

HB

149

AMENDMENT #1

OFFERED IN HOUSE RESOURCES

BY REP. *Wilson*

TO: HB 149

Page 4, line 4:

Following "pollutants":

Delete "listed"

Insert "as defined"

Page 4, line 10:

Following "(a)"

Insert "and (d)"

Adopted, 3/19/07

HB 149

Questions on NPDES primacy

1. List of things currently within (required or covered by) EPA NPDES permits that DEC is planning to put outside of permits when DEC assumes NPDES primacy.
2. How many third-party lawsuits over NPDES permits issued during the last five years deal with items that will be outside of NPDES permits after state assumes primacy.
3. Potential definitions and differences between the definitions for "Waters of the United States". Please clarify why it is confusing to have a separate definition of "waters" defined in statute.
4. Change in permit fees that will be charged with state primacy. What has the discussion been on the increase of these fees in the future.
5. Enforcement actions by EPA. How many are anticipated to be taken by DEC. Will DEC do a better enforcement than EPA?
6. With NPDES primacy, will Clean Water Act lawsuits have the State of Alaska as defendant. Will Alaska be responsible for lawsuits arising out of Clean Water Act complaints?
7. How much does an average Clean Water Act suit cost? Is this included in the fiscal note?

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
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March 19, 2007

The Honorable Paul Seaton
Alaska State Legislature
State Capitol, Room 102
Juneau, AK 99801-1182

Re: Questions related to HB 149

Dear Representative Seaton:

Louie Flora requested answers to the following questions on your behalf that are related to HB 149 and state primacy for the National Pollutant Discharge Elimination System (NPDES) permit and compliance program.

List of things currently within (required or covered by) EPA NPDES permits that DEC is planning to put outside of permits when DEC assumes NPDES primacy.

In addition to the example explained in the enclosed March 15 letter to Representatives Johnson and Gatto, DEC could request permittees, outside of the context of a permit, to conduct activities that are desired by DEC to gain a better understanding of the discharge or receiving environment, but not needed to determine the discharger's compliance with water quality standards or other legal requirements. Examples of such additional monitoring include sediment monitoring; nearby subsistence use; and other studies that might help refine effluent limits for permit re-issuance or to help the state revise regulatory water quality standards.

How many third-party lawsuits over NPDES permits issued during the last five years deal with items that will be outside of NPDES permits after state assumes primacy.

DEC does not track threatened or filed lawsuits between private parties and is not aware of any lawsuits responsive to this question. Concerns regarding third party claims for alleged violations of permit requirements, particularly for monitoring requirements that are not otherwise legally required, were brought up during the primacy Work Group meetings. These concerns were based on the fact that the Clean Water Act is a strict liability (without fault) statute and allows penalties of up to \$31,500 per day per violation.

Potential definitions and differences between the definitions for "Waters of the United States". Please clarify why it is confusing to have a separate definition of "waters" defined in statute.

See response to similar question in the enclosed March 15 letter to Representatives Johnson and Gatto. The Department is not opposed to defining "Waters of the United States" in statute, so long as the definition is identical to the definition in EPA and State regulations.

Change in permit fees that will be charged with state primacy. What has the discussion been on the increase of these fees in the future.

See response to similar question in the enclosed March 15 letter to Representatives Johnson and Gatto.

Enforcement actions by EPA. How many are anticipated to be taken by DEC. Will DEC do a better enforcement than EPA?

During the period 7/1/2004 through 6/30/2005, the last year for which EPA has compiled complete annual reporting, EPA took the following enforcement actions:

Administrative order	2
Consent decree	1
CWA penalty	28
Letter of violation/warning	12
Written information request	5
Total	48

During that period, 16 of these 48 actions (33%) included information gained from DEC inspections. Most of these EPA actions were based on non-compliance spanning multiple years.

Under NPDES primacy, DEC will have the same inspection goals that EPA currently has - inspect all major facilities once per year and inspect all minor facilities one time during the five-year life of the permit. DEC's enforcement policies must be as stringent as EPA's and are described in the Department's NPDES primacy application. It is impossible to predict how many enforcement actions will be taken in any given year, and the number will vary from year to year.

The NPDES Primacy Work Group, in its February 2005 report (copy enclosed), said the following about the potential benefits of primacy as it relates to enforcement:

"More predictable enforcement. The state can build specific, timely, and predictable steps into an enforcement program while maintaining a commitment to compliance assistance. Early communication of inspection results is key."

Currently, DEC inspectors have a goal of completing inspection reports within 30 days of inspections, except during the May-September inspection season where reports will be completed within 45 days. A copy is given to the inspected facility. We are not aware that EPA has a similar target. It is our experience that EPA holds inspection reports during case development for enforcement. DEC's objective is to notify a facility of non-compliance early so that corrective action can be taken. The inspection report can still be used for case development in enforcement.

With NPDES primacy, will Clean Water Act lawsuits have the State of Alaska as defendant. Will Alaska be responsible for lawsuits arising out of Clean Water Act complaints?

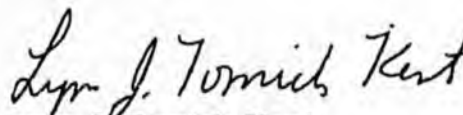
NPDES primacy will not increase the state's exposure to lawsuits under the Clean Water Act. In general, the Eleventh Amendment to the U.S. Constitution prohibits federal courts from hearing lawsuits brought by private citizens against states. Nothing in the citizen suit provision of the Clean Water Act changes that. The exception to this general rule, known as the *Ex parte Young* doctrine, is for lawsuits that seek non-monetary damages, but only then suits seeking prospective relief, ordering a state to comply with federal law. Nor does the state issuing an NPDES permit make the state a necessary party to a citizen suit brought to enforce the terms of a state-issued NPDES permit. Thus, having a state-run NPDES program should not create significant litigation exposure for DEC under the Clean Water Act. Persons wishing to challenge the terms of an NPDES permit issued by DEC would still have the right to assert such a challenge under state law. This involves the right to an administrative appeal followed by an appeal to state court.

How much does an average Clean Water Act suit cost? Is this included in the fiscal note?

The Department did not include the potential costs of future potential law suits against the state for NPDES permit decisions. This is generally consistent with other Department regulatory programs, since it would be impossible to predict the number or nature of potential suits, and therefore costs associated with them. The Department has contacted EPA for information regarding their costs associated with Clean Water Act suits. If they can provide this kind of information, I will forward it to you upon receipt.

Please let me know if you need any additional information.

Sincerely,



Lynn J. Tomich Kent
Director

Representative Seaton

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Enclosures: March 15, 2007 letter to Representatives Johnson and Gatto
w/ enclosures
NPDES Primacy Work Group Report, February, 2005

STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION
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March 15, 2007

The Honorable Craig Johnson
Co-Chair, House Resources Committee
State Capitol, Room 126
Juneau, AK 99801-1182

The Honorable Carl Gatto
Co-Chair, House Resources Committee
State Capitol, Room 126
Juneau, AK 99801-1182

Dear Representatives Johnson and Gatto:

Thank you for the opportunity to talk with the House Resources Committee about HB 149 on March 12. You requested a response to several questions that came up during the hearing. I've paraphrased those questions and provided answers below, along with some clarifying information.

Are there problems with using the term, "waters of the U.S.," and why isn't the term defined in HB 149?

The term "waters of the U.S." is defined by EPA in its regulations. 40 CFR 122.2. DEC has adopted the same definition in state regulations. The term could be defined in HB 149, but it would need to be identical to the definition in state and federal regulation for EPA to approve the state program.

Will the changes proposed in HB 149 now require NPDES permits for discharges to wetlands?

No. HB 149 does not require the state to issue any state NPDES permits that are not already required under the federal NPDES program. NPDES permits are already required under the Clean Water Act for discharges to wetlands and would also be required under a state-run NPDES program

Does removing the exemption (HB 149) for domestic sewage affect rural Alaska?

No. HB 149 does not change the discharges that require an NPDES permit, rather, it aligns state requirements with the federal requirements.

Do discharges of small heated process or cooling water or very small discharges require a permit? Examples - emptying a cooler, hot tub draining, human waste at hunting camps.

The federal NPDES program does not have a threshold below which very small discharges do not need permits, nor could EPA approve a state program with such a threshold. Never-the-less, courts have upheld agencies' inherent authority to exclude "de minimus" situations from the reach of regulation. Alabama Power Co. v. Costle, 636 F.2d 323, 360-61(D.C. Cir. 1979). This *de minimus* doctrine is grounded in the ancient principle that "the law does not concern itself with trifling matters." *Id.* Under this doctrine either EPA or DEC can safely ignore the kinds of situations that Committee members asked about at the March 12 hearing.

What's an example of requirements EPA or DEC might impose on a permittee either within or outside the context of a permit? Would those requirements be enforceable by citizens, in addition to DEC?

Example - the wastewater discharge permit (NPDES permit and DEC's certification of the permit) for the Red Dog Mine require bioassessment of fresh water streams. The bioassessment monitoring includes Periphyton (as chlorophyll-a concentrations), aquatic invertebrates (taxonomic richness and abundance), and fish presence and use. While these parameters provide a valuable indicator of primary production, they are not in themselves driven by permit effluent limits or Alaska's water quality standards. This type of requirement can be imposed by EPA within or outside the context of an NPDES permit. Under State primacy for the NPDES program, DEC would have the same latitude.

Monitoring and reporting requirements placed on a wastewater discharger outside the context of a permit, are not enforceable by the public through citizen suits either under federal law (33 U.S.C. 1365) or state law (AS 46.03.870). However, they are enforceable by EPA and DEC.

