

Clean Water Act Section 404 Dredge and Fill Program Assumption

Feasibility Report



Prepared for
Alaska Department of Environmental Conservation
Anchorage, Alaska

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THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Environmental
Conservation

OFFICE OF THE COMMISSIONER

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Dear Members of the Alaska Legislature:

I am excited to provide you with the Clean Water Act Section 404 Dredge and Fill Program Assumption Feasibility Study you directed the Department of Environmental Conservation (DEC) to complete during the 2022 Legislative session. The results of this study further demonstrate the necessity of the State to act expeditiously to take on these responsibilities from the U.S. Army Corps of Engineers by submitting an application to the Environmental Protection Agency (EPA). DEC looks forward to demonstrating the environmental and economic benefits State oversight of this program will bring to Alaska. After evaluating the results of this study, it is the Dunleavy Administration's intention to include funding for this effort in the Governor's amended FY24 budget slated to come out later this month.

Alaska has two-thirds of the country's wetlands and 43% of Alaska's land area is wetlands. I would like to highlight several items from this report. First, we have always said that Alaskans know more about protecting our wetlands than anyone from the Lower 48. Alaska does not have a shortage of wetlands with approximately 175 million acres, less than .1% of which have been developed to date. With the recent January 18, 2023, federal rule change that further expands the definition of regulated Waters of the United States, lands that will be subjected to 404 permits will only be increasing. It's the ideal time for Alaska to take this step and control environmental protection and economic development through the assumption of the 404 Dredge and Fill Program.

With support of the Alaska Legislature, we will make an Alaskan 404 Program as strong, or stronger than the requirements set out by the EPA. This is, in fact, a requirement of assuming the program. Permittees are required to compensate for unavoidable impacts to wetlands. We will have the opportunity to provide compensatory mitigation options that are presently not utilized and veer from the federal focus of restoring damaged wetlands, creating new wetlands, or putting lands into perpetual conservation easements as their primary mitigation options. Alaska has not lost wetlands like other states – there's little to restore; places where wetlands can thrive in Alaska are already a wetland; and many of Alaska's wetlands already have protection status as 88% are under public management (Alaska already has well over 150 million acres of lands set aside for conservation purposes). In short, the existing federal tools provided for mitigation do not maximize environmental benefit to Alaska. State implementation of the flexible compensatory mitigation requirements, however, could do just that: for example, the State could allow project developers to remediate contaminated sites that affect water quality in the watersheds of their activities. This is one example of how Alaska's oversight of this program could provide tremendous environmental and social benefits to communities and developers alike when Alaska gains oversight of this program.

By bringing this program under the State, Alaska will be in the position to take greater control of its destiny and not be subjected to changing federal administrations. Projects will benefit from increased coordination within the existing State regulatory framework as well as, in certain instances, avoid the huge cost and time burden of a NEPA analysis without decreasing environmental protection. Further, this tremendous opportunity will ensure that Alaskans can hold its State government accountable for actions far easier than holding Washington DC to task nearly 5,000 miles away.

The Lower 48 has lost well over 50% of its wetlands, a model Alaska will never follow. As we've heard time and time again, nobody does it better than Alaska. Given the expertise of our regulators and our ongoing commitment to setting the bar as high as possible, there is no better time than now to take over this program and ensure protection of our environment while providing the opportunity for responsible economic development to occur.

Once again, we look forward to speaking with you more about this amazing opportunity for Alaska. An Alaskan 404 Program will bring efficiencies to the process, decrease permitting timelines and associated costs of projects, while improving water quality and protecting the important ecological functions of wetlands in ways that reflect Alaska's priorities. Please don't hesitate to reach out to us if you have any questions and we look forward to your support of this critical work beginning with the FY24 budget.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason W. Brune".

