

**ALASKA STATE LEGISLATURE**  
**SENATE RESOURCES STANDING COMMITTEE**

February 27, 2023

3:30 p.m.

**MEMBERS PRESENT**

Senator Click Bishop, Co-Chair  
Senator Cathy Giessel, Co-Chair  
Senator Bill Wielechowski, Vice Chair  
Senator Scott Kawasaki  
Senator James Kaufman  
Senator Forrest Dunbar  
Senator Matt Claman

**MEMBERS ABSENT**

All members present

**COMMITTEE CALENDAR**

PRESENTATION(S): CONTINUATION OF THE OVERVIEW OF THE SECTION  
404 FEASIBILITY STUDY.

- HEARD

**PREVIOUS COMMITTEE ACTION**

See the 2/13/2023 Senate Resources Committee minutes

**WITNESS REGISTER**

JASON BRUNE, Commissioner  
Department of Environmental Conservation (DEC)  
Juneau, Alaska

**POSITION STATEMENT:** Provided information about the 404 Primacy  
Feasibility Study.

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

**POSITION STATEMENT:** Participated in the overview and answered  
questions about the 404 Primacy Feasibility Study.

JULIE PACK, Assistant Attorney General

Environmental Section  
Civil Division  
Department of Law  
Anchorage, Alaska

**POSITION STATEMENT:** Participated in the overview and answered questions about the 404 Primacy Feasibility Study.

**ACTION NARRATIVE**

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**CO-CHAIR CLICK BISHOP** called the Senate Resources Standing Committee meeting to order at 3:30 p.m. Present at the call to order were Senators Dunbar, Kaufman, Claman, Wielechowski, Co-Chair Giessel, and Co-Chair Bishop. Senator Kawasaki arrived soon thereafter.

**PRESENTATION: CONTINUATION OF THE OVERVIEW OF THE SECTION 404  
FEASIBILITY STUDY**

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**CO-CHAIR BISHOP** announced the committee would continue the overview of the Section 404 Feasibility Study.

He asked Ms. Miller and Ms. Pack to continue the overview.

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**JULIE PACK**, Assistant Attorney General, Environmental Section, Civil Division, Department of Law, Anchorage, Alaska, directed attention to slide 4 and said she wanted to address the concerns the committee expressed about the way EPA's 404(c) veto power interfaces with the state-assumed 404 primacy program.

1. The committee wanted to understand the mechanisms available to stop a 404 permit that should not be issued, and
2. How often EPA has made use of the mechanisms.

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**CO-CHAIR BISHOP** reconvened the meeting and noted that Senator Kawasaki joined the committee some time ago.

**MS. PACK** repeated her previous statement for Senator Kawasaki and continued to say the Department of Law was looking at the language itself, absent a court interpretation. She noted that

she previously spoke about the 404(j) process for federalizing a project and that it was a separate subsection from 404(c). Those distinct subsections intersect when EPA uses its 404(j) power to federalize a state permit. Federalization returns the permit to the Corps of Engineers ("Corps") and Section 404(c) applies.

She conveyed to Senator Claman that regulation 40 CFR 233.20 (c) clearly addresses the question he asked during the earlier hearing about EPA's power to use 404(c) on a state issued permit. She cited the following:

No permit shall be issued by the Director in the following circumstances:

(c) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under section 404(c) of the Act, or when the discharge would fail to comply with a restriction imposed thereunder.

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SENATOR CLAMAN said EPA has not used its 404(c) authority very often because some of the discharge situations might never arise unless the state has assumed 404 permitting, and only three have. Forty-seven states have not assumed 404 permitting so it's no surprise that there have been no lawsuits.

MS. PACK agreed that there have been very few opportunities for a court to opine on how 404(c) applies to a state-assumed program.

She addressed EPA's 404 veto exercise in Bristol Bay this last January. The 404 veto was issued to protect the anadromous fish in the area, but it was finalized before the state's Title 16 permitting process was allowed to begin. She referenced Senator Wielechowski's earlier point, and said the Department of Law believes that the state's unique permitting process that was specifically designed to protect anadromous fish should have been taken into account before EPA issued the veto. When agency staff flew to Washington, DC to discuss why the state's permitting process wasn't considered, they were met with silence.