What will happen to permit fees with NPDES primacy?

Permittees are already required to pay a fee based on DEC's direct costs associated with permitting (or issuing certifications of EPA NPDES permits) and compliance work. The Department has estimated that with primacy fees will, on average, go up by a factor of 1.8 over the current fees.

DEC's NPDES Work Group and overall public process

There have been and will continue to be, multiple opportunities for public involvement in program development, the application for primacy, and during future program implementation.

SB 110, from 2005 directed DEC to continue to work with a Work Group of NPDES permittees while developing the primacy application. SB 110 underwent public review through the legislative process. The Work Group includes representatives of large and small community domestic wastewater dischargers (sewage treatment facilities); and the oil and gas, timber, mining, seafood, and construction industries. The Work Group's members are listed at the DEC website at:

http://www.dec.state.ak.us/water/npdes/work_group.htm, along with agendas, handouts, drafts of the primacy application, attendee lists, meeting summaries, and other documents germane to the Work Group process -- the public has access to everything the workgroup has access to. The February 2005 Work Group report is enclosed. Work Group meetings and teleconferences have been public noticed and meeting announcements are also emailed to a list serve group (350+ people). Public representatives have been present and participated during the meetings and during the specific allocation of time on the agenda for public comment. The initial regulations for the program underwent public review and pending revisions to the regulations will have a public review beginning this week. And, when all is done, EPA will conduct another public notice and review of the entire program. Upon program approval, all permits will also undergo public review.

NPDES resources commitment

Prior to SB 110 (2005), the combined NPDES resources of DEC and EPA included 51 FTE. DEC's program under primacy will have 43 FTE. That reduction is a result of the efficiency gain associated with a single agency, instead of two, implementing a single program. EPA will maintain some positions to oversee the DEC program. See attached fact sheet on "Resources".

Primacy application status and EPA review

DEC provided a status report on NPDES to the legislature in the annual report (copy enclosed, see also enclosed fact sheet, "Overview and Status - February 2007). It was not until EPA reviewed the Department's full application submission that they, in October 2006, identified several statutory shortcomings that must be corrected in order to demonstrate that the Department has the necessary authority to implement the NPDES program; hence, the administration's introduction of HB 149 and its companion bill, SB 91. DEC and EPA have been working closely together to address all of EPA's comments on the program. The results of that work include minor amendments to the regulations, program description, and Attorney General's statement regarding state authorities to implement the program. It is our intent to submit a revised application in draft form to EPA this summer so they can take one last look before we submit a new final application this fall. EPA has committed to a schedule for a program approval decision by March 31, 2008.

DEC certifications of EPA NPDES permits

DEC and EPA currently have a dual role in permitting wastewater discharges. By virtue of state law, a state-certified NPDES permit usually serves as the state required permit. During FY 06, for EPA-issued NPDES permits, DEC issued:

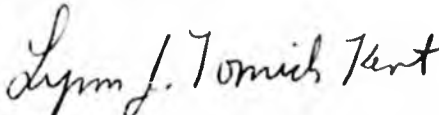
- Clean Water Act Section 401 certifications for 100% of EPA-issued NPDES individual permits (9 permits)
- Clean Water Act Section 401 certifications for 100% of EPA-issued NPDES general permits (5 permits)
- 15 authorizations under the TAPS linewide NPDES general permit
- 87 authorizations under the NPDES Placer Mining general permit
- 6 authorizations under the NPDES North Slope Oil / Gas general permit
- 7 authorizations under the NPDES General Seafood Processors general permit
- 20 authorizations under the NPDES Small Domestic general permit

In addition, where EPA has not issued NPDES permits, DEC issued:

- 18 state individual permits
- 62 state general permit authorizations

Please let me know if I missed any of the questions or I can provide any additional information.

Sincerely,


Lynn J. Tomich Kent
Director

Enclosure NPDES Primacy Work Group Report, February 2005
Resources Fact sheet
Annual Report to the Legislature
Overview and Status - February 2007

**NATIONAL POLLUTANT DISCHARGE ELIMINATION
SYSTEM PRIMACY WORKGROUP REPORT**

February 24, 2005

FINAL

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EXECUTIVE SUMMARY

Support for state assumption of the National Pollutant Discharge Elimination System (NPDES) program varied between permittee sectors. Certain sectors see substantial benefit and strongly support moving ahead. Other sectors see less benefit, but would not object if the state were to move towards primacy. All sectors believe that there are certain essential or desirable elements that should be incorporated into a state NPDES program.

The federal Clean Water Act (CWA) requires all wastewater discharges to surface water to be permitted under the NPDES permit program. The CWA clearly envisions states running this program and includes provisions for state primacy. Alaska is one of only five states where the Environmental Protection Agency (EPA), rather than the state, administers the NPDES permit program.

A workgroup of Alaska wastewater discharge permittees was asked to evaluate the concerns, costs, and benefits of state primacy. The workgroup recommends Alaska proceed toward primacy for the NPDES wastewater discharge permitting program contingent on the following 11 elements being incorporated into the state program.

1. Permit fees based on the structure established in House Bill 361.
2. Continued permittee participation during primacy application and program development.
3. Sufficient funding to develop and assume the program and consistent sufficient state general funds in the long-term.
4. Opportunity for permittee review of both draft and proposed final permits.
5. Permits contain only legally required monitoring and reporting necessary to comply with effluent limits and water quality standards.
6. Formal training plan and implementation of the plan for DEC permit and compliance staff.
7. Ensure permit consistency between areas under state and federal jurisdiction.
8. The ability for the department to use contractors to assist with peak workloads and technical permitting issues.
9. Use of the current state permit appeals process where permit provisions are not automatically stayed upon appeal.
10. Senior DEC management review of permits and conditions that set precedents or are controversial.
11. Primacy application submitted to EPA by June 2006.

I. INTRODUCTION

In contrast to most other states, Alaska does not administer the National Pollutant Discharge Elimination System (NPDES) program for wastewater discharge in the state. The Environmental Protection Agency (EPA) performs this important task. Senate Bill 326 - passed by the 22nd

Alaska Legislature in May 2002 - directed the Alaska Department of Environmental Conservation (DEC) to evaluate the potential benefits and consequences of the state assuming primacy of the NPDES program. The Department released "*State of Alaska's Assumption of the National Pollutant Discharge Elimination System – A Report to the Alaska Legislature*" in January 2004. Subsequent to release of the report, an advisory permittee workgroup was formed to examine the concerns, costs and benefits of state primacy and to recommend whether to proceed toward primacy.

Six meetings were held during the period November 2004 through January 2005 with representatives from NPDES permittee groups as well as the EPA. The workgroup was composed of one representative from each of the following:

- Oil and gas industry sector
- Mining industry sector
- Seafood industry sector
- Timber industry sector
- Construction industry sector
- Large community wastewater permitting
- Small community/tribal wastewater permitting

The EPA, as the current NPDES authority and the delegator of primacy, had a special role and attended meetings to provide perspective and guidance on federal requirements and constraints.

The meetings were held in Anchorage and were open to the public. Public notice of the schedule of meetings was provided. Meetings were informal and attendees who were not official members of the workgroup freely participated. Information, handouts, attendance lists and agendas were posted on an NPDES Primacy web site at http://www.state.ak.us/dec/water/npdes/work_group.htm.

The workgroup developed a concept for a state wastewater permitting program beginning with a list of characteristics important to a state NPDES program (Chapter II). The concept for a state-run program was compared to the current EPA program and benefits and costs were identified (Chapters III. and IV). A benefit and concern analysis followed (Chapter V.). Issues raised by members of the public are included in Chapter VI., and other topics discussed over the course of the six meetings are summarized in Chapter VII. The workgroup provided a recommendation as to whether to proceed toward primacy (Chapter VIII.).

II. CHARACTERISTICS OF AN ALASKA NPDES PERMITTING PROGRAM

The NPDES permit workgroup discussed the opportunities the state has in developing an efficient NPDES permitting process that appropriately addresses Alaska specific conditions and

needs. Lists of characteristics to include in an Alaska NPDES program were developed. These characteristics are summarized below.

Permit Application Process

Streamlining the administrative functions of the permit application process is one of the first improvements the state can take in assuming primacy for NPDES permitting. The workgroup discussed tools such as electronic forms, clear definitions, and integration of permits. The workgroup wants the state to issue and renew permits and authorize "notices of intent" to operate in a timely manner. Below is a list of the administrative tools that the workgroup wants to see the state employ:

- Single application submitted to one agency – DEC.
- Optimal use of general permits and permit by rule options.
- Timely renewal of general and individual permits.
- Timely action on requests for modified permits.
- Electronic submittals of application and discharge monitoring reports (DMRs).
- Streamlined application procedures where appropriate.
- Renewal notification sufficiently in advance so permits can be renewed without lapsing.
- Flexibility in the definition of "major" and "minor" facilities.¹
- Integration of waste management plan reviews and disposal permits.
- Investigation of the pros and cons of watershed permitting.
- A defined process and time schedule for issuance of various permits.
- Provisions for administratively extending permits.
- A process enabling agency/permittee consultations during permit development.

Permit Limits and Monitoring Requirements

Permit limits and monitoring requirements are derived from a combination of technology-based performance standards specified in federal regulation and state water quality standards. The water quality standards are also the basis for determining mixing zones, zones of deposit, and short-term variances. It is important to the workgroup that the translation of the water quality standards into effluent limits and monitoring requirements be conducted by permit writers who know the conditions and environment of Alaska. Specifically the workgroup wanted:

- Effluent limits that take into account natural conditions.
- Monitoring parameters and frequencies based on Alaska conditions.
- Sampling flexibility to provide concurrent monitoring of natural conditions.