Jason W. Brune
Commissioner

EXECUTIVE SUMMARY

The federal Clean Water Act (CWA or Act) has two main programs: the Section 402 Program to control point-source pollution discharges to surface waters and the Section 404 Program to regulate the discharge of dredge or fill material into wetlands and other waters of the United States. The CWA states "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of [s]tates to prevent, reduce, and eliminate pollution." It is built on the principle of cooperative federalism, 33 U.S.C. Section 1251(b). Congress preserved for states like Alaska the "primary responsibilities and rights" to prevent water resources pollution, stating: "it is the policy of Congress that the states . . . implement the permit programs under sections [402] and [404]." *Id.* Section 1251(b). Alaska assumed the 402 Program in 2008, joining 46 other states that implement the program. This report reviews the feasibility for Alaska to assume the 404 Program.

With over 174 million acres of wetlands and vast amounts of other waterbodies, Alaska's stake in administering the Section 404 Program of the CWA is unlike that of any other state (see comparisons in Table 1. Historic Wetland Loss/Gain by State – Table and Graphs). A great proportion of Alaska's economy – construction projects, public works, roads, mines, residential properties, or oil development – affects wetlands and often requires a Section 404 permit from the U.S. Army Corps of Engineers (Corps).

Alaska	Acres	Percent of Surface Area
Alaska Wetlands Acreage	174,683,900	43%
Deepwater (lakes and coastal)	29,870,400	7.40%
Total	204,554,300	50.400%

Source: Status of Alaska Wetlands, U.S. Fish and Wildlife Service. 1994

An assumed 404 Program means the State, rather than the Corps would issue Individual Permits (IPs), referred to by the Corps as Standard Permits (SPs)¹ and General Permits (GPs) for the discharge of dredged or fill material into certain waters. While the State can assume dredge and fill permitting responsibility from the Corps for most areas, the CWA requires that the Corps retain permitting jurisdiction for certain "non-assumable" waters that must remain subject to federal purview (generally, waters used to transport interstate or foreign commerce). Waters where the State would assume responsibility and waters where the Corps would likely retain jurisdiction is explained in Section 4 and demonstrated in Figure 2. - Figure 5. However, as shown in this report we estimate that the State would assume responsibility for approximately 75% of the 404 permit actions the Corps currently administers in Alaska. The remaining 25% would remain with the Corps.

A state program cannot impose any less stringent requirements than those set forth in EPA's state assumption regulations (40 CFR § 233).² To assume the Corps' permitting responsibility over

¹ Individual Permit (a term generally used by states) and Standard Permit (a term used by the Corps) refer to a similar permit tool and only authorize one project. A General Permit may be used to authorize multiple projects.

² The regulations provide that state 404 Programs "shall, at all times, be conducted in accordance with the requirements" of Section 404 and the Section 404 State Program Regulations (40 CFR § 233). States are not allowed to "impose any less stringent requirements for any purpose."

assumable waters, the State must show that its program is at least as stringent as the current federal 404 Program and has sustainable funding. Therefore, State assumption of the Corps' program does not decrease environmental protection in Alaska. In many respects, Alaska's management of the 404 Program may result in increased environmental protection and better management of resources. State assumption of the 404 Program has other important advantages.³ These benefits are explained in detail in Section 2, and summarized here:

- **Program assumption will maintain or improve environmental protection.** State assumption of the 404 Program will increase State and local involvement in key decisions and will better reflect the environmental priorities and needs of the state. State dredge and fill permitting can be better targeted to represent Alaska's environment and better protect the unique characteristics of Alaskan conditions, which is different from elsewhere in the U.S. A State 404 Program can be coordinated with existing key State programs already in place, such as the Alaska Department of Environmental Conservation (DEC) Wetland Management Plan; Alaska's Water Quality Standards; water quality monitoring program; the biannual Water Quality Assessment and Monitoring Report (which identifies impaired waters that may benefit from compensatory mitigation required of some 404 permittees); State land management and permitting programs; State fish and game programs; and State coordination programs for projects requiring multiple permits, including other environmental permits.
- **Compensatory Mitigation.** Compensatory mitigation (compensating for impacted wetlands) may be the most significant issue associated with implementing State program assumption. A more flexible, State mitigation approach may allow Alaska to address more pressing water quality protection and restoration needs than the federal program that is focused on restoration and creation of new wetlands. Alaska has such a large percentage of undisturbed wetlands that the requirements set for the lower 48 states to restore or replace impacted wetlands may not be suitable for Alaska. Techniques used to avoid, minimize, and compensate for wetlands impacts may not work as well in Alaska. This issue provides an opportunity to work with EPA and the Corps to develop the required compensatory mitigation in a manner that is appropriate for Alaska. Developing a compensatory mitigation system that meets federal requirements, is efficient for project applicants, and is appropriate for Alaska, will be one of the greatest benefits from a State-assumed program. Importantly, federal law currently provides that, "to the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, *provide flexibility for regional variations in wetland*

