

**ALASKA STATE LEGISLATURE
HOUSE RESOURCES STANDING COMMITTEE**

February 13, 2023

1:04 p.m.

MEMBERS PRESENT

Representative Tom McKay, Chair
Representative George Rauscher, Vice Chair
Representative Josiah Patkotak
Representative Dan Saddler
Representative Jennie Armstrong
Representative Donna Mears
Representative Maxine Dibert

MEMBERS ABSENT

Representative Kevin McCabe
Representative Stanley Wright

COMMITTEE CALENDAR

PRESENTATION(S): WATER PRIMACY UPDATE

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

JASON BRUNE, Commissioner
Department of Environmental Conservation
Anchorage, Alaska

POSITION STATEMENT: Participated in the Water Primacy Update presentation.

JULIE PACK, Assistant Attorney General
Department of Environmental Conservation
Anchorage, Alaska

POSITION STATEMENT: Participated in the Water Primacy Update presentation.

SHANNON MILLER, Program Manager
Division of Water
Department of Environmental Conservation
Anchorage, Alaska

POSITION STATEMENT: Participated in the Water Primacy Update presentation.

ACTION NARRATIVE

[1:04:28 PM](#)

CHAIR TOM MCKAY called the House Resources Standing Committee meeting to order at 1:04 p.m. Representatives Rauscher, Saddler, Patkotak, Armstrong, Mears, and Dibert were present at the call to order. Representative Patkotak arrived as the meeting was in progress.

PRESENTATION(S): Water Primacy Update

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CHAIR MCKAY announced the only order of business would be the Water Primacy Update presentation.

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JASON BRUNE, Commissioner, Department of Environmental Conservation (DEC), began the Water Primacy Update presentation on slide 2 of a PowerPoint [hardcopy included in the committee packet], which described the department's current primacy programs and how they interact with specific federal environmental legislation. He moved to slide 3, which explained Senate Bill 27, [passed during the Twenty-Eighth Alaska State Legislature], which mandated that DEC must take reasonable steps to assume primacy of Section 404 of the Clean Water Act.

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JULIE PACK, Assistant Attorney General, Department of Environmental Conservation, noted that the EPA's current Section 404c veto power would be unaffected by passage of any primacy assumption by the State of Alaska.

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REPRESENTATIVE SADDLER asked if the EPA exercised its veto power when it denied the Pebble Mine its permit.

MS. PACK clarified that is the power to which she was referring.

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MS. PACK moved to slide 5, which explained that Section 404(c) regulates the discharge of dredged or fill material into the waters of the United States and she described how it would interact with a piece of state-level legislation.

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REPRESENTATIVE SADDLER asked what the ramifications of the Sacket v. EPA case are.

MS. PACK explained the issue behind Sacket v. EPA and said that the case is currently in litigation and before the United States Supreme Court.

REPRESENTATIVE SADDLER asked what the implications of an expanded definition of wetlands would have on Alaska's current resource policy.

MS. PACK pointed to slide 11 to give context to how the EPA currently inventories Alaska's wetlands.

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MS. PACK continued to slide 8, which explained the legal ramifications of the state assuming control of a portion of the lands defined under Section 404(g) of the Clean Water Act. She moved to slide 9, which gave further context to the "legal landscape" of Section 404(g) of the Clean Water Act and continued to slide 10, which displayed a map of potential waters to be retained by DEC if state legislation regarding the primacy clause of Section 404 of the Clean Water Act were to pass.

REPRESENTATIVE SADDLER asked about the lands and waterways that would be maintained under federal control.

MS. PACK responded that each blue line on the map shows which waterway would be maintained.

CHAIR MCKAY asked how much of the waterways the state would acquire under the primacy clause of the Clean Water Act.

MS. PACK explained that the primacy clause of the Clean Water Act allows for only a certain amount of waters to be taken over by a state.

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REPRESENTATIVE MEARS asked whether the primacy clause would apply only to geographic possessions.

MS. PACK explained how the Clean Water Act interacts with state land possessions.

REPRESENTATIVE PATKOTAK asked about the long-term financial feasibility of the state owning current federal lands.

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COMMISSIONER BRUNE advised that the feasibility study completed by DEC specifically addressed the long-term viability and feasibility of the possibility of the state assuming ownership of federal lands.

SHANNON MILLER, Program Manager, Division of Water, Department of Environmental Conservation, joined in the presentation on slide 12, which gave context to the amount of wetlands and type of wetlands in Alaska, and she explained that Section 404 is meant solely for the regulation of discharge or fill materials into the Waters of the United States (WOTUS). She continued through slides 13-15, each of which explained legislative, legal, and executive steps that the state has taken towards assumption of lands included under Section 404 of the Clean Water Act.

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MS. MILLER continued to slide 16, which displayed the feasibility study titled "Clean Water Act Section 404 Dredge and Fill Assumptions." She explained how the study was completed and what it aimed to understand in its process.

REPRESENTATIVE SADDLER asked what the definition of the term "general permit" is.

MS. MILLER explained that a general permit is a permit that DEC may issue to an entity to allow for an easier authorization of that entity on any future developments or projects pursued.

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REPRESENTATIVE ARMSTRONG asked for an example of how the United States Army Corps of Engineers (USACE) may have handled a project differently than the state would.

MS. MILLER explained that if a federal entity were to develop a project that would unavoidably harm a wetland habitat, the entity would have to set aside separate lands to create a "no net loss" scenario of development. The state is looking to create an alternative to the "no net loss" principle.