¹ According to EPA NPDES permit policy, facilities are classified as either "major" or "minor". A "major" municipal facility discharges more than 1 million gallons per day or has a pretreatment program. A "major" industrial facility scores above 80 points on the EPA NPDES Permit Rating Work Sheet. EPA also retains the ability to use their professional judgment to designate a facility as a "discretionary major."

- Authorization of mixing zones in individual and general permits.
- Use of translators in determining permit limits for metals.
- Ability to refine effluent limits as data are collected.
- Only compliance monitoring included in permits with separate agreements for scientific data collection.
- Acknowledgement of the use of the best technologies.
- Requirements and process for site-specific criteria based on natural conditions.

Guidance Documents

Guidance documents prepared for the specific needs of Alaska operators and facilities are important to the workgroup. Fact sheets, frequently asked question summaries, and other guidance documents need to be current and posted on the web for easy access. The following is a list of specific guidance documents and fact sheets mentioned by workgroup members:

- Guidelines for baseline data collection for major, new projects.
- Permit process flow charts and processes explained in chronological order.
- Case-by-case best available technology guidance for industries lacking effluent guidelines.
- Clear explanation of when a discharge to the subsurface requires an NPDES or Underground Injection Control (UIC) permit.
- A fact sheet to accompany individual and general permits.
- Understandable regulations ordered to follow the permit development process.

Public Participation and Public Notice Process

In addition to the EPA requirements for public notice, the state should use the Alaska Online Public Notice System.

Permittee Review of Draft and Proposed Final Permits

The workgroup stressed the importance of communication with Alaska permit writers throughout the permit development process and, in particular, saw value in an opportunity for permittee review of draft and proposed final permits prior to issuance to avoid misinterpretations, omissions, and simple mistakes.

Compliance Assistance

The workgroup wanted to ensure that a state NPDES compliance program would be managed in a responsive manner. An exit interview by inspectors, where concerns and problems are discussed, is critical for operators to know what needs immediate correcting. Waiting months for an inspection report was viewed as potentially detrimental to receiving water quality and may

result in cumulative fines that largely reflect the permitting agency's inaction. The workgroup wants a state program committed to compliance assistance in addition to enforcement. Additionally, the workgroup wants the state program to have:

- Use of the full range of administrative tools available to the state such as Compliance Order By Consent, Notice of Violation, and compliance schedules.
- A DMR database that retains "qualifiers" on analytical results.
- Flexibility in the use of "Supplemental Environmental Projects" in lieu of fines, when appropriate.
- A process for immediate correction of de minimus issues.
- Procedures for "paper audits" as an alternative/adjunct to full inspections.
- Opportunity to request "enforcement free" compliance assistance audits.
- Use of the state's inspection ranking system to determine routine facility inspection schedules.
- Use of other department and state staff to inspect or follow-up on inspections when they are at a facility.

Appeals Process

The workgroup highlighted the appeals process in Alaska as being a significant difference between DEC and EPA. Under primacy, the Commissioner of the Department of Environmental Conservation would be the final administrative arbiter as opposed to the Environmental Appeals Board. The Commissioner would have the authority to delegate decision-making authority to an Administrative Law Judge. All permit terms and conditions in a new permit and contested provisions in a modified or renewed permit are not automatically stayed under the state appeals process in contrast to the federal appeals process. There are opportunities to build into the state process deadlines for completing steps in the appeals process. Judicial review of state permitting decisions will be conducted by an Alaska Superior Court instead of the federal 9th Circuit Court of Appeals and should be timelier. Currently, no new evidence may be introduced during an appeal to EPA. Under primacy, current state law allows new evidence to be introduced, which provides an opportunity to consider the best science and to build an optimal record for judicial appeal, but carries with it the additional costs associated with an evidentiary proceeding. The state could re-examine the appeals process for NPDES permits and decide whether to allow new evidence to be introduced during an administrative hearing and appeal.

Management Involvement

DEC is a much smaller agency than EPA Region 10 and this can provide for greater participation in significant policy setting decisions by the upper management team. Specifically, the workgroup wants to ensure that DEC management is aware when significant policy or compliance issues are made in association with permit or enforcement decisions. Specifically the workgroup wanted:

- Management review of draft permits in early stages of the transition to NPDES primacy.
- Process to elevate to management policy issues that arise in permitting and enforcement proceedings.

Budget and Staffing

The workgroup stressed that primacy must include an adequate and appropriately funded budget to hire, train, and retain experienced staff and ensure the necessary funds to travel. Workgroup members are convinced that permit writers must know and understand the specific environment and operational processes they regulate and that only comes through personal experience. The workgroup wants to ensure that the Department employ creative and flexible strategies, such as:

- Negotiated service (funding) agreements that include milestones.
- Provisions for the Department to enter into contracts for technical expertise on an as-needed basis.
- Staff in locations that facilitate communication with the permittee.
- Mechanisms for staff to utilize various travel opportunities, such as facility charters.
- Permit fees based upon the provisions of House Bill (HB) 361.
- A formal system for permit writer peer review, as well as management review.
- Permit writers' assignments compatible with their experience.

Transition

Full state assumption of NPDES program responsibilities can be transitioned over a 5-year period. The workgroup wants to ensure this process does not result in a lack of expertise or a lag in permits issued. The workgroup expects that the Memorandum of Agreement between DEC and EPA would schedule the phasing of specific permits and sees a continuing role for the group in designing a specific transition plan.

NEPA, ESA, and EFH

A desirable characteristic of a state program identified by the workgroup is less formal and faster planning and consultation processes. The workgroup sees value in environmental planning and interagency consultation, but believes that the objectives of formal processes can be accomplished with less formal, time consuming, and expensive processes.

EPA's issuance of an NPDES permit to a "new source" is considered a federal action and triggers the National Environmental Policy Act (NEPA) formal planning process. Under primacy, a state-issued NPDES permit does not trigger the NEPA process. The workgroup recognizes that other federal permitting actions, such as the issuance of a CWA 404 permit, could still trigger NEPA, but believes it less likely that NEPA would be triggered or be as burdensome under state primacy for smaller projects. Additionally, a state-issued NPDES permit

does not require formal consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act (ESA) or with the National Marine Fisheries Service under the Essential Fish Habitat (EFH) provisions of the Magnuson-Stevens Fishery Conservation and Management Act.

III. POTENTIAL BENEFITS OF PRIMACY

NPDES program assumption must be associated with improvements in the permitting process while continuing to protect the environment. Based on the characteristics of an Alaska NPDES permitting program the workgroup identified the following specific benefits to primacy.

Time and cost savings in permitting major new facilities. While permit fees will increase under primacy, the cost to the permittee to permit some major new facilities may decrease substantially. This decrease in costs will result from increased communication throughout the permitting and public notice phases of a project, the efficiencies of working with one regulatory agency as opposed to two, reduced travel costs for meetings with the permitting agency, working with permit writers familiar with Alaska conditions, a timelier appeals process, and compliance and enforcement programs based on site-specific and risk-based results.

Greater state role in project planning and less formal process. A state issued NPDES permit to a "new source" would not trigger the formal NEPA planning process, as would EPA issuance of the permit. However, the workgroup recognizes that it is likely other federal actions would trigger the NEPA process, at least for larger, new facilities. Even within a NEPA process, the workgroup sees benefit in the state playing a greater role as the state water quality authority. The workgroup also sees potential benefit in replacing the formal ESA and EFH consultation processes required of EPA with the less formal and faster processes under state primacy while still achieving the objectives of those programs.

Permit requirements better tailored to Alaska conditions. An advantage of state primacy is that the permit writers, who know Alaska's environment and conditions, will be responsible for translating water quality standards into effluent limits. Additionally, Alaska permit writers are skilled in understanding and applying the state's site specific and risk-based water quality standard provisions.

More predictable enforcement. The state can build specific, timely, and predictable steps into an enforcement program while maintaining a commitment to compliance assistance. Early communication of inspection results is key.

Improved and faster appeals process. The workgroup sees benefit in the very different and timelier appeals process under state primacy. A state-run NPDES permit program should have specific time frames for the steps in the appeals process with the DEC Commissioner (or an Administrative Law Judge if designated by the Commissioner) as the final arbiter. Judicial review of state permitting decisions in the Alaska Superior Court instead of the federal 9th Circuit Court of Appeals may also help resolve concerns more quickly.

Alaska-specific guidance documents. EPA develops guidance documents based on its national perspective. A potential benefit of state primacy would be guidance documents that are prepared for the specific needs of Alaska operators and facilities. A state practice of updating the fact sheet after the permit is finalized is another potential benefit. Additionally, posting fact sheets, frequently asked question summaries, and other guidance documents on the state web site would improve access for stakeholders and the public.

Availability of efficiency tools. Streamlining the administrative function in the permitting process is a potential advantage of a state NPDES permitting program. The state can develop tools such as on-line applications, on-line payments, electronic permitting tracking, and on line DMR submittals.

Better permit and Clean Water Act coverage. The workgroup sees the potential that state primacy would result in a higher percentage of dischargers with NPDES permits. NPDES permit coverage is important to protect water quality, as well as to the discharger who needs a permit to demonstrate compliance with the Clean Water Act. Better permit coverage may result from conversion of current state permits to NPDES permits, as well as efficiencies gained through optimal use of general permits. Better permit coverage will improve environmental protection.