MS. PACK said her final point is that the legislature has power under the Bristol Bay Forever Initiative to veto Pebble Mine specifically. That will be entirely unaffected by the 404 assumption program.

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MS. PACK reviewed slides 5 and 6.

**Clean Water Act  
Section 404**

- Regulates the discharge of dredged or fill material into Waters of the United States (WOTUS)

**Examples of Activities Requiring 404 Permits**

- Site improvement fill for residential, commercial, or recreational development
- Construction of revetments, breakwaters, levees, dams, dikes, and weirs
- Placement of riprap and fill material for roads, airports, or buildings
- Resource development projects

CO-CHAIR BISHOP asked for confirmation that a dredge and fill permit was specifically for backfill in wetlands.

MS. PACK said the backfill of wetlands does trigger a 404 permit, but other waters such as streams and tributaries also require a 404 permit.

CO-CHAIR BISHOP asked if a specific de minimis amount of fill or size of land or water would be exempt from the 404 requirements.

MS. PACK replied there are exemptions but none were based on the size of land or waters of the United States to be filled. She mentioned Sackett v. Environmental Protection Agency that went before the US Supreme Court.

CO-CHAIR BISHOP asked whether a property owner could be authorized by the state to go forward without a 404 permit if they brought accredited science and analysis from a specialized third-party engineering firm that indicated the land was not wetland.

MS. PACK replied that is a current practice; consultants prepare such reports and are submitted as a preliminary jurisdictional determination. Only the Corps has the power to accept a report a consultant submitted in lieu of a 404 permit.

CO-CHAIR BISHOP asked whether DEC would still have to get the Corps' blessing on a permit if the state had assumed primacy.

MS. PACK answered that the state would make those jurisdictional determinations if it had the program.

CO-CHAIR BISHOP asked whether an annual desk audit by EPA would be required for the state to keep its primacy program.

MS. PACK answered that three mechanisms are written into the statute regarding EPA oversight. One is that EPA gets a copy of every permit and every significant jurisdictional determination, so they are able to object. The second mechanism is that the state is required to submit an annual report and EPA can use that to audit the state. Third, EPA can withdraw the state's program under another section of 404.

CO-CHAIR BISHOP asked who would defend the landowner if DEC signed off on a permit under primacy and EPA didn't agree when it looked at the annual report.

MS. PACK explained that EPA's opportunity to raise an objection would be when it receives a copy of the permit. If EPA misses the window to object, the state has the final say on the permit. She noted that the one permit that was federalized in Florida was specifically over the definition of WOTUS.

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SENATOR DUNBAR asked what EPA's determination was when it federalized the permit in Florida.

MS. PACK explained that EPA's objection was specifically to Florida's use of the old Trump rule to determine the extent of WOTUS for a warehouse project in Florida.

SENATOR DUNBAR asked if she agreed that it wasn't wetlands versus not wetlands; it was WOTUS versus not WOTUS.

MS. PACK answered that the technical analysis is whether it is WOTUS and WOTUS can include wetlands but doesn't include all wetlands.

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SENATOR WIELECHOWSKI asked how much time EPA has to review the state's jurisdictional determinations.

MS. PACK explained that under Section 404(j), if EPA intends to provide written comment about a permit application or proposed general permit, it shall notify the state not later than the thirtieth day after it received the permit application or proposed general permit. At that point other agencies have 90 days to comment on the permit application or proposed general permit. If EPA or another agency objects or 90 days has passed, the state shall not issue the proposed permit if it has received the written objections from EPA.

SENATOR WIELECHOWSKI asked if it was reasonable to expect that developers would wait until after the ninetieth day to start a project because they wouldn't know before then whether EPA was going to object in writing.

MS. PACK said she wasn't sure because the state typically resolves any EPA objection, and only a handful of permits have been federalized. She offered to look into the matter and get back to the committee with the information.

SENATOR WIELECHOWSKI said the information would be helpful because, depending on the time of the filing, a developer might have to wait an entire season.

MS. PACK said it was a good point.

CO-CHAIR BISHOP asked Ms. Pack to send the information to the committee and he'd distribute it to the members.

MS. PACK agreed.

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SENATOR CLAMAN referenced Co-Chair Bishop's example of an analysis that said there were no waters of the United States and the property owner could develop as they wished. He asked if there was a problem today with the Corps approving those applications and issuing permits timely.

