



THE STATE  
*of* **ALASKA**  
GOVERNOR SEAN PARNELL

Department of Environmental  
Conservation

OFFICE OF THE COMMISSIONER

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**14.007**

January 24, 2014

The Honorable Charlie Huggins  
President of the Senate  
Alaska State Capitol, Room 111  
Juneau, AK 99801-1182

The Honorable Mike Chenault  
Speaker of the House  
Alaska State Capitol, Room 208  
Juneau, AK 99801-1182

Re: Assumption of Clean Water Act Section 404

Dear President Huggins and Speaker Chenault:

The first session of the 28<sup>th</sup> Legislature passed Senate Bill (SB) 27 establishing authority for the Departments of Environmental Conservation (DEC) and Natural Resources (DNR) to evaluate and apply to assume the regulatory program for dredge and fill activities, as provided to individual states under the Clean Water Act (CWA) Section 404. Governor Parnell signed SB 27 into law on May 21, 2013. As we informed the legislature last session, there is a significant amount of work to do to evaluate the costs, benefits and consequences of State assumption of the program. Because assumption would require additional resources, there will be future opportunity for the legislature to weigh in on a final decision whether to go forward with the program. A summary of major accomplishments to date can be found in the enclosed table. This letter provides additional background and details on the progress made by the Department of Environmental Conservation (DEC), Department of Natural Resources (DNR) and Department of Law (Law) since SB 27 was signed. We are pleased to report our progress on many fronts.

**Background**

Section 404 of the CWA establishes a program to regulate discharges of dredged or fill materials into waters of the United States, including wetlands. Section 404 allows the U.S. Army Corps of Engineers (Corps) and states with approved programs to issue permits authorizing discharges after notice and opportunity for public comment. While Section 404 is often described as a wetlands program, it applies to navigable waters and other waters of the U.S., not just wetlands. Examples of regulated activities typically requiring a 404 program permit under the CWA include:

- discharging dredged or fill material in waters of the U.S., including wetlands;
- addition of site improvement fill for residential, commercial, or recreational development;
- construction of revetments, groins, breakwaters, levees, dams, dikes, and weirs; and
- placement of riprap and fill material for roads, airports, or buildings.

An application for a state to assume the permitting and compliance work from the Corps must be submitted to, and approved by, the U.S. Environmental Protection Agency (EPA).

**Planning**

DEC is leading a State team with members from DNR and Law who work collaboratively, share knowledge, plan events, stay informed about relevant issues, and resolve issues that may arise during the Section 404 evaluation and assumption effort.

Early on the team started consulting with other states that have either already assumed Section 404 Programs (Michigan and New Jersey) or are in the process of evaluating assuming a Section 404 Program (Oregon). These states have provided guidance and suggestions to help Alaska as it evaluates and considers assumption.

In addition to consulting with other states, the State team has also been consulting with staff from the EPA and Corps, building a foundation of positive communication. DEC, DNR, the Corps and EPA signed a November 2013 Memorandum of Understanding (MOU) identifying points of contact and describing processes for communication, information exchange, and resolving issues that may arise during Alaska's program analysis and assumption effort. This MOU establishes a single point of contact (POC) for each agency and provides for regular meetings which will allow the agencies to share knowledge, keep others informed about relevant issues, and ensure that communication among the team is occurring.

**Capacity Development**

SB 27 provided funding to enable the agencies to prepare the assumption application and to develop the capacity to implement the program. DEC and DNR have developed position descriptions and hired 4 of the 7 positions. Recruitment is almost complete for the remaining vacancies. Law has assigned two assistant attorneys general to assist. In addition to hiring staff, funding was provided for contracts with professional experts in the field. DEC has retained a technical contractor, a professional wetlands scientist who has significant experience with 404 assumption efforts. DEC and DNR are both in the process of obtaining additional contractual support for this effort.

Recognizing that the Corps has limited resources, the Corps and the State have implemented an Interagency Personnel Agreement (IPA) that allows DEC staff to work closely with the Corps staff at their Anchorage office as they process permits. This opportunity allows DEC staff to gain a working knowledge of the current Section 404 processes as implemented by the Corps and potential improvements the State may want to make upon program assumption. This provides the State agencies with valuable experience and insight into the process, decision making, and data collection and tracking necessary to implement a 404 Program. The State staff will assist the Corps with responding to State information requests to the Corps -- information necessary for the State evaluation of 404 Program assumption. This agreement also allows the State to build a knowledgeable staff without reducing workload capacity of the Corps. To date, DEC has two permitting staff members who are working part time at the Corps.