IV. COSTS AND CONCERNS

The cost of the state assuming responsibility for implementing the NPDES wastewater permitting program will not be simply financial. The potential for non-monetary effects, such as perceived changes in roles and relationships or how EPA will continue to influence state actions, must be factored into a recommendation.

Fee increase. Under primacy, the state will establish effluent limits, determine other permit requirements, provide compliance assistance, and conduct enforcement. This increased workload will result in increased fees charged for permits. Fees are expected to increase on average by a factor of 1.8. This is a substantial increase, yet fees will still only pay for less than 20% of the program costs with state general funds and federal funds making up the balance.

Lack of resources and expertise. There is potential that the state may not direct an appropriate amount of resources to the NPDES wastewater permitting program. DEC's program implementation plan increases the number of staff from 29 to 43. Additionally, there is concern that the state will not be able to hire and retain staff with the expertise needed to understand the issues associated with complicated discharges from major industrial developments. A program that does not have the resources and expertise to meet its goals will provide no benefit.

Loss of state advocacy. Under EPA management of the NPDES program, the state and applicants have frequently found themselves allies working to change EPA's point of view. There is concern that assumption of the NPDES program will automatically place the state in an

adversarial role with the applicant. This loss of the state as an advocate, working to solve problems, is a concern.

Resources would be better used on other priorities. Recent state fiscal policy has been to limit the growth of government. There are concerns that assuming responsibility for a new program, such as NPDES permitting, will come at the cost of other programs and priorities. No one wants to see the gains the state has made in environmental management compromised because the state has taken on additional responsibility.

Primacy could be temporary. Concern has been expressed that future administrations or legislatures would not support state management of the federal NPDES permitting program. Future administrations or legislatures, faced with fiscal issues or political pressures, could decide to return this program to EPA.

EPA requirements under primacy will differ significantly from current policy. EPA currently exercises some judgment and flexibility in administering the NPDES program. For example, EPA recognizes there are significant constraints in regulating community facilities in rural Alaska and has adapted program objectives and actions accordingly. There is concern that once the state is responsible for the NPDES program, EPA will require the state to take actions the agency would not take itself.

A state administered program may not provide the degree of certainty currently in place at EPA. NPDES permitting under EPA is based upon long-term regulatory and policy provisions providing a consistent, defensible, and known structure. A state-run program could be subject to administrative policy shifts effectively eliminating needed predictability and consistent implementation of the program.

V. BENEFIT/CONCERNS ANALYSIS

The workgroup recognized that it is not possible to conduct a true "cost/benefit analysis" of state primacy for the NPDES program, or to reach consensus on which costs and benefits are most important. There was considerable variation in workgroup representatives' views of the relative "weight" of the benefits and costs (both monetary and non-monetary) based upon their current experience with EPA and their potential future experience under primacy.

Workgroup members used this section as a guide in their discussions with members of the groups they represent while arriving at their member-organization's recommendation regarding whether or not to proceed with primacy.

Permits that are written and administered by those with an understanding of Alaska conditions and facilities is seen by the workgroup as one of the most important benefits to primacy. Workgroup members recognize that derivation of permit limits are constrained by federal rules, but some members see more room for state interpretation than others. Workgroup

members believe that Alaska-specific guidance, particularly for establishing permit monitoring requirements, is the area with the greatest potential value.

The workgroup believes that permittee review of draft and proposal final permits is a key benefit. EPA Region 10 policy has been to withhold draft and proposed final permits from the permittee. When permittees are given an opportunity to review the draft and proposed final permit, typographical and significant technical errors and omissions can be corrected prior to public notice and permit issuance. A draft permit, free of errors or misinterpretations, ensures that the public and stakeholders have accurate information when determining if they have concerns and articulating them when they do. Errors in the final permit leave the permittee with limited, undesirable choices: 1) request a permit amendment which is a lengthy process; 2) appeal the permit; or 3) live with the error until the permit is renewed in five or more years.

The workgroup sees substantial benefit in using the state appeals process under primacy over the federal process. Under the state process, new permits are not automatically stayed upon appeal, the Commissioner of DEC is the final arbiter of administrative appeals (or an Administrative Law Judge if designated by the Commissioner), and judicial review of state permit decisions are handled by the Alaska Superior court, rather than the federal 9th Circuit Court of Appeals. The benefits to new projects are extremely important since the state process presents an opportunity for quicker resolution and timelier start-up of new projects.

Administrative efficiencies under primacy are viewed by the workgroup as a major potential improvement. The workgroup believes those with the most immediate and tangible benefits include:

- The opportunity, efficiency, and cost savings of working with one rather than two regulators (permitting agencies).
- The use of electronic permit applications and fee payment, electronic permit generation, and electronic Discharge Monitoring Report submittal and review.
- Optimal use of general permits.

The workgroup members, particularly the mining representative, believe that a reduction in permit issuance time under primacy for major new developments is a major benefit of primacy and presents the potential for significant costs savings. A cost analysis conducted by DEC for the workgroup for a hypothetical new mining project indicated that under primacy an NPDES permit issued 6 months quicker could save the company millions of dollars over the life of the project.

Overall, the workgroup is concerned about the currently projected permit fee increases and the potential for future increases in fees.

The workgroup is concerned about the state having consistent and sufficient state appropriations to run the program from year to year, given the state's fiscal situation.

The workgroup is concerned about the state's ability to hire and retain qualified staff. Despite hearing the state's plan to hire, train, and retain competent staff, and EPA's offer of staffing and technical assistance, workgroup members remained concerned about the state's

ability to have the necessary expertise on board at the same pace that permits will be phased in under primacy.

The workgroup is concerned that primacy will result in divided jurisdiction between the state and EPA. Under primacy, EPA will retain the responsibility to issue and administer NPDES permits for facilities that operate outside of state waters (primarily oil and gas platforms and floating seafood processors) and for sewage treatment facilities that have an approved waiver of secondary treatment requirements under Section 301(h) of the Clean Water Act. The workgroup recognized that the state could take steps to mitigate to some extent the effect of the split jurisdiction through its agreements with EPA.

Workgroup members strongly objected to a member of the public's premise that primacy will result in a "rollback" of environmental protection. A public attendee at the workgroup meetings indicated that the concern stems in part from a reduction in the federal permitting process – NEPA review, ESA, EFH, and Tribal consultations. Members of the workgroup did not agree, based upon their discussions that:

- Permit limits under primacy will be based on the same federal rules.
- State Water Quality Standards will continue to be the basis for effluent limits and monitoring.
- Tribes and federal agencies will be consulted through the public participation process.

The workgroup suggested that contrary to "rollback" of environmental protection a more efficient process under primacy should actually improve the environmental result.

The workgroup did not concur with a concern raised by a member of the public about the potential for lack of consistency with national enforcement priorities. A public attendee at workgroup meetings expressed concern that primacy in Alaska would result in different priorities than those established by EPA for the nation as a whole. They felt that primacy could create inconsistent enforcement and penalties creating competitive advantages and disadvantages across state lines. Workgroup members did not share these concerns, in part, because:

- 45 other states already have primacy for the NPDES program.
- EPA will continue in an oversight role.
- National priorities are translated into annual performance partnership agreements between EPA and the states.
- Some inconsistency is desirable to reflect actual regional conditions.
- There are situations where forcing consistency could actually result in reduced environmental protection.

The workgroup recognizes that the EPA regions are not entirely consistent currently. However, the workgroup also recognizes that whether Alaska has NPDES primacy has no bearing on consistency, or lack thereof, between regional EPA offices. The group also noted that there are policies in other EPA Regions that could be viewed as a potential benefit if implemented in Alaska.

A benefit associated with a change in the NEPA process was discussed by the workgroup without a conclusive result. Under primacy, state issuance of an NPDES permit to a "new source" would not trigger a NEPA review, as it does when EPA is the lead permitter. No formal

NEPA process would invite potential for significant efficiency. At the same time, the workgroup recognized that there would be a limited number of major projects that would not trigger NEPA because other federal actions would likely trigger NEPA anyway. Even for projects requiring a NEPA process, some workgroup members see value in the state, rather than EPA, serving as the lead "cooperating agency" for water quality.

VI. ISSUES RAISED BY THE PUBLIC

All workgroup meetings were open to the public. While discussing the benefits and concerns associated with primacy, public participants raised a number of issues. The workgroup considered, but did not always agree with, the concerns, which included:

- Lack of formal government to government consultation where Tribes provide traditional ecological knowledge and comment on the impact of the discharge on subsistence resources before the public comment period.
- Concern about adequacy of staffing levels for implementation of the NPDES program.
- DEC ability to retain expert staff to operate an effective and protective program.
- Potential for DEC consultant conflicts of interest.
- The greater flexibility available to a state managed NPDES program could result in reduced environmental protection.
- Alaska permit writers will be subject to greater pressure from industry than permit writers in Seattle.
- A state managed program could result in a lack of consistency with national enforcement priorities.
- The potential for a facility to be authorized to discharge under a general permit when an individual permit that includes site-specific factors would be more appropriate.
- Public and Tribal membership should be included in any future NPDES implementation workgroup.
- Concern about lack of sufficient future funding to run the program.
- Reduced public participation on a project that no longer triggers the NEPA, ESA, or EFH requirements.

VII. TOPICS DISCUSSED IN GREATER DETAIL

As the workgroup explored the general concept of state NPDES primacy, it delved into a number of specific topics. Five of the six all-day meetings focused on learning and information gathering. The following summarizes some of the key pieces of knowledge the workgroup gained.