³ "When States and tribes assume the Section 404 permit program, they protect the waters to the same level as the federal government and often increase efficiencies and remove redundancies in permitting processes." U.S. Army (2018, August 7). *Army Issues Memorandum to Empower States and Tribes in their Permitting Authority*. Retrieved December 28, 2022, from https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_authority

conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.”⁴

- **Opportunity to reduce the high costs and burdens of federal 404 permitting.** Applicants for 404 permits spend significantly on the permitting process. Any government actions that reduce the timeframe for issuing a permit (while still meeting all environmental protection needs) can represent a cost savings to permit applicants and the permitting agency. With Alaska’s short construction season, a 2-month permit delay may mean delaying construction to the following year. Project delays almost always result in higher project costs, usually with no environmental benefit. State-assumed programs can create streamlined timelines by creating state-specific general permits, establishing more stringent statutory timelines, permit coordination and increasing program stability, among other options discussed in this report.
- **Assumption would increase Alaska’s control over its economic future.** An important part of Alaska’s history is the fight to obtain more State control over Alaska’s resources from the federal government. The Corps’ wetland permit is the remaining, frequently used permitting authority retained by the federal government over State and private land. Assuming control would allow Alaska to coordinate permitting for projects, including control over scheduling, and priorities. Assuming permitting control over much of the State’s wetlands would be a major increase in State control over development in Alaska.
- **State government is closer and more accountable to Alaskans than the federal government.** State leadership employees are accountable to the legislature, which is closer to individual Alaskans than the federal government. The DEC budget and description of agency services and progress reports go through the legislature, with public review, every year. It is easier for the State to craft solutions for Alaska’s unique wetland, social, and economic circumstances than it is for the Corps, which must be concerned about how these may or may not apply to other states. DEC can prioritize resources and schedules to respond to Alaska priorities, whereas the federal government must adhere to national priorities. An obvious example of the better physical access Alaskans have to State government is that permittees and the public can meet with DEC employees and legislators in offices located around the state. It is easy to meet with a State employee, but to meet with the Corps in Alaska, one must gain access to a military base, which can be difficult.

⁴ See National Defense Authorization Act For Fiscal Year 2004, Pub. L. 108–136 § 314(b) (2003). Based on this congressional direction, in 2008, the Corps and EPA jointly issued regulations establishing standards and criteria for compensatory mitigation (“2008 Mitigation Rule”). See 73 Fed. Reg. 19593 (Jun. 9, 2008); 40 CFR Part 230, Subpart J. In doing so, the 2008 Mitigation Rule expressly required the Corps to account for “regional variations” when applying the standards and criteria. See 40 CFR § 230.91(a)(1) (“standards and criteria shall, to the maximum extent practicable . . . provide for regional variations in wetland conditions, functions, and values”). The preamble to the rule further clarified that the rule “does not prescribe a one-size-fits-all” approach to compensatory mitigation. 73 Fed. Reg. at 19616-17.

