



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 10**  
1200 Sixth Avenue, Suite 155  
Seattle, WA 98101-3123

OFFICE OF  
WATER AND  
WATERSHEDS

DEC 06 2018

Dear Tribal Leader:

Re: New Invitation for Tribal Consultation regarding the EPA's Clean Water Act Action on Alaska's 2006 Revised Mixing Zone Rule

I am writing to offer you government-to-government consultation on an upcoming U.S. Environmental Protection Agency Clean Water Act (CWA) action in Alaska. On August 14, 2006, Alaska's Department of Environmental Conservation (ADEC) submitted revisions to its water quality standards addressing the authorization of mixing zones. The purpose of this letter is to offer you a new opportunity to consult with the EPA about its upcoming CWA section 303(c) action on the revisions.

The EPA previously offered an opportunity for government-to-government consultation on October 27, 2005; however, neither tribal consultation nor EPA's CWA action have been completed. This is in part due to the EPA's obligations to consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service under the Endangered Species Act (ESA), which have been extensive.

The EPA anticipates completing ESA consultation with receipt of a third biological opinion on this project in early 2019 and is preparing to take a CWA action on Alaska's revised mixing zone rule. Because significant time has passed since the EPA's last communication (2009) with interested tribal governments regarding this pending action, the EPA is again offering an opportunity for government-to-government consultation to all federally recognized tribes in Alaska.

This opportunity for consultation is limited to the water quality standards revisions submitted on August 14, 2006 and does not include activities by ADEC and the EPA on other water quality standards topics. The EPA's pending action applies only to water bodies in the State of Alaska and does not apply to waters that are within Indian Country as defined in 18 U.S.C. § 1151.

The attachment to this letter summarizes background on the water quality standards revisions submitted by ADEC that are the subject of this offer for government-to-government consultation and background on the federal water quality standards regulation and guidance regarding mixing zones.

**Summary of Earlier Tribal Engagement Activities**

The EPA initially offered an opportunity for government-to-government consultation on this action by letter on October 27, 2005, and several tribes requested consultation at that time. Tribal engagement activities included two informational exchange conference calls between the EPA and the tribes in February 2006 and a July 2006 face-to-face consultation meeting between the EPA and tribal leaders in Ekwok. The EPA also provided the tribes with a series of email updates from January 2006 to March 2009 concerning ADEC and EPA activities related to Alaska's revised mixing zone rule.

### **Today's Opportunity for Tribal Involvement**

The EPA recognizes its unique relationship with tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions, and is offering you a new opportunity for government-to-government consultation regarding this upcoming CWA action on Alaska's revised mixing zone rule. Tribes that had previously requested government-to-government consultation are asked to reaffirm that request if they remain interested. Tribes that had not previously requested consultation are welcome to do so now.

We understand that you may have shared your concerns during the EPA's previous engagement activities on this topic. If you still have those concerns, we ask that you reaffirm them. You are also welcome to raise any new concerns that you may have.

The EPA will hold two informational conference calls for interested tribal governments to discuss this pending action and to answer any questions you may have. The calls will be held on **Wednesday, January 23, 2019, 9:30 – 11:00 am** and on **Wednesday, February 6, 2019, 8:30 – 10:00 am (Alaska Time)**. The conference phone number and conference ID for these informational calls is: **202-991-0477; conference ID 8014105#**.

The EPA will share the same overview of information during each call. The informational conference calls are intended to assist in your decision regarding consultation and are not a substitute for government-to-government consultation.

If you would like to request government-to-government consultation with the EPA regarding this action, please contact Bill Beckwith of my staff at (206) 553-2495 or by email at [beckwith.william@epa.gov](mailto:beckwith.william@epa.gov) by **Wednesday, March 6, 2019**. Please also identify a tribal representative to serve as a point of contact for planning purposes.

Thank you for your interest in this upcoming CWA action. Please do not hesitate to contact me if you have any questions, at (206) 553-1855 or at [opalski.dan@epa.gov](mailto:opalski.dan@epa.gov).