MS. PACK asked him to restate the question.

CO-CHAIR BISHOP clarified that his example was specific to wetlands, not WOTUS.

SENATOR CLAMAN said his question relates to somebody who wants to develop their land without having to get a 404 permit. That property owner gets a report that says the property has moisture, but it is not WOTUS, so a 404 permit is not necessary.

He asked if there are problems today with the Corps timely ruling on those requests.

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MS. PACK deferred the question to the regulated community and the DEC team because that wasn't in her knowledge base.

SENATOR CLAMAN referenced the earlier discussion with Senator Dunbar about the Florida lawsuit. He asked if the core of the question was that Florida believed it could use old regulations that applied to the Trump definition of WOTUS and the current administration disagreed saying that the state had to use the current definition of WOTUS.

MS. PACK said the crux of the question was which rule applies and the issue was technical and procedural. Under the 404 rules, the state has one or two years to update its regulations to comport with the changes in federal law. Florida and EPA took different positions on whether a court vacatur of the Trump rule constituted a change in federal law. The issue is moot because the required amount of time has passed.

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CO-CHAIR GIESSEL asked where permafrost fits in the definition of WOTUS.

MS. PACK said Alaska's view is that it was not addressed in the proposed rule, but permafrost should and sometimes does act as a shelf. If there is a WOTUS test based on connectivity, permafrost could inhibit the connection of water sitting on top of the permafrost shelf and create wetlands. Under the current wetland definition, that land would test positive for a wetland but not result in connectivity between the wetland that is at the top of permafrost and a traditionally navigable water. She said this is unclear and the state commented on that in 2022.

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SENATOR DUNBAR asked whether Michigan and New Jersey have issued permits appreciably faster since they assumed the program.

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SHANNON MILLER, Program Manager, Division of Water, Department of Environmental Conservation (DEC), Anchorage, Alaska, said that question is outlined in the feasibility report and she would follow up in writing with the details.

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SENATOR KAWASAKI referenced Senator Giessel's question and asked if the state, not EPA, would have to permit activities on permafrost if the federal government were to recommend that permafrost is considered wetland that is guided by WOTUS.

MS. PACK said she wasn't sure because such a recommendation would not have gone through the required public notice and comment period. But similar to Florida, it might be a question of whether that was a change in federal law and whether Alaska would have one or two years to change its regulations to comply.

SENATOR KAWASAKI asked if EPA had imposed additional requirements on issuing permits since the state assumed 402 primacy.

MS. PACK deferred the question to DEC.

SENATOR KAWASAKI said he was wondering about the wisdom of assuming primacy when there were many unanswered questions.

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MS. PACK discussed the legal landscape as outlined on slides 7-9:

- Clean Water Act (CWA) (1972)
- "Navigable Waters" - Waters of the United States (WOTUS)
  - Defines scope of CWA coverage
  - Challenging
  - Frequently changing
    - 2015 Obama Administration (Clean Water Rule)
    - 2020 Trump Administration (NWPR)
    - 2023 Biden Rule
    - Sackett v. EPA

She reminded the committee of Ron Opsahl's explanation that Congress has inartfully used navigable waters in multiple contexts, one of which was this. For this purpose, navigable waters are defined as WOTUS, and WOTUS defines the extent of the jurisdiction.

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MS. PACK continued to slide 8.

- CWA 404(g) - State administration of 404 program over certain waters

- Congress's intent (CWA 101(b))
- How much does the State get to assume?
  - State = "Assumable Waters"
  - Corps = "Retained Waters"
    - Defined by parenthetical in 404(g)
    - Federal guidance to clarify
- Takeaway?
  - State gets majority of wetlands when it assumes the program

MS. PACK referenced the point Senator Claman made several weeks ago, and explained that part of the reason that 47 states have not assumed the program relates to the complexity and confusion between assumed waters and retained waters.

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MS. PACK continued to slide 9.

