are subject to a permit under AS 46.03, 18 AAC 72, or 33 U.S.C. 1342.” Because the waste at issue is subject to a waste management permit under AS 46.03, it is not subject to an additional permit under 18 AAC 60. Additionally, Requesters have misconceived the project. Although rock will be used to build the berms, it will not be potentially acid-generating (PAG) rock.

Other potential adverse events—which Requesters have barely briefed, offering little more than a recitation of the list from the regulation—are also reflected in the design. In particular, the selection of a relatively flat area for construction addresses land instability concerns.<sup>64</sup> Requesters articulate a specific concern that the alluvial fan where the LAD system will be built has been characterized as a “high energy environment,”<sup>65</sup> which they seem to equate with unusual seismic instability. But this simply reflects a misconception of what this term means in geology. A “high energy environment” is one where the sediments were deposited in a way that transports a range of particle sizes and deposits larger components (in contrast to a low energy environment, like a settling pond, where fine components are deposited).<sup>66</sup>

Again, there is no basis to set aside the Division’s expertise in evaluating these issues.

C. *Avalanches, Floods, Earthquakes, Landslides, Mudflows, Land Slippage, and Deep Snow – Effect on Monitoring and Inspection*

Requesters recite the same litany of potential events in an argument that the Division failed to ensure that Constantine would have uninterrupted access to monitoring locations and the like. But in presenting this argument, Requesters fail to cite a single regulation applicable to this concern, relying instead on 18 AAC 60.008 (discussed above), 18 AAC 60.840 (relating to how test parameters are selected), and 18 AAC 60.215 (relating to stability, not access).<sup>67</sup> While it appears that Constantine has indeed made some provisions to preserve access, Requesters’ argument cannot be considered at all in light of the lack of a relevant legal foundation.

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<sup>63</sup> Opening Brief of Requesters at 34.

<sup>64</sup> *E.g.*, A.R. 50, 215, 623, 647. Some photos displayed in this case have exaggerated the steepness of the terrain, because the camera was tilted, because of lens selection, or because of the natural foreshortening that occurs when mountains are viewed head-on. A.R. 3354, which Requesters displayed at oral argument, is particularly misleading in this regard.

<sup>65</sup> Opening Brief of Requesters at 35; A.R. 170.

<sup>66</sup> One source for this widely understood concept is [https://glossary.slb.com/en/terms/d/depositional\\_energy](https://glossary.slb.com/en/terms/d/depositional_energy) (accessed 8/6/23).

<sup>67</sup> *Id.* at 35-37.

**V. State water standards have not yet been properly addressed.**

Requesters argue that the Division, in setting trigger limits in the WMP, has implemented Natural Condition-Based Water Quality Standards within the meaning of the second sentence of 18 AAC 70.010(d), but has done so without following the procedures set out in the Department's 2006 *Guidance for the Implementation of Natural Condition-Based Water Quality Standards*,<sup>68</sup> as that sentence requires. There is no dispute that the procedures in the *Guidance* were not implemented here; the parties' dispute is over whether they are applicable.

The Division contends that this issue has been raised untimely, because Requesters did not bring it up in the original comment round in 2019. Putting aside the question of whether Requesters fairly put the matter in issue at that time through their requests for clarification of the reasoning behind the permit's trigger limits,<sup>69</sup> the time for an adverse party to raise this timeliness concern has passed. Such objections must be raised when the hearing request is evaluated under 18 AAC 15.220(b) for eligibility to be heard under 18 AAC 15.200—which encompasses the requirement under § 200(a) for having previously raised the issue. The portion of this administrative adjudication leading to the Commissioner's order of December 29, 2022 was entirely devoted to that evaluation. The Division actively conceded during that phase that all four issues brought forward by Requesters were eligible for hearing under 18 AAC 15.200,<sup>70</sup> and the timeliness issue will not be revisited now.

Turning to the merits, the handling of water quality standards in this case starts with 18 AAC 70.010. Broadly, that regulation is aimed at regulating “the degree of degradation” that human activities may impose on a waterbody.<sup>71</sup> The regulation does not seek to improve on nature. Limits set by 18 AAC 70 must be met in surface water or groundwater at the boundary of a treatment works.<sup>72</sup> This leads us to 18 AAC 70.010(d), which provides:

Where the department determines that the natural condition of a water of the state is of lower quality than the water quality criteria set out in 18 AAC 70.020(b), the natural condition supersedes the criteria and becomes the standard for that water. When establishing a water quality standard based on the natural conditions in a permit, certification, or other written decision, the department will follow the procedures set out in the department's *Guidance for the Implementation of*

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<sup>68</sup> The *Guidance*, which has the force of regulation through an adoption by reference, can be viewed from a link on this page: <https://dec.alaska.gov/water/water-quality/standards/natural-conditions>.