- **State courts are more knowledgeable about Alaska’s unique conditions than are federal courts.** Lawsuits contesting Corps-issued permits are litigated in federal courts, including the possibility for challenges to permitting decisions to occur in federal courts as far away as Washington, D.C. Most (but not all) lawsuits contesting a DEC permit would be litigated in Alaska State courts where many Alaskans have more familiarity with the applicable procedures. For example, obtaining legal representation in federal courts can be more costly and specialized than in State courts in some instances. State courts tend to be more familiar with Alaska conditions and issues than courts hearing cases outside of Alaska.
- **Some projects may not be subject to federal NEPA review.** Congress has established that the National Environmental Policy Act (NEPA) only applies to “major federal activities” and not to state actions like issuance of state 404 permits. Likewise, Congress has directed that EPA approval of state 404 Programs is not subject to NEPA. The Corps’ wetland permit is frequently the federal action that requires federal NEPA review – an Environmental Assessment (EA) or the longer Environmental Impact Statement (EIS). Under a state-assumed program, projects that are not on federal land, do not involve federal funding, or that lack another federal nexus may not require federal NEPA review. Eliminating federal NEPA review would not impact many of the smaller projects in Alaska but could significantly decrease costs and accelerate the timeline for some of the larger Alaska projects, without compromising State agencies’ ability to protect the environment.
- **State assumption provides opportunities for permit streamlining.** Permit streamlining can result in cost savings for permittees and regulators.⁵ DEC could accelerate wetland permitting in several ways. For example, State assumption will eliminate the requirement for DEC to certify that the Corps’ permit meets Alaska water quality standards. Thus, rather than the need for two separate regulatory actions (with the chance for similar but slightly different required conditions) for the same activity, the separate certification would be eliminated. State assumption may also mean faster agency coordination. In addition, the State could make greater use of General Permits and delegate some activities to Alaska’s larger local governments. Likewise, for 404 purposes, EPA has utilized programmatic consultation approaches under the Endangered Species Act that provide for more streamlined review of species impacts.
- **The State could make more use of Alaska-specific policies and procedures.** Alaska agencies are better situated to craft policies and procedures that work for Alaska’s diverse geography and climate. Alaska could develop policies for different eco-regions of the

⁵ “Many States have determined that State and tribal implementation of the Section 404 permit program saves substantial money as they are able to incorporate the review process into their existing program. This action supports infrastructure investment as removal of redundancies in State/tribal and federal reviews will help provide more timely completion of permit review requirements.” U.S. Army (2018, August 7). *Army Issues Memorandum to Empower States and Tribes in their Permitting Authority*. Retrieved December 28, 2022, from [https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_a
uthority](https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_authority)

state without having to worry about national effects. Alaska may be better situated to craft Alaska-specific mitigation policies.

- **The State program would have a more inclusive and more predictable appeals process.** Under the Corps' program, only an applicant (or owner of the permitted property) may administratively appeal a federal wetlands permit. The federal appeals process has no firm deadline and can extend for a long time. Individual citizens must go to federal court. Under a State-assumed program DEC should use its existing appeals process, which is open to Alaska citizens that participated in the permit process, allows for an informal review by the Water Division Director, and an administrative appeal to the DEC Commissioner with firm deadlines, and allows unsatisfied appellants to generally go to State court. The faster, more predictable, more open appeals process has advantages for both industry and ordinary Alaskans.
- **The State program has the potential to be more stable and predictable to applicants than the federal program.** It is expected that the State program will provide more stability and predictability than the federal program. Recent experience with numerous changes to the federal definition of Waters of the United States (WOTUS) and the extent of the Corps' jurisdiction have caused confusion to agencies and applicants.⁶ Michigan and some other states have provided a more stable and predictable program than the Corps' program, as their regulatory programs cover both WOTUS and non-WOTUS locations. The multiple federal boundary changes between WOTUS and non-WOTUS are less disruptive in states with programs that cover both. Under the 404-oversight process, Alaska will have one year to update existing state regulations to reflect changes in federal regulations (or two years, if a statutory change is required), providing more time to inform permittees of coming changes.

State assumption of the 404 Program would require overcoming some challenges. These are explained in Section 3 and summarized below.

- **Cost.** Based on current estimates, development of the application to EPA to assume the 404 Program, drafting regulations and program tools, along with staff hiring and training would require ramping up over two years. We estimate that, during the first year, these efforts would require bringing on 28 positions and \$5.0 million. The second year (and program implementation beginning in the third year and beyond) would require 32 permanent positions and cost the State approximately \$4.8 million per year. The State could pay for this program through General Funds, fees, or a combination of these. The estimated costs of the assumed program and potential funding mechanisms are explored in Sections 5.3 through 5.4 of this report.