- **404(g) State administration**
- (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (**other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto**) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

MS. PACK said many states have identified the bolded language in paragraph (1) as lacking in clarity and a stumbling block for many states. In 2015 the Obama Administration EPA created a workgroup to look at the matter. In 2017 the group issued a report and recommendation. The US Army Corps of Engineers adopted the recommendation in 2018. In January 2023, EPA affirmed that it would use the memo as a starting point for determining which waters are retained by the Corps and which waters are assumable by the state. The recommendation was to start with the Section 10 Rivers and Harbors list of waters. In Alaska that is 47 rivers and adjacent wetlands. In this context it proposes to define adjacency as 300 feet from the ordinary high water mark of the Section 10 waters. Alaska anticipates using that as a starting point, just as Florida did and was successful.

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MS. PACK directed attention to the state map on slide 10 that illustrates in blue the waters the Corps would retain under a state-assumed program. Areas that would not be under state authority include all the coastline, Denali National Park, Metlakatla, and the Port of Alaska.

SENATOR CLAMAN asked whether the blue on slide 10 includes the 47 rivers she mentioned earlier.

MS. PACK answered in the affirmative.

SENATOR CLAMAN asked if the Corps' jurisdiction on any one of those waters would be 300 feet upland from the ordinary high water mark on both sides of the river.

MS. PACK said that's the concept, although the geography of an area would call for more or less and that would be determined in the MOU between DEC as the state and the US Army Corps of Engineers.

SENATOR CLAMAN asked for confirmation that if the state were to assume primacy, it would only be assuming the areas that are not under the Corps' jurisdiction.

MS. PACK said that's correct.

CO-CHAIR BISHOP asked for an explanation of the 300 foot high water mark.

MS. PACK said the 2017 memo asked how much area on either side of a navigable in fact water is needed to ensure the Corps can meet its mission to promote and protect navigability. Based on legislative history and technical sources, 300 feet was identified as a starting point.

CO-CHAIR BISHOP asked if the 300 feet keeps moving as erosion eats away at the Tanana River bank each summer.

MS. PACK said it's a case-by-case determination.

MS. PACK directed attention to the state map on slide 11 and explained that the green shows the approximate location of wetlands over which the state would have jurisdiction if it were to assume primacy under the current definition of WOTUS.

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MS. MILLER added to the discussion about Alaska's landscape and why it was important to assume the 404 program. She made the following points:

- ~ About 174 million acres or 43 percent of the state is wetlands.
- ~ Alaska has two-thirds of the nation's wetlands.
- ~ The state needs to work with federal partners to make an Alaska-specific program.
- ~ DEC has been given the directive to take the necessary steps to assume the program.
- ~ Last year DEC asked the legislature to fund the primacy program.
- ~ Instead, DEC was granted \$1 million to draft a feasibility report.
- ~ DEC issued a request for proposal (RFP) to draft a road map for getting to program assumption. It read:

- Request for Proposal Language:

"The consultant will research, develop, and publish a persuasive and factual feasibility report for assumption of CWA §404 permitting in Alaska. The intended audience of the report is the Alaska Legislature and should clearly and effectively communicate the advantages and benefits of an Alaska-run dredge and fill permitting program."

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SENATOR WIELECHOWSKI asked where in the budget language or budget intent language it said to draft a persuasive feasibility report.

MS. MILLER answered that DEC looked at the feasibility report as the opportunity to look at how to get to program assumption.

SENATOR WIELECHOWSKI noted that the report to the legislature directed the consultant to communicate just the advantages and benefits of assuming primacy. He said he sees that lack of balance as a fundamental flaw in the entire feasibility study. It doesn't address that the program probably would be prohibitively expensive, and that it could be why 47 states have decided not to assume the program.

MS. MILLER responded that the feasibility study includes technical, economic, legal, operational, and scheduling information for program assumption. It identifies why and how conclusions were reached and it cites both Alaska specific and national resources. It includes information from other states that have assumed the program, and it looks at the challenges Alaska needs to address with those five components. DEC spoke with the Corps and EPA and those agencies agreed with the challenges that DEC identified and appreciated the approach outlined in the report.

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SENATOR DUNBAR asked whether the consultant conferred with states that had looked into assuming the program and decided against it, and if that information was reflected somewhere in the feasibility study.

MS. MILLER answered that DEC reached out and spoke to many states, including Oregon, Nebraska, and Arizona, and they shared their information. DEC also looked through the online resources available from the National Association of Wetland Managers. It has reports and some of the actions other states have taken.