Sincerely,



Daniel D. Opalski  
Director

cc: Tribal Environmental Directors (by e-mail)

Enclosure



## **Attachment to the EPA's December 2018 Invitation for Tribal Consultation regarding the EPA's Clean Water Act Action on Alaska's 2006 Revised Mixing Zone Rule**

### **Alaska's Revised Mixing Zone Rule**

The water quality standards revisions that are the subject of EPA's upcoming action were adopted by ADEC on February 17, 2006; were certified by the Alaska Attorney General on February 21, 2006, as being duly adopted pursuant to state law; and became effective under Alaska state law on March 23, 2006. In revising its mixing zone regulation, ADEC repealed 18 AAC 70 sections 245, 250, 255, 260, and 270 and consolidated the revised regulation in 18 AAC 70.240. ADEC also adopted accompanying edits and new definitions at 18 AAC 70.990. Despite substantial wording changes and reorganization, many of the fundamental concepts of Alaska's mixing zone rule before and after the 2006 revisions are similar. There are also substantive changes, such as how mixing zones in spawning areas for a specified list of fish may be authorized if mitigation is provided (this change is not applicable to anadromous Pacific salmon defined as Chinook salmon, Coho salmon, sockeye salmon, pink salmon, and chum salmon).

ADEC also provided implementation guidance for its revised mixing zone rule (Implementation Guidance: 2006 Mixing Zone Regulation Revisions, February 3, 2009). This guidance is generally focused on areas where ADEC felt it had made significant revisions. Accordingly, a large portion of the guidance addresses the changes regarding mixing zones and spawning areas mentioned above. The EPA expects to use the implementation guidance to inform review and action on Alaska's revised mixing zone regulation. However, EPA will not take a CWA section 303(c) action on Alaska's mixing zone implementation guidance because it is not binding in regulation or statute.

Access to the full text of Alaska's revised mixing zone rule and Alaska's mixing zone implementation guidance can be found at: <https://dec.alaska.gov/water/water-quality/mixing-zones/>.

### **Background on the Federal Water Quality Standards Regulation and Mixing Zone Guidance**

The federal water quality standards regulation at 40 CFR Part 131 requires that states and authorized tribes adopt designated uses for their waters, water quality criteria to protect those designated uses, and an antidegradation policy. States and authorized tribes may, at their discretion, also adopt general policies affecting application and implementation of water quality standards, such as mixing zone policies (40 CFR 131.13). Like other water quality standards, such policies adopted in regulation or statute on or after May 30, 2000 require the EPA's approval before they become applicable water quality standards for purposes of implementing the CWA (40 CFR 131.21(c)).

A regulatory mixing zone is an area where initial mixing and dilution of a discharge with its receiving water occurs and pollutant concentrations are allowed to exceed certain applicable

water quality criteria. The allowance for regulatory mixing zones is based on the premise that certain water quality criteria may be exceeded under limited circumstances while still protecting the designated uses and existing uses in the water body as a whole. The federal water quality standards regulation does not specify requirements for mixing zones. Rather, EPA guidance presents a framework for implementing mixing zones so that they protect uses in the water body and do not impede progress towards the CWA objective to restore and maintain the chemical, physical, and biological integrity of the Nations waters. The EPA's guidance addresses factors such as mixing zone location, size, shape, and in-zone water quality, and discharge outfall design.

Additional information about mixing zones can be found in the EPA's Water Quality Standards Handbook, Chapter 5 (<https://www.epa.gov/sites/production/files/2014-09/documents/handbook-chapter5.pdf>); the EPA's 1991 Technical Support Document for Water Quality-based Toxics Control, sections 2.2.2 and 4 (<https://www3.epa.gov/npdes/pubs/owm0264.pdf>); and the EPA's 1998 Advance Notice of Proposed Rulemaking, 63 FR 36742, 36787-94 (<https://www.gpo.gov/fdsys/pkg/FR-1998-07-07/pdf/98-17513.pdf>).