Department of Environmental Conservation February 27, 2014 House Finance Budget Subcommittee Close-out Potential \$1.4M Reduction of Entire Clean Water Act Section 404 Primacy Review

With SB 27 and its funding DEC/DNR have created an experienced and energized team that is already hard at work evaluating how to improve the 404 program and whether Alaska should seek primacy for 404 wetlands permitting. Regardless of what the Legislature ultimately does with the recommendations that come out of the study, SB 27 and our work will deliver needed and substantial benefits to Alaska businesses and communities.

Improving the wetlands permitting program and taking primacy could be one of the most significant ways that Alaska can improve the permitting process for resource development projects. There are numerous unarguable benefits to state control versus federal control, and we must fully evaluate these benefits against the costs.

Even if we do not pursue primacy, there are other tools that we are now developing with this program that will deliver significant benefits to the state, such as programmatic General Permits and mitigation policies better tailored to Alaskan conditions. Elimination of the program now would stop one of the most important initiatives currently underway to improve the efficiency of permitting projects in the state.

Background

• Last session, the legislature passed SB 27 directing DEC, in coordination with DNR, to evaluate the costs, benefits and consequences of the State taking over the Clean Water Act Section 404 wetlands dredge and fill permitting program from the Corps of Engineers. The legislation gives the agencies the authority to apply to take over the administration of the program.

404 Program Primacy Benefits

- State, instead of federal, management of water and land use priorities.
- Faster permitting for major projects at reduced cost. No NEPA requirements with potential for legal challenges simply to delay projects.
- Program tailored to Alaska, including pre-application assistance to permit applicants.
- Mitigation required for project impacts to wetlands that are tailored to Alaska and don't "lock up" more lands against future development.
- Replacement of Endangered Species Act and Essential Fish Habitat formal consultation with less formal and faster processes while still achieving the objectives of those programs.
- State judicial review, rather than federal courts.
- Program accountability to legislature and Alaskans.

Impacts of Eliminating the Funding

• The legislature approved a fiscal note for SB 27 that provided sufficient funding for the primacy evaluation and application development, with the full understanding that DEC and DNR would need to come back to the legislature before a final decision could be made on whether to pursue primacy, since primacy would cost the state more than the amount initially authorized by SB 27 and because the Departments may find, during the evaluation, that they need additional statutory authority.

- While it is certain that a full program will cost more than SB 27 provides, we don't know yet what those costs will be until our evaluation is complete. Those costs will be future costs, not current. A lean budgetary time provides a perfect opportunity to evaluate a future program. Efficiency and cost savings will be woven into the potential State 404 program.
- DEC, DNR and Department of Law have been working diligently since SB 27 passed to implement the bill and have made significant progress. While not called for by the legislation, the Department provided a letter-report to the legislature in January. The fiscal note contemplated a budget increase for FY 15, however, given the tight economic situation, the administration chose not to request that \$419.6 increase and to leave our FY 15 level of effort at the baseline amount of \$1.4 million. (The DEC budget includes approximately \$360.0 for RSA to DNR and approximately \$200.0 for RSA to Law.)
- It is premature to stop the effort at this juncture. Cutting that remaining \$1.4 million will have significant adverse effects.
- The State agencies already have a lot of momentum. DEC, DNR, and Law have assembled a top-notch team of staff with extensive experience in 404 permitting. Three positions at DEC and one at DNR have been filled; an RSA is in place with Department of Law; one contract has been in place since early fall, and a second contract will be issued shortly. This team is already leveraging their work on 404 to benefit the State:
 - DEC staff are rotating through short term assignments, working at the Corps of Engineers' office to learn their permitting processes; what steps we might want to emulate in a state-run program; and what steps we might want to improve upon in a state-run program.
 - We are working on general permits with the Corps of Engineers.
 - We are working closely with EPA and the Corps to impact existing processes even under Corps management.
 - We have relationships with the federal agencies that are more productive than they have been in many years.
 - If cut now, the State would be throwing away this added value that is occurring at relatively low cost.
- If we cut experienced core staff, we would have to start all over again, once funding becomes available at some point in the future to implement SB 27. This is what worries us the most the time it would take to replace experienced staff and loss of the momentum we have now we don't know who might be in place at the Corps or EPA the next time we launch implementation of SB 27.
- The Departments are already taking this effort in measured steps. We are not rushing in to full primacy. The initial steps we are taking will have lasting effects and benefits to the State, even if in the end, we collectively decide not to pursue full primacy of the 404 program. Now is not the time to make a decision before the study is complete and those benefits are realized. Two significant anticipated benefits are:
 - <u>Programmatic General Permits.</u> We are working with the Corps of Engineers to develop one or more "programmatic general permits." These are general permits developed by the

Corps of Engineers, but designed to be implemented by the State. We do not need to have full program primacy to do this work and it has the potential to provide significant streamlining for industries that need a CWA 404 permit and State permits. The first one we are working on is for placer mining.