Electronic Permit Applications, Data Submission, and Payment Procedures

Applicants can currently pay DEC invoices for wastewater, food service, and air permit fees using a centralized online payment center.

DEC will begin using an improved data management system in the fall of 2005. When applicants enter information into the new web based permit applications, the information will automatically populate the department database, eliminating the need for DEC staff data entry. The new data management system will also facilitate the electronic submission of discharge monitoring reports (DMRs), including those with qualified data, relieving a heavy paperwork burden for both permittees and DEC. Under primacy, the state data management system would be capable of meeting NPDES reporting requirements to the EPA national data system.

Inspection Ranking System

With input from a previous stakeholders workgroup in 2000, DEC developed a risk-based inspection ranking system in order to determine which facilities should be inspected each year. The system prioritizes facilities for inspection based on potential threats to human health and the environment. Under primacy, EPA generally expects a state to inspect all "major" facilities each year. EPA has indicated that after an initial primacy transition period, there may be some flexibility for DEC, using its risk-based inspection ranking system, to replace an inspection of a low risk "major" facility for a number of "minor" facilities (i.e. exchange one major for two minors).

Permit by Rule

The use of permit by rule (PBR) to simplify the permitting process is not as efficient under the Clean Water Act as it is under state law. The CWA requires all permits to be renewed every five years. EPA issued a PBR for stormwater, but it was struck down by the federal 9th Circuit Court of Appeals. Under primacy, PBR may only be possible if DEC revisits the regulations every five years, somewhat negating the efficiency of having a Permit by Rule.

Underground Injection Control Program

The state does not need to have an approved UIC program to pursue NPDES primacy. Ten states with NPDES primacy do not have an approved UIC program.

Reporting Metal Limits

There is no flexibility under a state managed NPDES permitting program for using dissolved rather than total recoverable metals for effluent limitations. There are two narrow exceptions: 1) when the approved analytical method reports metals in the dissolved form; and 2) technology-based effluent limits for discharges that are not subject to effluent guidelines promulgated by EPA. However, the use of translators is an accepted method of converting Alaska's dissolved metals water quality standards into appropriate total recoverable effluent limits.

Public Notice Process

The decision to conduct a public hearing in state law hinges on "good cause" as opposed to EPA's "significant interest." The state does not have to public notice a decision to deny a permit application. The state currently can hold a hearing as soon as 15 days after public notice; under primacy DEC would have to meet the federal requirement of 30 days. DEC will be required to prepare response to comments received documents, which currently the department does on a case-by-case basis. DEC will not be able to only use the state of Alaska's Online Public Notice

web site because the federal regulations require the public notice of a draft permit in the newspaper.

DEC Staffing

DEC intends to use agreements with EPA to bring experienced permit writers to Alaska, ensuring that the needed expertise to write permits is available at the time of primacy. These temporary, one- to two-year assignments would provide on the job training to the newly hired staff. DEC also has the ability to access technical expertise through term contractors who can be hired quickly to meet short-term needs. The workgroup encourages DEC to establish employee classifications at levels sufficient to retain technically qualified staff.

Fees

HB 361 passed the legislature in 2000 setting state policy for fees charged by resource agencies, including DEC fees for wastewater discharge permitting. The law requires that fees be set in statute, regulation, or established in a negotiated services agreement. Wastewater fees can only include the direct costs of DEC permitting and compliance work and travel for inspections of businesses with more than 20 employees. (A facility with less than 20 employs that has a parent company with more than 20 would be charged for travel.) Fixed fees must be established for standard categories of general and individual wastewater discharge permits. Negotiated service agreements can be used for complex projects where a set fee is negotiated between DEC and the permittee along with project milestones. Fees must be reviewed and updated every 4 years.

Penalties

In order to assume primacy, the state must have the legal ability to assess civil penalties in at least the amount of \$5,000 per day. The state currently has this authority. The state is not required to seek that or any other minimum amount of penalty.

Memorandum of Agreement

The EPA Regional Administrator and the Commissioner of DEC enter into a Memorandum of Agreement (MOA) as a part of the state's process to seek authority to administer the NPDES permitting program. The MOA would include provisions for the transfer from EPA to the state of pending and existing permits, the classes and categories of permit applications, draft permits, and proposed permits that the state will send to EPA for review, comment, and where applicable objection. Additionally, the MOA will identify the state records and reports to be submitted to EPA. MOA's also contain state/EPA dispute resolution procedures.

Performance Partnership Agreements

The state and EPA negotiate an annual work plan under a Performance Partnership Agreement (PPA). With primacy, the PPA would contain such items as compliance targets negotiated between the state and EPA. The PPA and MOA would provide details on how the NPDES program will be implemented and may be subject to further scrutiny by the workgroup as part of the primacy process, should the workgroup make that recommendation.

EPA Objection and Overfile Process

Federal regulations (40 CFR 123.44) prescribe the process by which EPA can review and object to state issued NPDES permits, as well as the grounds for objection. The regulations establish a

review and objection process for proposed permits – permit status after the close of the public comment period but before issuance. However, EPA may agree via the MOA to review draft permits rather than proposed permits. The state would only have to forward the proposed permit to EPA if it differed from the draft permit, EPA had objected to the draft permit, or there was significant public comment. In the MOA documents for the two most recently delegated NPDES states (Maine and Arizona), EPA agreed to review draft permits. The Alaska MOA would likely be similar in this regard.

When EPA receives a draft permit for review, as agreed to in the MOA, they can use the 30-day public comment period to submit comments, including general objections to the permit. When EPA provides notice of general objection, it then has an additional 60 days to provide specific objections. Although typically not the norm, EPA can still object to a proposed permit following the public notice period but prior to issuance. The state has 90 days to satisfy EPA's objections.

If the state fails to satisfy the objections, EPA can issue and assume authority for the permit for one permit cycle, at the end of which authority for the permit reverts to the state. While the procedure exists, in practice EPA Region 10 typically works with the state to satisfy the objections and has never federalized an NPDES permit.

There are specific grounds on which EPA must base its objections to draft permits in NPDES primacy states. The two most common grounds for EPA objection are also the most subjective. They are 1) a misinterpretation of federal regulation or the Clean Water Act, and 2) inadequacy of monitoring requirements.

Under primacy, states provide draft permits to the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (the "Services"). The Services provide comments directly to the state on the potential impact of the discharge on federally listed species or critical habitat. The Services may petition EPA to review the draft permit if they believe that the state has not satisfied their concerns. If the EPA agrees that the draft permit does not comply with the Clean Water Act, then EPA works directly with the state to modify the permit or may federalize the permit.

Tribes may also petition EPA to review a draft permit if they believe that it does not comply with the Clean Water Act. Any EPA objection would need to be based upon the same grounds established in 40 CFR 123.44. Formal consultation would only be triggered if EPA federalized the permit.

Administratively Extended Permits

EPA and DEC can administratively extend individual or general permits past the expiration date. However, new discharges cannot be authorized under an administratively extended general permit, and applicants must apply for an individual permit.

Transition Process

There are six components to the NPDES permitting program.

1. NPDES Permitting (both individual and general permits)
2. Stormwater

3. Compliance and Enforcement
4. Permitting Federal Facilities (Optional)
5. Pre-treatment Program
6. Biosolids Management Program (Optional)

DEC proposes to assume responsibility for the first five components. The NPDES permitting program consists of developing, issuing, and modifying permits. The stormwater program regulates wastewater discharges generated during runoff from land and impervious areas. As part of the compliance and enforcement program, permittees are required to monitor discharges and DEC reviews monitoring reports, conducts inspections, and may take appropriate enforcement actions. The federal facilities program issues permits for facilities such as military bases and national parks. The pre-treatment program sets standards to control pollutants from industrial users who discharge directly to a publicly owned treatment works. DEC proposes not to assume responsibility for the biosolids program, which regulates the disposal of sewage sludge.

The Clean Water Act allows states to phase in NPDES program responsibilities over 5 years. Designing a specific transition plan with timeframes to assume different aspects of the program will be a subject for the workgroup should primacy proceed.

Application for Primacy

A state must formally apply to EPA to assume NPDES primacy. The State NPDES application must describe how the state's program satisfies the required legal framework and meets the federal requirements governing NPDES permitting and compliance procedures. The application must include:

- A letter from the Governor requesting approval of the state's application.
- A program narrative that describes how the state will issue permits, ensure permit compliance, perform enforcement, fund the program, track issued permits and enforcement actions, and submit periodic reports to EPA.
- Copies of all applicable state statutes and regulations (i.e. new NPDES regulations).
- An Attorney General statement of legal authority that confirms the state's laws and regulations are sufficient to implement the NPDES program.
- A signed Memorandum of Agreement between the state and EPA.
- A compliance assurance agreement that will ensure that legal requirements are met and compliance and environmental goals are achieved.

If a state's application is acceptable, EPA issues a public notice of its intent to approve the state's submittal. Following public comment, EPA takes final action to delegate the NPDES program to the state. EPA is responsible for conducting Endangered Species Act consultations with the U.S. Fish and Wildlife Service and the National Oceanic Atmospheric Administration fisheries service as part of its review and approval of a state's NPDES program application. EPA will also seek input from Tribes.

Procedure for Returning NPDES Primacy to EPA

The criteria for withdrawal of a state NPDES program are established in 40 CFR 123.63. The process for withdrawal of a state NPDES program is found in 40 CFR 123.64. No state has ever returned an NPDES program to EPA.