**Outreach**

The State team has developed a consistent communication message that outlines the goals and objectives of a potential State 404 Program, as well as our plans for gathering information and evaluating the potential costs, benefits, and consequences of assuming this program. The team has been discussing potential 404 Program assumption with stakeholders and at conferences and is planning a structured and robust outreach effort.

DEC has established a webpage (<http://dec.alaska.gov/water/wetlands404/index.htm>) as a tool to share information about SB 27, the evaluation of a State 404 Program, and the development of State Programmatic General Permits. The webpage includes Frequently Asked Questions (FAQs) that will be

updated over time, a list serve that allows individuals to sign up for program updates, and additional information on the program.

DEC, DNR and Law staff have presented information regarding SB27 and efforts to evaluate assumption of a Section 404 Program and capacity development at various conferences, symposiums, and seminars. Staff will continue to participate in these events over the coming year to provide information to various stakeholders.

### **Mitigation Program Development**

As part of the evaluation of 404 Program assumption, the State is looking at developing a comprehensive program for compensatory mitigation which is required by the 404 Program “to offset unavoidable adverse impacts to wetlands, streams and other aquatic resources authorized by Clean Water Act section 404 permits.” Compensatory mitigation may be achieved by some combination of four methods --- restoration, rehabilitation, enhancement or preservation --- which can be performed either onsite or offsite. It is a critical issue with the current Section 404 Program and will play a large role in the evaluation of a state managed Section 404 Program. Compensatory mitigation is viewed on a macro-scale in that rules and guidance are generated at the national level, but implemented at the local, site-specific level. This national approach to mitigation is not the most effective for Alaska and the team is reviewing options for flexibility that may be available under a State-administered program.

The state team is exploring how to incorporate the CWA Section 404(b)(1) Guidelines into the State program. The guidelines, adopted in 1980 by the EPA, state that discharge of dredged or fill material can only be permitted when appropriate and practicable steps have been taken which minimize potential adverse impacts on the aquatic ecosystem. Subpart II (§230.70-.77) of the guidelines identifies 40 categories of possible steps to avoid, minimize, and compensate for adverse impacts. In 2008, the EPA and the Corps jointly adopted new regulations (*Compensatory Mitigation for Losses of Aquatic Resources; Final Rule*) that were informed by the prior three decades of national experience.

The 2008 Final Rule provides for three mechanisms – permittee-responsible, Mitigation Banks, and In-Lieu Fee mitigation – for achieving compensatory mitigation. With Mitigation Banks and In-Lieu Fee programs, a permittee can purchase mitigation credits and the permittee’s liability for achieving successful compensatory mitigation is transferred to the Bank or In Lieu Fee program. The 2008 Final Rule also requires Interagency Review Teams to review and provide recommendations for all applications from potential In-Lieu Fee operators and Mitigation Banks. Multiple state and federal agencies have recently come together to establish a Statewide Interagency Review Team (SIRT) for Alaska. The purpose of the SIRT is to address compensatory mitigation issues of broad or statewide applicability. The intent is to provide consistency between the various agencies involved in Interagency Review Teams. Both DEC and DNR represent the State as members of the SIRT created in September 2013. The SIRT is important for the state to encourage flexibility in implementing mitigation requirements in Alaska regardless, of whether the State ultimately assumes the 404 Program.

### **Review of Regulations**

As the State team evaluates and prepares the regulations that will be needed for an Alaska 404 program, the agencies are reviewing EPA and the Corps’ Section 404 implementing regulations, as well as regulations from those states that have previously assumed the Section 404 Program (Michigan and New Jersey). The agencies are also reviewing draft regulations that Oregon has prepared for its proposed 404 program. A strawman draft of potential Alaska regulations is being prepared by Law. The evaluation process provides the agencies an opportunity to consider potential state flexibility in a state-administered program and whether Alaska may need additional statutory authority to implement a 404 program.