- <u>Mitigation</u>. Wetlands and dredge and fill permitting and mitigation requirements for resource development projects are onerous and inappropriate to Alaskan conditions. Alaska's read of the Clean Water Act and existing federal regulations is that considerable flexibility is expected in the application of 404 permitting, particularly flexibility to meet local conditions. If Alaska assumes the program, Alaska intends to maximize this flexibility.
 - DNR has fully engaged with the Corps to evaluate potential improvements to how the Corps implements nationwide requirements for wetlands mitigation for projects permitted in Alaska. This effort will yield benefits to Alaskan projects, even if we don't pursue full program primacy; however, State primacy would have even broader benefits in this arena.
 - The currently preferred federal option in other states is to have permit applicants fund wetland remediation projects. This is not a very viable approach in Alaska where we haven't inappropriately destroyed wetlands that require restoration. So, the federal approach to address mitigation requirements in Alaska is to lock up land in conservation easements that prohibit development, including private land, which we have precious little of. Under primacy, Alaska would maximize the flexibility provided by the Clean Water Act and existing regulations to come up with creative, alternate mechanisms for mitigation, that actually help water quality in the State of Alaska. Examples could include:
 - Addressing perched culverts, freeing up salmon habitat.
 - Cleaning up legacy wells on the North Slope.
 - Addressing invasive aquatic species.
 - As an example of the current problem, we sometimes have a large, well funded permit applicant, negotiating mitigation requirements with the Corps and EPA as part of their 404 permit. These negotiations often last until very late in the permit process. Applicants on many large projects end up agreeing to significantly more mitigation than should be required under federal law, simply to receive their permits and keep their project on-schedule. This can and has set an unreasonable precedence for the next company to come along that needs a 404 permit. Today, the State does not even have a seat at the table for those discussions that affect our land, economy, and future. Under primacy, it would be our table.
- The State funding is being leveraged with the experienced staff in the Departments and at the Corps and EPA. The Departments have entered into an MOU with the Corps and the EPA, who has ultimate State program approval authority. That MOU signifies Corps and EPA support for the State's work on the program assumption analysis and on State primacy. This is a huge step. And, we have constructive top level people at both the Corps and EPA working with us. When we recently sought program primacy for the CWA wastewater permitting program, we did not enjoy this same level of early support from the federal agency, which caused significant delays. The Corps and EPA are fully engaged with the State and a budget cut would send the message that the State is not serious about primacy we will lose this federal momentum, and

likely the current federal champions for a state program before we can take up any serious effort in the future.

- The Department has made significant information requests to the Corps and we are using that information to support the costs, benefits, and consequences analysis. We plan to have that report to the legislature next session. If we stop now, we will have to start from the beginning on our information gathering, with an impact to both the State and the Corps to re-do this effort (since the info we have now will be too dated to use in a future effort).
- Through the assumption analysis process, DEC and DNR are developing a better understanding of the challenges associated with the Corps-administered program. While the Corps is supportive of State efforts, in task execution we are finding that:
 - The Corps budget is shrinking which exacerbates cumbersome federal processes and delays their permitting work.
 - Permit applicants feel this when the Corps doesn't respond to applicant inquiries. Applicants express concerns that the Corps offices are on base and they cannot easily go on base to meet with the Corps. Applicants also report that the Corps does not engage in pre-application discussions and won't entertain project proposals until a complete application has been submitted. This requires applicants to expend significant resources to develop an application packet and supporting information before work with the Corps even begins. A routine feature in state permitting programs is the opportunity for potential permittees to have pre-applications discussions with the permitting agency.
- Another benefit, and one reason the legislature wanted to evaluate state 404 program primacy is that under primacy, when the state issues the permits, there is no federal 404 permit triggering NEPA reviews which can greatly extend the permitting timeline.
- The Corps with EPA oversight manages the 404 program in Alaska from a nationwide perspective. The Corps is wary of using the flexibility allowed under the Clean Water Act due to a precedent they might set nationwide. An Alaskan program will be just that: Alaskan, to address Alaskan conditions.
 - For example, there is no permafrost outside of Alaska. How can a nationwide perspective address the unique issues associated with permafrost?
- If this effort is abandoned, it is likely that it will be at least 10 years before the State will return to this effort -- all the while, federal overreach continues, and intractable precedence continues to be set.
- A delay now would mean the Corps and EPA remain in the driver's seat for permitting of big projects on the horizon as well as projects contemplated by small businesses in Alaska, who are struggling with the Corps and EPA's approach to project impacts mitigation. Do we want a better program with State involvement in the future? We think so. . .