



THE STATE  
of **ALASKA**  
GOVERNOR MIKE DUNLEAVY

**Department of Environmental  
Conservation**

DIVISION OF WATER

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March 6, 2023

The Honorable Cathy Giessel  
The Honorable Click Bishop  
Co-Chairs, House Resources Committee  
State Capitol  
Juneau AK, 99801

Dear Senators Giessel and Bishop:

Thank you for the opportunity to provide an overview about the state assumption of the 404 program. Questions arose during the meeting on February 27 that required additional information, which are responded to below.

***Do developers typically wait to hear if EPA objects to their application before starting their project?***

Based on the context in which this question arose during the February 27 hearing, DEC understands the question to be whether, under a state-administered 404 program, permittee applicants, following submission of their application to the state, wait to commence activities requiring § 404 authorization until after EPA objects to their permit application, or the time period for EPA to object has expired. DEC further understands this question to be aimed at individual permits, not general permits.

Permittees must wait. Under section 404(j), a permit cannot be issued until EPA has informed the State that (1) it does not intend to comment on the permit application, which EPA must do within 30 days of receiving a copy of the permit application from the State; or (2) EPA has indicated its intent to comment on the permit application and has (a) either submitted such comments, or (b) allowed 90 days to pass following EPA's receipt of the permit application. Practically speaking, then, since a permit applicant cannot begin 404 activities before obtaining a 404 permit, and EPA's time period to make objections is before permit issuance, all permittees must wait to hear what EPA's objections, if any, are before proceeding.

***Can you please provide the Corps timeliness for current 404 applications and/or determinations?***

Attached is Appendix 2 from the Feasibility Report detailing the timeframes for the Corps' actions.

***Are Michigan and New Jersey faster at determinations than the Corps?***

See Section 2.8, beginning on page 14 of the [Feasibility Report](#). In Michigan, actions must typically be taken on completed permit applications within 90 days, and the average permit processing time is approximately 60 days (less for general or minor permits). In New Jersey, permit decisions are generally made in 60 days on average while wetland boundary verifications generally are completed in 90 days and individual permit decisions take less than 180 days. Florida assumed 404 permitting in 2020 and their average permit issuance time is 61 days. Comparing the Michigan permitting timelines for two similar landfill expansions, Michigan issued the C&C Landfill Expansion permit in 73 days while the Corps took longer, 84 days, to issue its permit for the Granite Creek Landfill Expansion. Both Michigan and New Jersey are faster when the State authorizes an activity under a general permit: Michigan, for example, issued a General Permit in 13 days for a minor storm sewer project, while the Corps took 227 days to issue its standard permit covering very similar activities.

***Did the 402 program have additional requirements assigned by the EPA after assumption?***

There were no modifications to the Memorandum of Agreement or Program Description after it was signed by the DEC Commissioner in October 2009. EPA does engage with DEC on the various components of the Section 402 APDES program, including (but not limited to) a "Permit Quality Review" for the permitting program approximately every four years, and a "State Review Framework" for the compliance, enforcement, and data program every five years.

***Can you provide Donlin and Ambler compensatory mitigation details?***

For Donlin, the Corps required compensatory mitigation for permanent loss of 2,877 acres of wetlands, 3 acres of fill below the ordinary high-water mark of the Kuskokwim River, and 175,316 linear feet of streams. Donlin's compensatory mitigation plan included purchasing 9.8 released credits from an In-Lieu fee provider, restoring 92.95 acres of wetlands, 8,982 linear feet of streams, 16.8 acres of riparian buffer, and preserving a total of 3,425.75 acres of wetlands, 271,074 linear feet of streams, and 2,243.9 acres of riparian buffer. Additionally, Donlin proposed permittee-responsible mitigation projects, which involve restoring, enhancing, or preserving more wetlands, streams, or river areas. This will be accomplished in part by deed restrictions. See Donlin ROD at 6-4, available at <https://www.poa.usace.army.mil/Portals/34/docs/regulatory/Donlin%20Gold%20>

[Corps-BLM%20Joint%20Record%20of%20Decision.pdf?ver=2018-08-13-191053-293.](#)

The Bureau of Land Management (BLM) issued a favorable Record of Decision (ROD) on the Ambler Road project in July 2020. As part of that decision, mitigation in the forms of avoidance and minimization were found to be sufficient, and compensatory mitigation was not required for the Ambler Road project. However, the Biden administration sought and won approval to voluntarily remand the ROD on February 22, 2022, and BLM is in the process of developing a Supplemental Environmental Impact Statement for the Ambler Road project that will evaluate a range of alternatives and topics, which could include new mitigation requirements. There is no timeframe established for the completion of this additional review.

***Why are states not allowed to engage in government-to-government consultation with tribal organizations?***

"Government-to-government consultation" is a term of art created by federal law and executive order. It that requires that the federal government engage in certain processes in relation to sovereign Tribes. Since this is a legal creation of federal law, it does not exist under state law. This is why the State has historically stated that "government-to-government consultation" does not apply, generally, to the State.

However, DEC has a Tribal Government Liaison position that coordinates with divisions and other state agencies and works closely on tribal concerns. DEC also maintains a Tribal relations website at <https://dec.alaska.gov/commish/tribal/> that includes a 2002 document describing the DEC Tribal consultation process.

In the Program Description for implanting primacy for Clean Water Act Section 402 permitting, Appendix H outlines the Department's public participation guidance and strategies. Several paragraphs of the document discuss consultation efforts, including section 4.0 - Supplemental Communication Tools, which outlines a consultation process led by the Division of Water's Local and Tribal Government Liaison. This consultation and process is in addition to the routine public participation process available to the general public and takes place prior to issuance of a public notice of a draft permit. Additionally, the Division of Water maintains a helpful document on our "APDES Information for Tribes" website titled APDES Guidance for Local and Tribal Governments. As we develop the Section 404 Program for approval and prepare the Program Description, we anticipate a similarly structured consultation process for tribal organizations.

Nothing precludes states from forming intergovernmental agreements and state-tribal compacts to promote positive state-tribal relationships and foster collaborative policy development.

Co-Chairs Giessel and Bishop

March 6, 2023

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If you would like more information or have additional questions, I am happy to assist.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Bates".

Randy Bates

Director

Attachments:

Feasibility Study, Appendix 2 – Corps Action Timeframe

Cc: Julia O’Conner, Staff to Senator Giessel  
Anne Rittgers, Staff to Senator Bishop