SENATOR DUNBAR asked if those reports were included in the Jade North report.

MS. MILLER answered yes; the issues identified in the report are issues that were identified as hurdles for other states.

SENATOR DUNBAR asked if her use of the term "we," referred to DEC or the consultant, Jade North.

MS. MILLER answered that DEC reviewed several drafts of information from Jade North to ensure the consultant was on point and that it filled any information gaps DEC identified.

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SENATOR CLAMAN said he didn't believe she answered Senator Wielechowski's question about the legislature's direction to DEC regarding the feasibility report. He noted that the commissioner said DEC only does what the legislature directs it to do. The direction from the legislature that's quoted on a slide says nothing about getting a persuasive report, but DEC's request for proposal was for a persuasive report. He asked, "Why did you not follow the legislature's instruction to get an objective report; why did you ask for a persuasive report?"

MS. MILLER responded that DEC believes it met the mark for objectivity, and the feasibility report includes a statement of the legislative intent language.

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SENATOR CLAMAN pressed the point that instead of following the legislature's instruction to get an objective report, DEC issued a request for proposal for a persuasive report. It cites just three states that have looked at 404 assumption; Nebraska is still looking and both Oregon and Arizona have abandoned the idea. However, the Association of Water Resource Managers, which is referenced in the report, identified 23 states that have rejected assumption. The report mentions none of those, which is clear evidence that the report is not objective.

He again asked how the decision to request a persuasive report was made.

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MS. MILLER answered that the focus of the report was to assume the program. The legislative intent language was vague and because DEC received the directive in law to assume the program, the agency thought it was important to have a feasibility study that provided a roadmap for how to do that.

CO-CHAIR BISHOP pointed out that the request for proposal language also directed the consultant to develop a factual feasibility report. He asked Commissioner Brune or Mr. Bates to weigh in.

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JASON BRUNE, Commissioner, Department of Environmental Conservation (DEC), Juneau, Alaska, restated that DEC can do no more or no less than what the legislature directs, so he looks specifically at the language in the legislature's requests. He cited the new paragraph (14) in the 2014 statute, Sec. 46.03.020(14) that read:

(14) notwithstanding any other provision of law, take all actions necessary to receive federal authorization of a state program for the department and the Department of Natural Resources to administer and enforce a dredge and fill permitting program allowed under 33 U.S.C. 1344 (sec. 404, Clean Water Act) and to implement the program, if authorized.

COMMISSIONER BRUNE opined that the directive to take all actions necessary was very persuasive.

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SENATOR KAUFMAN mentioned risk management, and asked whether the feasibility report had a section that identifies the risks associated with assumption of the 404 program.

MS. MILLER answered yes; each particular type of activity includes a brief analysis of the challenges and what must be addressed to meet those challenges.

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MS. MILLER turned to slide 16 that shows the cover page of the "Clean Water Act Section 404 Dredge and Fill Program Assumption Feasibility Report" that consultant Jade North, LLC prepared for DEC. She conveyed that Jade North was comprised of individuals who had retired from state service and the US Army Corps of Engineers. She highlighted that DEC also hired Baker Botts as outside counsel; it was the law firm that assisted Florida in its program assumption. She said the consultants were asked to help DEC develop a roadmap to get to program assumption.

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MS. MILLER continued to slide 17 to discuss the benefits of permit streamlining.

Benefit:

Permit Streamlining

- Opportunities for permit streamlining
  - Eliminating the 401 certification

MS. MILLER explained that Section 401 of the Clean Water Act authorizes a state to certify that water quality standards are being met under a Section 404 Corps-issued permit. If the state were to assume the program, it could do away with the 401 certification because the information would be captured in the 404 permit. The 401 certifications would still be required in the Corps-retained waters.

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CO-CHAIR BISHOP asked if the number of pages in the 401 certification would be reduced if the state were to assume primacy.

MS. MILLER said she didn't know but the Corps and the state need to have the same information, so the application process is the same for both.

MS.MILLER continued to discuss permit streamlining.