Current EPA Permit Coverage

According to EPA Region 10 statistics, there are 2,287 facilities covered by 16⁹ wastewater permits (155 individual permits and 13 general permits) in Alaska. Seventy-one (71) facilities are considered "major" facilities. Forty-four (44) "major" facilities have an individual permit and 27 "major" facilities are covered by three general permits. As of July 7, 2004, 77% of all permits (individual and general) for "major" facilities are current, and 80% of the individual permits for "major" facilities are current.

There are currently 2,216 "minor" facilities in Alaska. Individual permits cover 111 facilities and 10 general permits cover 2,105 facilities. As of July 7, 2004, 94% of all "minor" permits (individual and general) are current, but only 10% of the "minor" individual permits are current. Many "minor" facilities are operating on administratively extended permits that are out of date for many pollutants (e.g. chlorine) or do not have water quality based effluent limits. EPA is aware of 64 unpermitted "minor" facilities.

Enforcement Quotas

EPA provides national compliance goals for state NPDES programs but does not establish specific enforcement quotas.

VIII. RECOMMENDATIONS OF THE WORKGROUP

The majority of the workgroup recommends or does not object to Alaska assuming primacy for the NPDES wastewater discharge permitting program contingent on specific conditions. The large community wastewater workgroup member does not think that primacy will provide significant benefits to this segment of the regulated community and does not support primacy. Concerns include the increase in fees, uncertainty regarding EPA oversight, and the potential for the state permit and compliance requirements to be more restrictive than EPA. However, this member recognizes the potential benefits of NPDES primacy to industrial permittees and doubts that his represented group will offer any significant objections should the state decide to pursue primacy. The oil and gas representative was neutral in her support of primacy, but would not oppose assumption if specific provisions are included in the program and implementation of primacy.

The workgroup reached consensus on the following 11 NPDES program elements that must be included in the proposed legislation authorizing state assumption of the NPDES program, intent language associated with legislation, or implemented in regulation or as program guidance as the program is developed.

Costs controlled through the fee structure established in HB 361. Primacy legislation must include a commitment that the fee structure established in HB 361 will apply to state issued

NPDES permits. This ensures that fees are based on the department's direct permitting and compliance costs.

Continued permittee participation during program development. The workgroup believes that permittee participation during program development will result in a NPDES permitting program that is protective of the environment without unnecessarily burdening the regulated community. Permittees should be involved in the development of the MOA with EPA and particularly in designating the phasing of the transfer of permits from EPA to the state. The expectation for permittee involvement in program development must be included in the intent language of the proposed legislation. Workgroup members recommend that timber industry permits be among the first to transition to the state. It is essential that EPA continue to participate to ensure the development of an application that can be approved as quickly as possible.

Program Stability. A successful NPDES permitting program requires long-term fiscal stability. Alaska's proposed NPDES program will be funded through fees, federal grants, and state general funds. The workgroup expects that the state will provide sufficient and consistent funding for the NPDES program. The fiscal note for primacy legislation must indicate the need for long-term fiscal stability for the NPDES program.

Permittee review of draft and proposed final permits. The opportunity for the permittee to review both the draft and proposed final permit prior to issuance and to discuss them with DEC in order to correct errors, omissions or misinterpretations is critical. The opportunity for permittee review must be included in proposed primacy legislation.

Permit monitoring and reporting requirements are legally required. Workgroup members recognize that scientific studies and the collection of additional sampling data are beneficial to understanding the receiving environment and determining future permitting requirements. However, requiring the reporting of this data as a permit condition invites potential permit noncompliance and reduces industry willingness to conduct voluntary studies. Workgroup members prefer that supplemental monitoring be included in a separate agreement rather than in the permit. Primacy legislation must include a limitation that only sampling and reporting requirements necessary to determine compliance with effluent limits and water quality standards or required in legal settlements be included in permits.

Formal training plan and implementation of the plan for DEC permit and compliance staff. Well-trained staff are required to write appropriate and expeditious permits. The state NPDES program must include training plans and opportunities for staff to receive that training. The workgroup encourages DEC to use EPA, as proposed, to mentor state staff during the initial phases of primacy.

Ensure permit consistency between areas under state and federal jurisdiction. Recognizing EPA will retain permitting responsibility for facilities in the federal waters three miles off shore, the workgroup recommends DEC work with EPA on permit consistency for seafood processors and oil and gas activities that occur in both jurisdictions.

Use of contractors. Continued use of contractors to deal with workload surges or specific technical permitting issues is a critical element of a state primacy program. Primacy legislation and regulation must establish a mechanism for the department to develop a list of contractors, vetted for conflict of interest concerns, which can be used for permit related work.

No automatic staying of permit conditions during appeals. State law does not automatically stay the terms and conditions of a permit during the appeals process. A state NPDES program must reflect this existing appeals process.

Senior DEC management review of permits that set precedents. The workgroup recommends that senior DEC management review controversial or precedent setting permit provisions. Management participation ensures understanding of the potential for far reaching implications when new or controversial precedents are established and are an important element of a state NPDES permitting program.

Goal of an application submitted to EPA by June 2006. Recognizing that the state has no control of EPA's approval process, the workgroup wants DEC to submit a primacy application to EPA by June 2006. This goal must be included in the intent language of the proposed legislation.

**Department of Environmental Conservation
NPDES Primacy
Resource Comparison**

Background

There is currently a total of 51 DEC and EPA staff working on wastewater permitting for Alaska. DEC is proposing a staffing level of 43 positions ("full-time equivalents, or FTEs") for a state-run program. This amounts to a reduction of 8 positions from the current total. That reduction is a result of the efficiency gain associated with a single agency, instead of two, implementing a single program.

To confirm the accuracy of the proposed resource commitment, DEC looked at the staffing levels and budgets of the other EPA Region 10 primacy states (Washington and Oregon) on a staff per permit, and a budget per-permit basis.

Comparison between Alaska and EPA Region 10 Primacy States Staffing

	Alaska	Oregon	Washington
Program Staffing			
FTE (Full Program)	43	52	117
FTE (Permitting & Compliance)	24	18	47
Permit Caseload			
No. of Individual Permits (IPs)	343	363	839
No. of Major (Individual) Permits	45	77	80
No. of General Permits (GPs)	21	16	11
No. of IPs and GPs / FTE (Full program)	8	8	7
Program Budget			
Annual Program Budget (millions)	\$4.8	\$4.0	\$17.8
Budget per permit (dollars)	\$13,187	\$9,171	\$20,940

IP = Individual Permit
GP = General Permit
FTE = Full-Time Equivalent position

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NPDES Primacy

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National Pollutant Discharge Elimination System (NPDES) Primacy



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NPDES Application submitted to EPA

On June 29, 2006 the State of Alaska formally applied to the U.S. Environmental Protection Agency for authority to permit wastewater discharges in Alaska. Currently, EPA issues National Pollutant Discharge Elimination System (NPDES) permits, which are then certified by DEC. The Clean Water Act establishes the NPDES wastewater permit program and encourages state to implement the program.

History

NPDES Primacy Bill Signed

The Governor signed Senate Bill (SB) 110 into effect on August 27, 2005. This bill authorizes the state to pursue primacy for the NPDES wastewater discharge permitting and compliance program established under the Clean Water Act. The bill directed DEC to submit an application for NPDES program primacy to EPA by July 1, 2006.

NPDES Work Group

Prior to the passage of SB 110, DEC convened a permittee Work Group to examine the concerns, costs, and benefits of state primacy and to recommend whether the state should proceed toward primacy. Their findings and recommendations are contained in the February 2005 NPDES Primacy Workgroup Report and were used in the development of SB 110.

DEC continued to work with the NPDES Work Group in designing Alaska's NPDES program and in developing the primacy application for EPA.

Of Interest...

- › [Primacy Application](#)
- › [State applies for Governor's Press](#)
- › [SB 110](#)
- › [Governor Signs Primacy Bill](#)
- › [NPDES Primacy Background](#)
- › [Work Group](#)
- › [NPDES Report to Legislature 2007](#)
- › [Sign up for primacy email updates](#)

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NPDES Primacy

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NPDES Primacy Work Group

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Between November 2004 and January 2005, DEC convened six meetings of a permittee Work Group to examine the concerns, costs and benefits of primacy and to recommend whether the state should proceed toward primacy. The Work Group was composed of one representative from each of the following:

- Oil and gas industry sector
- Mining industry sector
- Seafood industry sector
- Timber industry sector
- Construction industry sector
- Large community wastewater permitting
- Small community/tribal wastewater permitting

EPA, as the current NPDES authority and the delegator of primacy, also participated.

The Work Group's findings and recommendations from those first 6 meetings are contained in the February 2005 NPDES Primacy Workgroup Report.

Primacy legislation (SB 110) passed on May 10, 2005. The bill directed DEC to submit a primacy application to EPA for their approval before July 1, 2006. The bill also directed DEC to continue to work with the permittee Work Group.

The NPDES primacy Work Group met 6 more times and participated in 4 teleconferences between June 2005 and June 2006. The Work Group provided key assistance in the design of the APDES program and application development.

All work group meetings were open to the public.



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- › NPDES Home Page
- › Work Group Meetings
- › Meeting 13- December 13, 2004
- › Meeting 12 - June 2005
- › Meeting 11 - February 2005
- › Meeting 10 - November 2004
- › Meeting 9 - September 2004
- › Meeting 8 - August 2004
- › Meeting 7 - June 2004
- › Teleconferences

Of Interest...