#### **404 Program Evaluation**

One of the major tasks under SB 27 is an evaluation of the costs, benefits, and consequences of the State assuming the Section 404 program. This analysis will support the development of a formal application to assume and administer a Section 404 Program. The team has developed a list of key program elements that EPA will expect to review as a part of Alaska's formal submittal. The State team will continue to evaluate key program elements such as the development of a permit application and permit issuance process, compliance assurance process, a process for jurisdictional determinations, mitigation requirements, program guidance, regulations and resources.

One important aspect of the State's evaluation is to better understand the current 404 permitting universe, potential future State workload, and necessary resources. In Alaska, the Corps authorizes approximately 750 activities annually in Waters of the U.S. including wetlands. Authorizations for new activities are issued under three types of permits: individual, nationwide, and general permits. Approximately 26 percent of all permits issued by the Corps over the last three fiscal years were general permits. The State's information requests to the Corps and monthly meetings with the Corps and EPA are the primary means of exploring this issue.

#### **State - Assumable Waters and CWA Jurisdiction Over Waters**

In the next several months, the State will be meeting with the Corps and EPA to explore the question of which specific waters and wetlands that the State can assume jurisdiction over under a State-administered 404 program. The waters and wetlands which would be subject to a State program are referred to as "assumable waters." Under Section 404(g), there are certain waters that will be non-assumable and which would remain under the Corps' Section 404 regulatory authority, namely waters which are now used, or could be used, as a means of transport in interstate and foreign commerce; waters subject to the ebb and flow of the tide; and wetlands adjacent to these waters. The allocation of waters and wetlands that will be assumable by the State given the limitation in Section 404(g) is another key consideration in evaluating whether the State should move forward with a State 404 Program.

Federal jurisdiction over waters covered by the CWA is also in question. This issue has been the focus of several Supreme Court decisions within recent years and the issue of jurisdiction will continue to be a significant discussion over the next year. In September 2013 the EPA prepared and released the draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. This study is considered a precursor to provide support of future federal rulemaking that will likely expand the definition of "Waters of the U.S." to include disconnected wetlands and other waterbodies over which the federal government does not currently have clear jurisdiction. Alaska resource agencies submitted joint comments on the study to the federal docket prior to the November 6 deadline. Shortly thereafter a leaked copy of the draft Waters of the U.S. rule was obtained by the press. While EPA's Science Advisory Board (SAB) convened a Peer Review Panel meeting December 16-18, 2013 in Washington D.C. to review the study and afford the public an opportunity to comment, commenters made reference to the leaked draft rule as well. DNR represented the State with public testimony at the Peer Review Panel meeting. The State of Alaska's primary concern is that the leaked rulemaking will lead to most if not all waters and wetlands being classified as jurisdictional Waters of the U.S., and thus subject to expensive and time-consuming Clean Water Act Section 404 permitting and mitigation. There is also the potential for the rule to further restrict waters a state may assume jurisdiction over for a state 404 program.

#### **State Programmatic General Permits (SPGPs)**

The State team is exploring the development of State Programmatic General Permits (SPGPs). As the name implies, SPGPs are State-administered General Permits which can be issued for certain categories of activities. SPGPs are for recurring activities that are similar in nature and cause only minimal individual and cumulative adverse impacts. They can apply statewide or regionally. Under an SPGP, the Corps' Regulatory

Division would issue a general permit and authorize the State to administer it. These state-administered permits do not have the same geographic limitations that apply to state assumption of the 404 Program. They can be administered by a state *instead of* program assumption, or *in addition to* program assumption – they can be a tool for a state to administer permits in waters and wetlands not otherwise allowed under the CWA restrictions on program assumption. There is no comparable mechanism for individual permits.

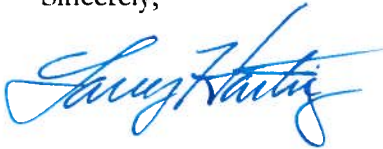
The State team has been collaborating with the Corps on the reissuance of a regional general permit for Placer Mining, which is a candidate for a state-administered SPGP.

**Funding**

Funding for the initial work (program evaluation, development of the application to assume the program and initial State capacity development) was appropriated via the fiscal vote for SB 27. The team expects to fully expend the FY 14 funding which is not a part of the base budget for FY 15. While the governor's budget does not include the FY 15 increment contemplated by the fiscal note, the team does not expect to experience delays in the program evaluation and assumption application development work.