- Greater use of General Permits
- Coordination with other project permits
- More use of Alaska-specific policies and procedures
- Ability to tailor policies and procedures to Alaska's unique conditions

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MS. MILLER advanced to slide 18, Benefit: Mitigation Flexibility & Alaska's Water Quality Priorities, and discussed the following:

- Under 404 assumption, Alaska may be able to address our clean water priorities
- Examples might include:
  - Cleanup of orphaned contaminated sites
  - Replace perched culverts
  - Cleanup of tundra pond trash disposal sites

SENATOR WIELECHOWSKI asked if she agreed that the state could already do the things she cited under EPA monitoring of the 404 program.

MS. MILLER answered yes, and EPA was very supportive when DEC said it wanted more flexibility to address site cleanup possibilities under a state-assumed program.

SENATOR WIELECHOWSKI asked if she agreed that EPA had allowed more flexibility on the Ambler Road and Donlin Gold projects.

MS. MILLER said alternatives have been allowed, but not to the extent that DEC would like. She deferred to Ms. Pack to address the Donlin Gold project.

MS. PACK said she did not have the specifics of the Donlin mitigation requirements, but she would follow up in writing with the information.

CO-CHAIR BISHOP asked her to send the information to his office and he would distribute it to the members.

SENATOR WIELECHOWSKI asked if she agreed that if the state were to assume primacy, it could not create new compensatory mitigation options without either complying with the Clean Water Act or securing EPA approval.

MS. PACK said that's correct. DEC cannot do anything that is contrary to the Clean Water Act or the 404(b) guidelines. Anything DEC promulgates would have to be equivalent.

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SENATOR CLAMAN said he'd also like an update on the Ambler Road to see the mitigation that was approved for that project.

CO-CHAIR BISHOP commented that slide 18 highlights that the state wants to clean up contaminated sites on federal land within the state faster than the federal government has been doing.

MS. PACK confirmed that this was a tool the state could use to clean up contaminated sites throughout the state, including federal land.

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MS. MILLER advanced to slide 19 to discuss the benefits to Alaskans under a state-assumed program:

Benefit:

Accountable to Alaskans

- State government agencies are more accessible to Alaskans than federal agencies
- A State-run program is accountable to Alaskans and the legislature

- Increased control over our environmental and economic future

SENATOR WIELECHOWSKI cited the feasibility study and asked if she agreed that there was no legal obligation for tribal consultation.

MS. MILLER answered that DEC tries to meet with tribes early in the process to discuss projects the department is working on. To that end, Commissioner Brune meets quarterly with regional corporations. DEC envisions the 404 authorizations would have a tribal engagement plan that's similar to the 402 authorizations to ensure that all stakeholder voices are heard.

SENATOR WIELECHOWSKI asked whether DEC had ever denied a request for consultation with tribes.

MS. MILLER answered that she didn't have an answer.

SENATOR WIELECHOWSKI asked if she would follow up with an answer.

MS. MILLER agreed to do so.

SENATOR WIELECHOWSKI asked if she was saying that the DEC consultation guidance document was equivalent to the federal consultation process for tribes.

MS. MILLER responded that the department has an established process to work with tribal partners to understand their concerns about projects DEC proposes.

SENATOR WIELECHOWSKI requested a yes or no answer.

CO-CHAIR BISHOP recognized Commissioner Brune.

COMMISSIONER BRUNE answered no; during his tenure DEC had never denied a meeting with a tribe, regional corporation, or village corporation. He also clarified that DEC was prohibited from having the same relationship with tribes that the federal government has. However, what was required in the 402 permit and will be required in the 404 permit is to establish a policy that addresses the needs of indigenous people. Tribal liaisons reside within the Division of Water and the Commissioner's Office, and there is a new process for regular meetings with tribes and regional and village corporations to ensure those voices are heard early and become part of the decision-making process.

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SENATOR WIELECHOWSKI asked whether DEC would support returning to a coastal zone management program that would establish a formal consultation process.

COMMISSIONER BRUNE said he couldn't speak to the Dunleavy administration's intention, but if the ACMP were re-implemented, DEC would incorporate it into the current program.

SENATOR CLAMAN asked why DEC was prohibited from having the same relationship with tribes that the federal government has.

COMMISSIONER BRUNE answered that lawyers have told him that state law does not allow a similar government-to-government relationship between tribes and the state as the federal government enjoys. He offered to confer with the Department of Law and follow up with a more specific answer.

SENATOR CLAMAN commented that tribes would never be on the same footing with state government as they are with the federal government.