REPRESENTATIVE ARMSTRONG asked whether the federal government has been cooperative with Alaska in creating a new alternative.

MS. MILLER answered that a memorandum of understanding (MOU) was reached in 2018 between EPA and USACE that allows for the cooperation between the federal government and states.

REPRESENTATIVE MEARS asked which divisions within DEC would become more streamlined in their operation if the Section 404 primacy clause were to be adopted by the state.

MS. MILLER explained that the adoption of the Section 404 primacy clause by the state would allow for DEC to align its permitting timelines with other state agencies.

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COMMISSIONER BRUNE added that there would be other opportunities created within DEC if the Section 404 primacy clause were to be adopted.

REPRESENTATIVE PATKOTAK asked what kind of opportunities would be presented to local governments in Alaska if the state were to adopt the Section 404 primacy clause.

MS. MILLER answered that DEC would create a "regional general permit" to allow local governments within a region to adopt an overarching general permit that would apply to any community within said region of the general permit.

REPRESENTATIVE PATKOTAK asked what guardrails would be in place to ensure that local control of permitting would be left intact if the Section 404 primacy clause were to be adopted by the state.

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MS. MILLER explained that a general permit is an umbrella-type permit that would allow for any development or activity to be authorized under it.

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REPRESENTATIVE PATKOTAK asked what percentage of authority of permitting the state would assume if the Section 404 primacy clause were to be adopted by the state.

COMMISSIONER BRUNE answered that DEC is trying to get as close to 100 percent as it can get.

MS. MILLER added that the state would be able to eliminate the "401 certification" as required by Section 401 of the Clean Water Act if the state were to adopt the Section 404 primacy clause.

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MS. MILLER resumed the presentation on slide 18, which described how Alaska would be able to address waterway cleaning priorities sooner if the Section 404 primacy clause were to be adopted. She continued to slide 19, which explained how DEC would be able to be more accountable to Alaskans under an assumed adoption of the Section 404 primacy clause.

REPRESENTATIVE SADDLER asked whether the state has the authority to delegate federal and state authority itself.

MS. MILLER explained different ways that DEC currently delegates authority and manages policy throughout different levels of government.

REPRESENTATIVE MEARS asked whether the proposed general permit program would create regional offices with which Alaskans could interact.

MS. MILLER replied that the feasibility study outlined a scenario that created regional offices around Alaska.

COMMISSIONER BRUNE added that every DEC position statewide could be teleworked, anywhere in Alaska, and he emphasized the positive outcomes that teleworking has created for the department.

REPRESENTATIVE MEARS shared her concern of the legislature adopting a program that would be based off of Alaska's current weaknesses in employee recruitment and retention.

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MS. MILLER responded that the proposed program created a robust applicant pool compared to what other state departments in Alaska have seen.

REPRESENTATIVE ARMSTRONG asked whether the pool of qualified applicants is the same pool of people who would staff the new program.

COMMISSIONER BRUNE emphasized that the retention of staff is paramount to giving the regulated community timely, science-based, and dependable permits.

REPRESENTATIVE ARMSTRONG asked whether DEC's requested funds account for the cost of training the new recruits to the program.

COMMISSIONER BRUNE confirmed that the funds requested by the department absolutely include the cost of training new employees.

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MS. MILLER resumed the presentation on slide 20, which described the mixed benefits and challenges of the National Environmental Policy Act of 1969 (NEPA). She continued to slides 21 and 22, which explained the challenges of USACE retaining some of the waterways it currently manages and displayed a map with an example of how such a management system would work. She moved to slide 23, which highlighted the need for MOUs between DEC and EPA. Slide 24 described the workload that DEC would acquire and the staffing necessary to assume the possible workload. Ms. Miller moved to slide 25, which displayed a simplified cost-benefit analysis of the proposed program by DEC.

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REPRESENTATIVE ARMSTRONG asked how confident DEC is in its ability to not go over budget past 2025.

MS. MILLER answered that DEC anticipates its figure of \$5 million is the correct amount.

COMMISSIONER BRUNE added that DEC completed its feasibility study to analyze the trend of development in Alaska to create an

estimate of the number of positions the state would need to keep up with development.

REPRESENTATIVE MEARS commented that permit fees do not generally keep up with a department's funding needs and explained that it would be necessary for DEC to be funded by the general fund.

COMMISSIONER BRUNE explained that the benefit of a general permit is that there is a finite number of responsibilities for each entity involved in the permitting process. He said that there are multiple private entities that are willing to participate in the proposed permitting program in order to streamline the development of projects in Alaska.

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MS. MILLER moved to slide 26, which described the feasibility study's recommendations of actions to be taken by DEC and the legislature to enact the proposed permitting program.

COMMISSIONER BRUNE explained that the root of the Section 404 primacy clause is to return the decision-making process to Alaska and continue to "raise the bar" of what environmental conservation is to the rest of the country.

REPRESENTATIVE MEARS asked how the governor's supplemental budget would assist DEC in creating its proposed permitting program.

COMMISSIONER BRUNE replied that DEC has received permission to pursue the efforts of returning primacy to the state.

REPRESENTATIVE MEARS asked why there were so many people working on the proposed permitting program and not the solid waste program currently active at DEC.

COMMISSIONER BRUNE explained that the proposed permitting program is more complex than the solid waste program.

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ADJOURNMENT

There being no further business before the committee, the House Resources Standing Committee meeting was adjourned at 2:11 p.m.