Since SB 27 was signed, staff within DEC, DNR, and Law have all worked collaboratively to evaluate the assumption of a Section 404 Program and the development of SPGPs. We continue to believe that the state should take the lead in management of our waters and wetlands, and look forward to further exploring the possible benefits of assuming a state administered program for dredge and fill activities. DEC intends to provide another status report to the legislature in January 2015.

Sincerely,



Larry Hartig  
Commissioner

Enclosure: State of Alaska 2013 Major Accomplishments Matrix for Senate Bill 27

cc: Liz Clark, Senate Secretary, Senate Secretary's Office w/enclosure  
Suzi Lowell, Chief Clerk, House Chief Clerk's Office w/enclosure

# Attachment 1: State of Alaska 2013 Major Accomplishments Matrix for Senate Bill 27

		MAJOR ACCOMPLISHMENTS	TIMELINE
404 ASSUMPTION EFFORT	Planning	<ul style="list-style-type: none"> <li>Met with other states regarding assumption (Oregon, Michigan, New Jersey) and Association of Wetlands Managers</li> <li>Point of Contact (state and federal agencies) regular communication and information exchange</li> <li>Work plan development and tracking</li> <li>Memorandum of Understanding: <i>State of Alaska Assumption of CWA Section 404 Regulatory Program</i> between EPA, Corps, DNR, and DEC</li> </ul>	June – Oct  May – present  Dec – Jan 2014 Nov
	Capacity Development	<ul style="list-style-type: none"> <li>Three DEC positions filled, two in recruitment</li> <li>One DNR position filled, one in Position Description development</li> <li>Staff wetland training               <ul style="list-style-type: none"> <li>EPA Clean Water Act Section 404 Regulatory Training</li> <li>Corps of Engineers Wetland Delineation Training</li> </ul> </li> <li>Interagency Personnel Agreement: two DEC staff job-shadowing at the Corps Alaska District Office</li> <li>Contract support               <ul style="list-style-type: none"> <li>DEC Reimbursable Services Agreement to obtain services from Commissioner's Office Program Coordinator</li> <li>DEC contract retained professional wetland scientist with significant experience with Section 404 assumption</li> <li>DNR Request for Proposal for Consulting for State Assumption of Corps 404 Program</li> </ul> </li> </ul>	Sept – present May – present  May Nov Dec – present  May – present  Oct – present  Dec
	Outreach	<ul style="list-style-type: none"> <li>Communication Plan development</li> <li>Webpage and Frequently Asked Questions developed</li> <li>Outreach and education efforts               <ul style="list-style-type: none"> <li>State of Alaska's Effort to Become the Primary Agency for 404 Permits: Law Seminars International, Oil and Gas Production and Mineral Mining in AK</li> <li>2013 Southeast Alaska Watershed Symposium</li> <li>CWA Section 404 Assumption by the State of Alaska: Mining in Alaska: Law, Permitting Issues and Current Trends</li> </ul> </li> </ul>	Dec – present Dec – present Nov Sept  Nov Oct
	Mitigation	<ul style="list-style-type: none"> <li>State Interagency Review Team signed Memorandum of Understanding evaluating mitigation options and national implementation of EPA's 404(b)(1) Guidelines</li> </ul>	Nov – present
	Regulation	<ul style="list-style-type: none"> <li>Preliminary draft regulations developed</li> <li>DEC and DNR roles and responsibilities identified</li> <li>Draft Section 404(b)(1) Analysis Report (analysis of other states implementation of guidelines and provides recommendations for Alaska's implementation strategy)</li> </ul>	Sept – present Dec Dec
	Application	<ul style="list-style-type: none"> <li>Initial information data request to Corps</li> <li>Identified critical program elements</li> <li>Develop schedule and timeline for potential application submittal</li> </ul>	Nov – Dec Nov Dec
SPGP State Programmatic General Permits	Placer Mining	<ul style="list-style-type: none"> <li>Preliminary meetings with DEC, DNR, and Corps staff regarding renewal of Placer Mining General Permit</li> <li>Review and comment on the draft public notice and revised Place Mining General Permit</li> </ul>	Nov – present  Dec