⁶ The definition of WOTUS was changed again during the writing of this report. The EPA December 30, 2022 announcement and a link to the revised definition can be found at: [Revising the Definition of "Waters of the United States" | US EPA](#). This new definition is scheduled to become effective 60 days after publication of the new definition in the Federal Register.

- **Clarifying Responsibility between Federal and State Agencies.** The CWA does not allow the State to assume permitting responsibility for all waters and wetlands in Alaska. While the Department of Environmental Conservation (DEC) would likely issue 75% of dredge and fill permits, the Corps would still have authority for the other 25%. Some projects would require only a State permit, some a federal permit, and some might cross boundaries and involve permits from both the Corps and DEC. Section 4.6 discusses options for projects which cross the boundary of assumable waters. Different states have handled this issue in different ways. In any case, the State would need clear maps and guidelines to avoid potential permittee confusion.
- **Environmental Review.** Under a State-assumed program, DEC would have to conduct the environmental review currently conducted by the Corps. This includes writing decisions consistent with federal regulations (known as the "404(b)(1) guidelines ") which give direction to the dredge and fill permitting process required for a federal wetlands decision. This review may involve other agencies: working with the U.S. Fish and Wildlife Service on endangered species, and work with the State Historic Preservation Office (SHPO) on cultural resources issues. Finally, because federal NEPA review may not be required for some projects, DEC's environmental review guidelines (that must be at least as stringent as the Corps' 404(b)(1) guidelines) supporting a permit decision may receive more public interest.
- **EPA Oversight.** EPA has a history of close oversight over state programs which assume portions of the CWA regulatory authority. Experience in Alaska's 402 wastewater discharge program assumption process indicates that significant time and effort will be required to work with EPA to ensure that the agency's oversight is appropriate and allows DEC's assumed 404 process to remain efficient and not burden permittees with responsibilities beyond what the law requires. DEC can expect to develop a series of MOUs with EPA to address program issues. While EPA has the right to review the State's decisions, experience with other states that have assumed the 404 Program indicates that once the State assumes the program, formal EPA objections to State permits are rare. Where concerns arise over particular projects, the Corps, EPA, and the state are usually able to work cooperatively to resolve issues and move forward.
- **Tribal involvement.** Tribal governments enjoy a government-to-government relationship with the federal government and may express concerns about loss of this relationship when a federal program is assumed by a state, however, Alaska governors have issued Administrative Orders over the years to support consultation between State agencies and tribes. DEC has an "ADEC Tribal Consultation Policy" that applies to the agency's work, including work under assumption of a program from the federal government. Concerns over the potential loss of involvement by tribal governments was expressed during State assumption of the 402 wastewater discharge permitting program. To address those concerns for the 402 Program, DEC developed a guidance document "APDES Guidance for Local and Tribal Governments." The same tribal concerns should be anticipated in the 404-assumption process and can be addressed by developing similar program guidance.

The recommended program.

The 404 dredge and fill program is the only CWA program available to states for which Alaska does not have authority (see figure below). The Corps' wetlands permit is the remaining major permitting authority retained by the federal government over development on state and private land in Alaska. Given the benefits to the environment and economy of the state, DEC should take the necessary steps to assume the 404 Program from the Corps. Assuming the Corps' 404 permitting program will allow the State to issue approximately 75% of the 775 annual permit actions currently issued by the Corps (about 580 actions per year). See Table 2 Comparison of Corps Program Staffing Size to Proposed Alaska Program Staffing that describes estimated actions/year based on a five-year average. With full program funding, the quickest possible timeframe to achieve program assumption approval is about two years. The first year would require 28 FTE and \$5.0 million, ramping up to an ongoing program in the next year with 32 FTE and a budget of \$4.8 million (the cost decreases somewhat in the second year because one-time office equipment and supplies are purchased for 28 FTE during the first year). Based on regional workload, the 32 staff required to maintain the program would be allocated with approximately 14 staff in Anchorage, 12 staff in Fairbanks, and 6 staff in Juneau. Section 5.4 of this report describes different methods to fund the cost.

