THE STATE of ALASKA
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Representative Bill Stoltze, Co-Chair
Representative Alan Austerman, Co-Chair
House Finance Committee
State Capitol, Room 510
Juneau, AK 99801

Dear Representative Stoltz and Representative Austerman:

This letter responds to questions that came up today in the House Finance Committee hearing on SB 27, a bill authorizing DEC and DNR to assess and pursue state primacy of the Clean Water Act Section 404 dredge and fill permitting program.

Representative Wilson asked whether under primacy the State of Alaska would lose any right it currently has to challenge EPA or the U.S. Army Corps of Engineers if the State disagrees with a federal agencies' decision that certain permafrost areas in the state are to be considered "wetlands" that are "waters of the United States" for purposes of Section 404 jurisdiction?

Response: No. The State would not lose any existing right it has to assert such a challenge. The regulatory definition of "wetlands" and the courts' interpretation of the federal definition have been evolving and could change again. The State will retain its ability to challenge evolving definitions of wetlands when we believe the federal agencies or lower courts have not followed the requirements of the Clean Water Act or other applicable federal law. In individual site determinations, EPA would still have an oversight role, and we anticipate when and how they would exercise their oversight would be set out in the Memorandum of Understanding between the state agencies and EPA. We also anticipate, with primacy, the State will be better positioned for these challenges, with State-developed guidance and with on-the-ground experience in implementing such changes to definitions.

Representative Austerman asked whether, under state primacy, the state agencies will conduct any environmental impact analysis for a project needing a 404 permit if there isn't a federal requirement to do an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA).

Response: A NEPA review is triggered by a federal decision – a federal permit, a project on federal land, or federal funding for a project. If the State has primacy for the 404 permitting program and there is no other federal decision involved in a proposed project, the State's issuance of a 404 permit would not trigger NEPA. However, when considering whether to issue a 404 permit, the State must comply with the guidelines adopted by the Corps and approved by EPA under section 404(b)(1) of the Clean Water Act. These Section 404(b)(1) guidelines are used to determine whether a proposed site for the disposal of dredged or fill material would be appropriate. The guidelines require that practicable alternatives to the proposed discharge site or activities be examined, and that no discharge of dredged or fill material shall be permitted if there is a practicable alternative. Practicable alternatives include activities which do not involve dredged or fill materials, and discharges of dredged or fill material at other locations with potentially less damaging consequences. The guidelines specify that for federal decisions subject to NEPA, the NEPA analysis will in most cases satisfy this 404(b)(1) alternatives analysis. Conversely, where NEPA is

not required (for example, on an action or project where the state has 404 primacy and there are no federal decisions involved), the practicable alternatives analysis and determination under Section 404(b)(1) will largely serve the purpose of the NEPA alternatives analysis.

Sincerely,

Michelle Hale
Director