- › NPDES Primacy Report, Feb 05
- › Primacy Application
- › SB 110
- › Sign up for primacy email updates

Division of Water

NPDES Primacy



State of Alaska > DEC > Water > NPDES > NPDES Workgroup

Meeting 7 June 6, 2005

Sharon Murgan
(907) 465-5530

Handouts

- Agenda
- Process Outline
- SB 110
- SB 110 Fiscal Note
- Distribution of Program Costs
- Work Plan - Application Elements
- Work Plan - Objectives & Tasks
- State Program Requirements (40 CFR Part 123)
- Continuing Planning Process (40 CFR Part 130.5)
- Arizona Program Description
- Arizona MOA
- Arizona Attorney General's Statement
- Arizona Governor's Letter
- Oregon Compliance Assurance Agreement
- Timeline for Regulation Development
- Special Interest Areas

Sample of informational available on each meeting

Attendance Sheet

Minutes

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 149
 (H) Publish Date: 2/21/07

Revision Date/Time (Note if correction): _____ Dept. Affected: Dept of Environmental Conservation
 Title: "An Act relating to the authority of the Dept. of Env. RDU Division of Water
Cons. to require certain monitoring, sampling. ." Component Water Quality
 Sponsor: Rules Committee
 Requester: Governor Component No. 2062

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2008 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

This bill would align the state's wastewater permitting and compliance requirements with the Environmental Protection Agency's (EPA) in order to make Alaska's program approvable by EPA. This bill will have no fiscal impact.

Prepared by: Lynn J. Tomich Kent, Director Phone (907) 269-6281
 Division: Water Date/Time 1/10/07 9:00 AM
 Approved by: Mike Maher - Acting Commissioner Date _____
 Agency: Department of Environmental Conservation

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION
OFFICE OF THE COMMISSIONER

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March 1, 2007

The Honorable Craig Johnson
Co-Chairman, House Resources Committee
State Capitol, Room 126
Juneau, AK 99811

The Honorable Carl Gatto
Co-Chairman, House Resources Committee
State Capitol, Room 108
Juneau, AK 99811

Dear Representative Johnson and Representative Gatto:

The Department of Environmental Conservation (DEC) respectfully requests a hearing for HB 149 "An Act relating to the authority of DEC to require certain monitoring, sampling, and reporting and to require permits for certain discharges of pollutants."

In 2005, the Alaska legislature passed legislation which directed DEC to take all actions necessary to assume the National Pollutant Discharge Elimination System (NPDES) wastewater discharge permitting authority from the Environmental Protection Agency (EPA). The program includes responsibility for issuing and monitoring compliance with the permits.

EPA approval of a state NPDES Program requires that the state have comprehensive statutory authority to implement the program. EPA has identified a number of areas where current state statutes need to be amended to complete the statutory underpinnings for an Alaska NPDES program. Our attorneys agree with EPA's assessment and conclusions in this regard. HB 149 addresses all shortcomings in the current statutes. Correcting the identified statutory shortcomings is a prerequisite to further progress towards NPDES primacy for Alaska.

I have enclosed several documents for your information as you consider this important piece of legislation, including Governor Palin's transmittal letter and a copy of the Department's Annual Report to the Legislature on the status of the



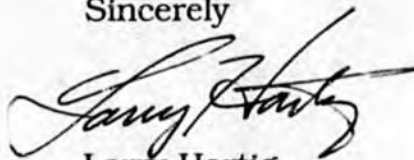
The Honorable Craig Johnson
The Honorable Carl Gatto

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March 1, 2007

primacy effort. If you require further information, please contact me or Linda Hay, DEC's Legislative Liaison, at 465-5290.

Sincerely

A handwritten signature in black ink, appearing to read "Larry Hartig", written in a cursive style.

Larry Hartig
Commissioner

Enclosures

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 20, 2007

The Honorable John Harris
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182



Dear Speaker Harris:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the authority of the Department of Environmental Conservation (department) to require certain monitoring, sampling, and reporting and to require permits for certain discharges of pollutants, and to criminal penalties for violations of the permit program.

Under the federal Clean Water Act, discharges of pollutants to surface waters require a permit either from the United States Environmental Protection Agency (EPA), or from a state that has received approval from the EPA to administer the permitting program. Alaska has applied to the EPA for approval of a state permitting program, and the EPA is currently reviewing Alaska's application. Under federal law, the EPA cannot approve a state program unless it is as stringent as the EPA's program. This bill would revise certain provisions of law governing the department's permitting and enforcement authority, in order to align the state's permit requirements with the EPA's. The changes are all designed to help facilitate final approval by the EPA of Alaska's program.

Three of the proposed changes would involve current exclusions from the requirement of getting a discharge permit. The first exclusion is for sewage. Current state law provides that the discharge of sewage into a "sewerage system" does not need a permit. Federal law exempts only discharges of sewage into "publicly owned treatment works." The difference is that the federal exemption is for sewage going to a place where it will receive treatment; while the state exemption is broader and needs to be amended in order to reflect a treatment requirement. The solution offered by this bill would be simply to change the state exemption so that it matches the EPA's: only sewage discharged to a publicly owned treatment works would be exempt from the permit requirement.

The Honorable John Harris

February 20, 2007

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The second exclusion would be for discharges that are incidental to certain drilling and trenching activities. Current state law exempts those discharges from the permit requirement if they don't result in a discharge "directly into any surface water." To align state law with the federal permit program, that phrase would be changed by deleting the word "directly" and changing "surface water" to "waters of the United States," a term defined identically in state and federal regulations.

The third and final exclusion is for the discharge of munitions on active ranges. The federal definition of "pollutant" at 40 C.F.R. 122.2 includes munitions, so a permit is required for their discharge to waters of the United States. Yet state law exempts the discharge of munitions from the permit requirement. This bill would limit the state's munitions exemption to discharges that do not enter waters of the United States, again to bring state law into line with federal law.

The bill includes three other provisions. One would give the department the authority to require site sampling and reporting of results analogous to what the EPA exercises under sec. 308 of the Clean Water Act. Another clarifies that the department's permitting authority extends to all "pollutants" listed under federal law. The third provision also follows federal law (33 U.S.C. 1319(c)) by allowing the department to pursue criminal enforcement for negligent violations of any aspect of the state permit program.

This bill is an essential component of the state's effort to receive primacy from the EPA in the permitting of discharges in our state. I support continuing forward with efforts to receive primacy, and I urge your prompt and favorable action on this measure.

Sincerely,

Sarah Palin
Governor

Department of Environmental Conservation
NPDES Primacy
Overview and Status – February 2007

Background

Section 402 of the Clean Water Act (CWA) requires that all discharges to surface waters be permitted under the National Pollutant Discharge Elimination System (NPDES) permit program.

The CWA intends for states to implement (to have “primacy” for) the NPDES program with the Environmental Protection Agency (EPA) acting in an oversight role.

Forty-five states have primacy for the NPDES program. The four other states, aside from Alaska, that do not have NPDES primacy are Idaho, New Mexico, New Hampshire and Massachusetts.

EPA is the NPDES authority in Alaska. DEC plays a secondary role “certifying” that EPA permits meet state water quality standards and issuing state permits for very small discharges that EPA cannot get to.

In 2005, the Alaska legislature (SB 110) directed DEC to take all actions necessary to assume the NPDES discharge permitting authority including responsibility for issuing and monitoring compliance with the permits.

NPDES Program Components

There are six components to the NPDES permit program. The State intends to assume responsibility for the first five.

1. *NPDES Permitting* which amounts to developing, issuing, modifying and renewing the permits.
2. *Stormwater Program* which consists of permitting stormwater discharges from construction and industrial activities as well as permitting the stormwater collected and discharged by large municipal storm sewer systems.
3. *Compliance and Enforcement* which includes monitoring compliance with permit terms and conditions and taking enforcement action when necessary.
4. *Federal Facilities* which involves permitting of discharges from federally-owned facilities, such as Department of Defense installations.
5. *Pre-treatment Program* which consists of regulating highly toxic discharges into sewerage systems.
6. *Biosolids Management Program* which regulates the disposal of sewage treatment byproducts, or “sludge.”

Department of Environmental Conservation
NPDES Primacy
Overview and Status - February 2007

The Biosolids component is a small component of the NPDES program in Alaska. States have the option whether to assume primacy for this part of the program.

NPDES Primacy Application

The application to assume NPDES primacy includes:

1. A *letter from the Governor* requesting approval of the state's application;
2. A *program narrative* that describes how the state will issue permits, ensure permit compliance, perform enforcement, fund the program, track issued permits and enforcement actions, and submit periodic reports to EPA;
3. An *Attorney General statement* of legal authority that confirms the state's laws and regulations are sufficient to implement the NPDES program;
4. A signed *Memorandum of Agreement (MOA)* between the state and EPA that establishes timeframes for the state to assume authority for the program components over a five-year period; and
5. A *compliance assurance agreement* developed between the State and EPA that describes the methods the State will employ to assure that permittees comply with the terms and conditions of their permits.

Application Status

DEC submitted the NPDES primacy application to EPA by July 1, 2006, as directed by the legislature.

EPA provided an extensive list of comments on the application on October 31, 2006. It was not until EPA reviewed the Department's full application submission that they identified several statutory shortcomings that must be corrected in order to demonstrate that the Department has the necessary authority to implement the NPDES program. Legislative action on these statutory amendments is being pursued during the current legislative session (HB 149 and SB 91).

DEC is also making revisions to the program description, Attorney General's statement, MOA, and regulations in response to EPA comments.

DEC intends to submit a revised application to EPA this summer, and anticipates EPA program approval by the end of the calendar year.

Sectional Analysis of SB 91/HB 149

Sec. 1.