COMMISSIONER BRUNE responded that those entities would still have the authority to request consultation with the federal government.

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CO-CHAIR BISHOP asked whether a village corporation would apply to the state or federal government for a permit to fill five acres of wetland on their property for a woodlot.

MS. PACK explained that EPA's definition of Indian Country includes reservations but not corporations, so the hypothetical village corporation would apply for a permit from the state. If the state were to assume the program, EPA would still be required to consult with tribes upon program approval and reflect any articulated concerns and objections.

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MS. MILLER continued to slide 20 and discussed the following:

Benefit and a Challenge: National Environmental Policy Act (NEPA) & Environmental Review

- In some cases, the State Program will not need to conduct the federal NEPA process but
- Must be as stringent as 404(b)(1) guidelines

- Requires evaluation of impacts on the physical, chemical, biological, and human use characteristics of the aquatic environment and special aquatic sites

MS. MILLER highlighted that before a permit is issued, the evaluation must be conducted even if the NEPA process is no longer required.

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SENATOR WIELECHOWSKI asked whether the state had a public process to review potential damage to fish habitat or impacts to fisheries that was equivalent to the NEPA process.

MS. MILLER answered that a 404 permit undergoes a public review process and the fish habitat permit under Title 16 also requires a public process.

SENATOR WIELECHOWSKI asked if it was equivalent to the NEPA process.

MS. MILLER said she couldn't speak to whether it was equivalent.

MS. PACK added that the NEPA process is only triggered under three circumstances: 1) issuance of a federal permit; 2) the project has federal funding; or 3) the project is on federal land. The state does not need an equivalent process for the projects that do not trigger NEPA.

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SENATOR CLAMAN asked under what circumstances NEPA would not apply.

MS. PACK answered that the subset of projects under discussion are those where the only federal nexus is the permit issued by the Corps. When that trigger is removed and neither of the other two triggers are met, the NEPA process is not required.

MS. MILLER mentioned other authorizations that may be required for a project on state land including a best interest finding to analyze aquatic and biotic impacts and an air permit that analyzes impacts a project may have on air. She also pointed out that NEPA is a process, not a permit.

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MS. MILLER advanced to slide 21, Challenge: Clarifying Federal/State Responsibilities, and agreed with Ms. Pack that

since the Corps will retain jurisdiction over some waters, DEC and the Corps will need to work together to ensure that the boundaries are clear among agencies, stakeholders, and future permittees.

CO-CHAIR BISHOP asked whether those administrative boundaries should be codified in statute.

MS. MILLER suggested addressing jurisdictional boundaries in regulation so it's easier to update when a water body changes. She continued that the state and Corps will agree on the boundaries through a memo that is part of the program application to EPA. Any changes will be updated and shared with EPA as the overseeing authority.

[4:49:23 PM](#)

SENATOR DUNBAR referenced slide 24 and asked how DEC determined that 25 percent of the permitting responsibilities would remain with the Corps.

MS. MILLER answered that it depends on the type of action that takes place but it's generally based on the 47 retained water bodies that have a 300 foot adjacency boundary on either side.

[4:50:41 PM](#)

SENATOR CLAMAN asked if she agreed that he would need to get a permit from the Corps for a placer mining operation on the Nenana River because it would be on waters of the United States.

MS. MILLER confirmed that was accurate.

MS. MILLER continued to say that the state will need to work with federal agencies to identify the federal and state responsibilities and ensure it's clear to stakeholders and future permittees.

CO-CHAIR BISHOP asked if the state and Corps would review the memorandums of agreement (MOA) every few years to look at what was and was not working.

MS. MILLER answered that once an MOA is drafted, it's good until it needs to be updated.

SENATOR WIELECHOWSKI asked if there would still be protections for cultural and historic resources under the National Historic Preservation Act.

MS. MILLER replied that is essential.

SENATOR CLAMAN asked why anyone should think that jurisdiction and WOTUS will be settled in the two years allocated for the application process when the question of which waters are WOTUS has been ongoing since statehood.

