

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION

DIVISION OF WATER DIRECTOR'S OFFICE

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March 21, 2011

The Honorable Paul Seaton
House of Representatives
Alaska State Capitol, Room 102
Juneau, AK 99801-1182

The Honorable Eric Feige
House of Representatives
Alaska State Capitol, Room 126
Juneau, AK 99801-1182

Dear Representatives Seaton and Feige:

At the March 18 House Resources Committee meeting on CSHB 185, this Department and the Department of Law were asked to provide additional information to the committee. The Department has conferred with the Department of Law on the following information.

What does the Federal Water Pollution Control Act regulate?

The federal Clean Water Act (CWA) prohibits the discharge of pollutants, which includes munitions, into navigable waters without a permit. "Navigable waters" are defined as "waters of the United States, including the territorial seas." "Waters of the United States" are defined in EPA regulation as follows:

40 CFR 230.3(s) The term *waters of the United States* means:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United

States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

The types of waters that are included in "waters of the United States" have been the subject of much litigation nationwide and its interpretation is continually in a state of flux as courts around the country interpret it on a case-by-case basis.

What is the old state policy vs. the "new" state policy regarding permitting of munitions discharges?

Alaska Statute (AS) 46.03.100 prohibits the discharge of solid or liquid waste to the lands and waters of the state. It has been longstanding state policy via AS 46.03.100(e)(7) to exempt firing ranges from these state permitting requirements.

The CWA, however, requires a permit for discharges of munitions to "waters of the United States" and in order for the Department to receive primacy to issue wastewater discharge permits under the CWA, we had to resolve the discrepancy between the CWA requirement and the longstanding state policy to exempt firing ranges from permit requirements. We did this in a change to AS 46.03.100(e)(7), passed in 2008 (sec. 4, ch. 17, SLA 2008), by adding a phrase to the existing state permitting exemption for firing ranges -- ". . . unless it results in a discharge into waters of the United States." While this change made Alaska's statutes consistent with the requirements of the CWA and was ultimately approved by the EPA in the state's request for primacy, it has the potential to cause the state to be more restrictive (i.e. more stringent) than the CWA or longstanding state policy. This is because the Department of Defense has been working with EPA on the federal requirement to obtain a permit for the discharge of munitions into waters of the United States. So, if that requirement changes, no CWA permit is required, and the state statute remains as is, then the state statute would still require a munitions range operator to obtain a permit, thus exceeding the requirements of the CWA. To avoid that scenario, the goal of CSHB 185 is to match the federal requirements by citing to the CWA.

CSHB 185 would only require the state to issue a permit if it is required to do so under the CWA. It is a subtle, but important change that will retain the state policy to exempt ranges from permitting requirements for munitions discharges to the

land and for discharges to waters that are not required to have a permit under the CWA.

Are non-military training ranges covered by the permit exemption of AS 46.03.100(e)(7)?

Yes - all firing ranges used for training activities on active ranges are exempt from state permitting requirements unless use of the ranges results in a discharge into waters of the United States. CSHB 185 will also exempt all firing ranges used for training activities on active ranges unless the discharge requires a permit under the Clean Water Act.

What is the definition of “active ranges?”

A military representative described “active ranges” from their perspective during the hearing. There is no legal definition of “active range” in state statutes, however, from a permitting perspective an “active range” is one where there are discharges occurring – the range is in use, or will be in use during the 5-year life of a permit (if a permit is required).

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn J. Tomich Kent".

Lynn J. Tomich Kent
Director

cc: Lindsay Wolter, Department of Law