<sup>69</sup> See A.R. 4801; cf. A.R. 5323-24.

<sup>70</sup> Division's Response to Request for Adjudicatory Hearing (Dec. 2, 2022) at 11.

<sup>71</sup> 18 AAC 70.010(b).

<sup>72</sup> 18 AAC 70.010(c).

*Natural Condition-Based Water Quality Standards*, dated November 15, 2006 and adopted by reference.

The first sentence of 18 AAC 70.010(d) establishes that whenever the Department determines that a natural condition of a water of the state is lower than a numerical standard in the water quality regulations, the “natural condition supersedes” and “becomes the standard for that water.”<sup>73</sup> The sentence is not self-executing; it requires a determination.

The process for making the requisite determination,<sup>74</sup> documenting it,<sup>75</sup> expressing it where necessary for use in permits,<sup>76</sup> allowing public input on the determination,<sup>77</sup> and allowing appeals<sup>78</sup> is set out in the *Guidance*. The requirements found in the *Guidance* have been adopted by reference as regulations,<sup>79</sup> and they are law binding on the Department. The *Guidance* “specif[ies] the procedures that the [Department] will use to implement natural condition-based water quality standards.”<sup>80</sup>

If the Department makes the determination under the first sentence of 18 AAC 70.010(d), a public notice and comment procedure ensues. It is not optional, but rather is triggered “[a]ny time DEC finds that the natural condition comprises the water quality standard for a water.”<sup>81</sup> Importantly, this process may be conducted independently or may be conducted “as part of the public notice and comment process of an associated action, such as a permitting decision.”<sup>82</sup> In either event, however, the notice must be explicit and must contain substantial background information:

The public notice will include information on the waters to which the natural condition-based standard applies, a summary of the information supporting that the natural condition is the water quality standard, a summary of any information on how the standard will be expressed in narrative or numerical terms, and a description of how members of the public can obtain a copy of the detailed record.<sup>83</sup>

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<sup>73</sup> If the prerequisite determination by the Department has been made, the natural condition supersedes the default criteria set in the tables in 18 AAC 70.020(b).

<sup>74</sup> *Guidance* at 2.1.1 – 2.1.3.

<sup>75</sup> *Guidance* at 2.1.6.

<sup>76</sup> *Guidance* at 2.1.4.

<sup>77</sup> *Guidance* at 2.1.5.

<sup>78</sup> *Guidance* at 2.2.

<sup>79</sup> 18 AAC 70.010(d).

<sup>80</sup> *Guidance* at 1. As the Division points out, the Department could, in its discretion, establish a site-specific water quality criterion under 18 AAC 70.235. But 18 AAC 70.010(d) is clear that the *Guidance* is the sole route for establishing water quality standards based on natural conditions without promulgating a regulation.

<sup>81</sup> *Guidance* at § 2.1.5 (italics added).

<sup>82</sup> *Guidance* at 2.1.5.

<sup>83</sup> *Id.*, last paragraph.



In this case, the Division has evidently made a determination under 18 AAC 70.010(d), and the “any time” provision of the *Guidance* has been triggered.<sup>84</sup> However, no public notice and comment process in conformity with the *Guidance* has been completed. The sole public notice issued, which is found at A.R. 3562-87, did not set out to, and did not, provide the information required by the quoted passage from the *Guidance*. This means that an independent notice and comment process in accordance with the third paragraph of *Guidance* § 2.1.5 will need to occur before discharges under the WMP can occur, and corrective action triggers in the WMP may need to be adjusted as appropriate to meet the natural condition-based water quality standards that result from that process.

The applicant is still required to adhere to water quality standards.<sup>85</sup> There is no indication that the Division’s judgment to use an indirect, predictive model to monitor for exceedances, as permitted by 18 AAC 60.830(g)(3),<sup>86</sup> was inappropriate. Thus, there is no fundamental flaw in the WMP, and it will not need to be reissued through a new notice and comment process provided any adjustments to corrective action triggers are downward, rather than upward—or, otherwise stated, more, rather than less, stringent.