[4:53:30 PM](#)

MS. PACK said the debate has only been ongoing since the Clean Water Act was enacted in 1972, but the point is taken. She continued that many people are hopeful that the US Supreme Court decision, which is expected by June, will add clarity. Second, states like Michigan and New Jersey have extended their programs beyond WOTUS so the instability associated with the changing definition of WOTUS isn't reflected in their permitting programs. Finally, when the state is issuing jurisdictional decisions it can ensure that the discretion is applied consistently, regardless of changing administrations.

[4:55:09 PM](#)

MS. MILLER turned to slide 24, and spoke to the following:

#### Workload & Staffing Analysis

- Alaska could assume approximately 75% of the Corps' permitting responsibilities
  - Approximately 581 actions per year
  - 32 FTE = 18 actions/FTE/year
- Corps completed 775 actions/year
  - Over a 5-year period (2017-2022)
  - 48 FTE = 16 actions/FTE/year

SENATOR DUNBAR said he continues to think that this might be an underestimation of cost and the number of full time equivalent (FTE) positions that will be required. Not all actions are the same and the state will be taking on the more marginal cases that need a determination, which will be more time consuming and expensive.

[4:57:19 PM](#)

MS. MILLER responded that the feasibility report has a chart that compares what the state would assume versus what the Corps would retain. She offered to provide that information separately or point out its location in the feasibility report.

SENATOR DUNBAR asked to what degree of certainty the consultants concluded that the state would be taking on either the equivalent or easier case actions.

MS. MILLER answered that DEC worked with and obtained the information directly from the Corps and then did a desktop study of where the actions would be located. This too was in the feasibility report.

SENATOR DUNBAR asked if there was an analysis of the time the state actions would take relative to the actions the Corps would retain.

MS. MILLER said that analysis was completed.

She continued to slide 25 and spoke to the following:

#### Cost Analysis

- Program development (two years) FY 2024-2025
  - FY2024:
    - \$4,964.0 (\$4.9 million)
    - 28 FT Positions in FY 24
    - Training, equipment, and travel
    - Legal consultation, regulations development
    - Coordination with agencies
    - Assumption application development
  - FY2025
    - Anticipates four additional positions
    - Approx. \$4,700.0 (9\$4.7 million) in FY 25 & beyond

[5:00:35 PM](#)

SENATOR CLAMAN asked why the legislature should have any confidence in a report that suggests Alaska could assume the relatively large 404 program with a fairly small number of staff when all three states that assumed primacy grossly underestimated their staff needs.

MS. MILLER pointed out that slide 24 identifies the Corps as having 48 full time employees to run the full program. She said DEC believes that 32 full time employees is appropriate.

CO-CHAIR BISHOP commented that she was saying that state employees are more efficient than federal employees.

MS. MILLER responded that DEC was looking at capitalizing on the general permits.

CO-CHAIR BISHOP noted that was something the federal government couldn't do.

[5:02:43 PM](#)

MS. MILLER advanced to slide 27 and reviewed the following:

Next Steps to Assumption

- Obtain funding & hire staff
- Prepare application to EPA
  - Submit final Q1 2025
- Program approval mid-late 2025

SENATOR WIELECHOWSKI cited a March 27 2019 communication from Commissioner Brune and two other commissioners regarding a January 30, 2019 letter from a Native council requesting consultation regarding the Donlin Gold project. The commissioners' letter mentioned that Senator Lyman Hoffman advised the commissioners of the council's concerns regarding the state permitting process for this project and requested they illustrate the steps the agency had taken to protect the resources in the region. The commissioners' letter then said:

We respectfully decline your request to establish an ongoing relationship of government-to-government consultation between our agencies and the tribes of the Yukon Kuskokwim Delta region regarding the project beyond the already significant and ongoing public notice and comment processes. Government-to-government consultation is a federal process. State law requires that agencies undertake an open public process that treats all interested parties equally. Adequate opportunities exist for meaningful engagement to occur through multiple public notice and comment periods for state authorization where appropriate.

CO-CHAIR BISHOP asked Senator Wielechowski to share the communication with his office so he could distribute it to the rest of the committee. He then offered Commissioner Brune the opportunity to respond.

[5:05:34 PM](#)

COMMISSIONER BRUNE stated that he and his team subsequently had multiple meetings with the council, but those meetings were not government-to-government.

5:06:48 PM

There being no further business to come before the committee, Co-Chair Bishop adjourned the Senate Resources Standing Committee meeting at 5:06 p.m.