Gives ADEC authority equivalent to that of EPA under sec. 308 of the Clean Water Act (CWA), to require monitoring, sampling and reporting.

Sec. 2.

Broadens the scope of ADEC's permitting authority to cover discharges of waste material as well as disposal. Also deletes an exemption for domestic sewage, which is dealt with elsewhere (see sec. 4 of bill, amending AS 46.03.100(e)(1)).

Sec. 3.

Clarifies that it is up to ADEC what form of authorization to require for any given discharge or activity.

Sec. 4.

This section changes three current exemptions from the permit requirement, in all cases to comply with the scope of the federal NPDES program. The exemptions are for domestic sewage, discharges incidental to drilling and trenching, and munitions.

Sec. 5.

Expands ADEC's authority to include monitoring and reporting requirements in APDES permits to be equivalent to EPA's authority under the CWA.

Secs. 6 & 7.

Clarify that the state term "waste material" covers "pollutants" as defined under federal law.

Sec. 8.

This follows the CWA in making negligent violations of the NPDES permit program enforceable through criminal misdemeanor charges.

Sec. 9.

Provides for an immediate effective date, to facilitate timely program approval by EPA.

NPDES Program Approval Criteria

Federal law sets out the criteria that EPA uses in reviewing and approving state permit programs for discharges of pollutants into surface waters. The criteria are listed broadly in section 402(b) of the federal Clean Water Act (codified at 33 U.S.C. § 1342(b)). More detailed approval criteria are found in EPA's regulations, at 40 CFR Part 123. A brief summary of both the statutory and regulatory approval criteria follows.

Under the Clean Water Act (CWA), a state seeking approval of its NPDES program must have authority to do the following¹:

- issue permits that comply with the CWA, are limited to five years duration, can be terminated or modified for cause, and control disposal into wells;
- enter onto the premises of regulated facilities to inspect and monitor, and require reports as provided in CWA § 308;
- provide public notice and opportunity to comment on permit applications;
- ensure that the EPA Administrator also gets notice of each application;
- ensure that it won't issue a permit that would impair anchorage or navigation in navigable waters;
- enforce permits and the program through civil and criminal penalties;
- regulate publicly owned treatment works (POTWs, for treatment of domestic wastewater) in compliance with the CWA; and
- ensure that industrial users of POTWs also comply with CWA requirements.

¹ Note: this list is a simplified summary of the detailed provisions found in Clean Water Act section 402(b)(1)-(9).

EPA has promulgated regulations, and also issued guidance, that together establish very detailed requirements for a state permit program. The regulations are at 40 CFR Part 123. Alaska's on-going efforts to obtain NPDES primacy have been largely guided by the regulatory criteria set out there, and the discussions between ADEC and EPA over the details of the state's proposed program routinely return to the issue of what federal law requires.

While a comprehensive summary of those requirements is not practical, given their complexity, one over-riding requirement is that the state program must be as stringent as the federal program. A state cannot cut corners on any matter subject to a regulatory requirement. In effect this limits the flexibility a state has when it chooses to implement its own permit program.

All of the provisions of HB 149/SB 91 are designed to satisfy EPA's stated concerns that current state law is not as stringent as federal law on certain specific topics. ADEC and the Department of Law will be available to answer questions that legislators may have about any of the provisions of this bill.

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION
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January 24, 2007

The Honorable Lyda Green
President of the Senate
Alaska State Legislature
State Capitol, Room 516
Juneau, Alaska 99801

The Honorable John Harris
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, Alaska 99801

Dear President Green and Speaker Harris:

The 24th Alaska Legislature passed Senate Bill 110 during its 1st regular session in 2005 directing the Department of Environmental Conservation (DEC) to seek primacy from the Environmental Protection Agency (EPA) for the National Pollutant Discharge Elimination System (NPDES) wastewater discharge program. Governor Murkowski signed this legislation into law on August 27, 2005 with an effective date of November 25, 2005. Section 6 of the bill reads as follows:

REPORT TO THE LEGISLATURE. Until full authority for administering the National Pollutant Discharge Elimination System has been transferred to the Department of Environmental Conservation, the Department of Environmental Conservation shall submit, within 10 days after the date the Legislature convenes in regular session, a report to both houses of the Legislature and the governor that includes the following information:

- (1) the department's progress in preparing and submitting its application to the United States Environmental Protection Agency by June 30, 2006;
- (2) a description of the progress by the United States Environmental Protection Agency in reviewing the state's application and the expected or actual date and contents of the agency's approval; and
- (3) the progress made by the Department of Environmental Conservation and the United States Environmental Protection Agency during the five-year National Pollutant Discharge Elimination System program transition period, the identification of the program responsibilities that have been transferred to the Department of Environmental Conservation and the program

Dear President Green and
Speaker Harris

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responsibilities retained by the United States Environmental Protection Agency, whether the transition is proceeding on schedule, and identification of relevant statutory, regulatory, or financial impediments to obtaining National Pollutant Discharge Elimination System primacy as intended by the Legislature.

This letter is the Department's second progress report to the Legislature. The first progress report was transmitted on January 9, 2006.

As required by Section 5 of SB 110, the Department has continued to confer with the NPDES Primacy Work Group, which includes representatives of affected permittees. The Work Group met three times and participated in one teleconference during the last calendar year, providing key assistance in the design of the APDES program, regulations, and primacy application development.

The Work Group's members are listed at the DEC website at: http://www.dec.state.ak.us/water/npdes/work_group.htm, along with agendas, meeting summaries, and other documents germane to the Work Group process. All Work Group meetings have been publicly noticed and open to the public with a specific allocation of time on the agenda for public comment. In addition to the Work Group, DEC met with staff from other State agencies to provide updates on our progress toward NPDES assumption. Staff also presented status reports at conferences attended by affected permittees.

Section 5 of SB 110 provided legislative direction to the Department to submit the NPDES primacy application to the U.S. Environmental Protection Agency (EPA) before July 1, 2006. The Department completed a major element of the primacy application by adopting program regulations on June 28, 2006. The complete primacy application was submitted to EPA on time, on June 29, 2006.

EPA provided an extensive list of comments on our application on October 31, 2006 and met with Department staff in mid November 2006 to discuss and clarify those comments. The Department and EPA have developed a work plan and process to address all EPA comments and to make any necessary revisions to the NPDES application components. The Department's goal is to resubmit the NPDES application to EPA by June 15, 2007.

Despite EPA opportunity to review SB 110 language and prior legislative direction regarding NPDES primacy (HB 546 in 2004), it was not until EPA reviewed the Department's full June 29, 2006 application submission that they identified what EPA believes are several statutory shortcomings that must be corrected in order to demonstrate that the Department has the necessary authority to implement the NPDES program. Legislative action on these statutory amendments will be pursued during the current legislative session.

Dear President Green and
Speaker Harris

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January 24, 2007

Notwithstanding EPA's opportunities to review and provide comment on the pre-public and public comment versions of the Department's draft regulations for the NPDES program, EPA responded to the state's application with several comments that will also require revisions to the program regulations that were adopted on June 28, 2006. The Department intends to propose these regulatory changes for public comment this spring. The revised regulations must be adopted prior to re-submitting the primacy application to EPA.

There are currently no financial impediments to obtaining NPDES primacy.

Once EPA determines that the application is complete and meets all federal requirements for a state-run NPDES program, they will initiate a public review and consultation process. The Department expects that EPA can complete this process and issue program approval by the end of December 2007.

Concurrent with developing the NPDES primacy application, the Department has successfully implemented several components of its capacity development plan to ensure the Department has the staffing and training to implement the NPDES program when authority is transferred from EPA. For example, ten of the fourteen new positions allocated to the Department as part of SB 110 have been filled, and over 35 staff have attended two EPA courses - the NPDES Permit Writers' course and EPA's Basic Inspector course. A third course, the Water Quality Standards Academy, is scheduled in February 2007.

As noted in the January 9, 2006 Report to the Legislature, the case proceedings in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), in which the United States Ninth Circuit Court of Appeals reversed EPA's decision to grant NPDES primacy to the State of Arizona, is still ongoing. In this case, the plaintiffs alleged that EPA had failed to consider, pursuant to the endangered Species Act (ESA), the possible harm that could be caused to habitat and wildlife by Arizona's assumption of primacy. The Ninth Circuit Court reversed and remanded the primacy-granting decision to EPA with instructions to weigh Arizona's application under the ESA. In the fall of 2006, through the Department of Justice, EPA petitioned for Supreme Court review of the Ninth Circuit's decision. The State of Alaska filed an *amicus* brief (i.e., "friend of the court") in support of EPA's petition. In January 2007, the Supreme Court decided to hear the case. While awaiting a Supreme Court decision, we continue to prepare the NPDES application as if EPA consultation under the ESA will not be required to approve our application. If, however, the Supreme Court decides that EPA must conduct an ESA consultation when considering approval of Alaska's NPDES program, it could cause considerable delays in EPA's approval action. EPA would have to conduct ESA consultation in a unique arena - one where they will have to consider potential impacts to endangered species of future state permits not yet issued or even applied for.

Dear President Green and
Speaker Harris

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January 24, 2007

The Department looks forward to working with you on legislation to ensure full authority to implement the NPDES program and is prepared to answer any questions you may have about our progress toward primacy.

Sincerely,



Mike Maher
Acting Commissioner

cc: John Bitney, Legislative Director, Office of the Governor
Kirsten Waid, Senate Secretary, Alaska State Legislature
Suzi Lowell, House Chief Clerk, Alaska State Legislature