Accordingly, the holding in this Part V will be implemented as follows. The WMP will be affirmed with one modification, set out in Part VI, that will preclude discharges prior to completion of an independent natural condition-based water quality standard process in conformity with the *Guidance*.<sup>87</sup> Based on that process, corrective action triggers in the permit must be amended if they are not protective of natural condition-based water quality standards. They may be amended downward, but not upward, in conformity with the final sentence of 18 AAC 15.100(c), which was discussed in Part III.

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<sup>84</sup> See A.R. 4801.

<sup>85</sup> A.R. 8, 9 (§ 2.1.1.7), 16 (§ 2.5.2), 18 (§2.6.1), 20 (§ 2.7.2)

<sup>86</sup> Because this is the final agency decision, regulations in effect now are the ones that apply to it. Accordingly, the citation here is to the February 25, 2022 revision of 18 AAC 60. For discussion of which version of changing laws should be applied, *see, e.g., Stacey v. Jewell*, No. 3:13-CV-00113-RRB, 2015 WL 13674859, at \*2 (D. Alaska 2015) (court must apply the regulation that went into effect after the ALJ held the hearing but before the Interior Board of Land Appeals rendered its decision because “[t]he law in this Circuit is clear that an administrative agency is bound to enforce its rules in effect at the time it takes *final* action” (italics added); *ITG Voma Corp. v. Int’l Trade Comm’n*, 253 F. Supp. 3d 1339, 1349 (Ct. Int’l Trade 2017) (“An agency is required to apply the law that is in effect at the time that it issues its final determination, even when a change in legislation occurs during the administrative proceeding.”); *see also Ziffrin v. United States*, 318 U.S. 73, 78 (1943) (seminal case holding that “a change of law pending an administrative hearing must be followed in relation to permits for future acts” and noting that “[o]therwise the administrative body would issue orders contrary to the existing legislation”).

<sup>87</sup> Construction of the LAD system may proceed. The applicant bears any risk that downward adjustment of corrective action triggers may affect its use.

## VI. Conclusion and Order

The challenges to the WMP and related decisions, as issued on October 4, 2022, are resolved as follows:

1. The decision not to require an APDES permit is affirmed. This is a final agency decision.

2. The WMP is amended to add the following provision 2.1.1.10:

Notwithstanding any other provision herein, the permittee may not discharge wastewater through the LAD system until the Department has delivered to the permittee and published via the Online Public Notice System a notice that it (i) has completed all proceedings attendant to its finding that the natural condition comprises the water quality standard for any wastewater constituent and (ii) has completed any associated amendments to Tables 1-5 herein.

Issuance of the WMP is otherwise affirmed. This is a final agency decision.

3. The Division is directed to initiate and conduct a proceeding under the Department's *Guidance for the Implementation of Natural Condition-Based Water Quality Standards* with respect to water quality standards in the vicinity of the LAD system. Review of any decision that the natural condition comprises the water quality standard for a water will be available to participants in that proceeding in accordance with *Guidance* § 2.2. Upon completion of that proceeding, the Division shall make downward amendments to levels in Tables 1-5 of the WMP as needed to conform to any standards determined to apply including, where applicable, standards in 18 AAC 70.020(b). Upward amendments may not be made.

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Insofar as this decision moves forward the state waste management permit for the proposed exploration activities at the Palmer Project, the Commissioner does not dismiss the concerns of the Chilkat Indian Village and many Haines area residents regarding activity in the headwaters of Glacier Creek. The Department will continue to consider their views, and encourages their participation in the upcoming proceedings related to natural condition-based water quality standards. More broadly, the Department will remain vigilant in enforcing the terms of this permit and in reviewing future permits or amendments, should the project change, expand, or move into a mining phase.

DATED: August 18, 2023.

By:

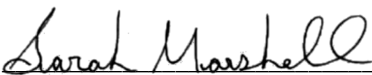
Jason W.  
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Jason Brune  
Commissioner of Environmental Conservation

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**Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.**

**Certificate of Service**: I certify that on August 18, 2023, a true and correct copy of this order was distributed as follows: Erin Colón (by email), Olivia Glasscock (by email), Cameron Q. Jimmo, AAG (by email), Cody B. Doig, AAG (by email), James F. Clark (by mail and email), and Dept. of Law Central Email. A courtesy copy was emailed to Hearing Liaison Gary Mendivil, Deputy Commissioner Emma Pokon, and Julie Pack, AAG.

By:   
Office of Administrative Hearings