

**01/22/14**  
**OVERVIEW:**  
**DEPARTMENT OF**  
**ENVIRONMENTAL**  
**CONSERVATION**

<TARGET><BILL></BILL><SUBJECT>01-22-14 OVERVIEW  
DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION</SUBJECT><COMM>HRES28</COMM></TARGET>



THE STATE  
of **ALASKA**  
GOVERNOR SEAN PARNELL

Department of Environmental  
Conservation

DIVISION OF WATER

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January 22, 2014

The Honorable Eric Feige  
House Resources Committee, Co-Chair  
Alaska State Capitol  
Juneau, AK 99801-1182

The Honorable Dan Saddler  
House Resources Committee, Co-Chair  
Alaska State Capitol  
Juneau, AK 99801-1182

Re: Update on House Bill 80 - cruise ship wastewater discharge general permit

Dear Representative Feige and Representative Saddler:

House Bill (HB) 80 passed in the first session of the 28<sup>th</sup> Legislative session amending the cruise ship wastewater statutes in AS 46.03 Article 7. Among other things HB 80 extended the term of the present general permit to 2015, which many large cruise ships rely on to authorize their treated discharges to Alaska waters; and authorized the Department of Environmental Conservation (DEC) to grant "mixing zones" in future permits. The bill did not change Alaska water quality standards. This letter provides an update on DEC's development of a draft of the next cruise ship wastewater general permit and the public process we will be following in finalizing that permit.

Because of the continuing public interest in Southeast Alaska regarding the effect of HB 80 and how DEC would apply its existing mixing zone requirements to large cruise ships to protect water quality, I made a number of presentations over the last year to groups in Juneau, Ketchikan, and Sitka, providing information about the amounts, contents and location of ship discharges and how DEC's mixing zone regulations are applied around the state to similar discharges to protect water quality.

In developing the next general permit, the Division of Water in DEC has used actual discharge data and mathematical models to identify how the discharge will disperse in the receiving water and the expected concentration of regulated pollutants. Using this information and applying state mixing zone regulations, the Division has drafted a new cruise ship general permit in accordance with statute (AS 46.03.462). The draft permit is similar to many other wastewater discharge permits, such as those for land-based public wastewater treatment plants, which have been operating with authorized mixing zones for many years throughout Alaska. Mixing zones will be available for underway and stationary (at the dock) discharges, with some restrictions. Permit conditions will continue to be more stringent for at-the-dock discharges which can be confined by proximity to shore. The draft permit and fact sheet, which explains to the public how DEC developed the proposed mixing zone authorization and describes other key terms in the draft permit, are under internal review.

We intend to public notice the draft permit in 2014. There will be the opportunity for the public to comment on the draft. We will use these comments to prepare and issue the final general permit, which we hope to have in place before the start of the 2014 cruise seasons. If it takes additional time, there is the option to continue to cover the large cruise ship discharges under the existing general permit, which doesn't expire until 2015.

Sincerely,

A handwritten signature in cursive script that reads "Michelle Bonnet Hale".

Michelle Bonnet Hale  
Director



## Department of Environmental Conservation

### 2014 Report on Financing and Managing the Prevention Account of the Oil & Hazardous Substance Release Prevention & Response Fund

Legislative intent language contained in the Operating budget (Ch14, SLA2013, page 13, line 19):

*"It is the intent of the Legislature that the Department of Environmental Conservation provide recommendations to the Legislature on or before the start of the second session of the Twenty-eighth Alaska State Legislature, January 21, 2014, that identify ways to finance and manage the oil and hazardous substance release prevention and response fund as a viable, long-term funding source for the state's core spill prevention and response initiatives. The plan should include an analysis of prior expenditures from the fund for the remediation of state-owned contaminated sites, a proposal to expeditiously remediate state-owned contaminated sites, and a report on the Department's effort to achieve program efficiencies to restrain a draw on the oil and hazardous substance release prevention and response fund."*

#### Background

The Legislature established The Oil and Hazardous Substance Release Prevention and Response Fund (or "Response Fund") in 1986 to provide a ready and reliable source of payment of the expenses incurred by the Department of Environmental Conservation's (DEC) in responding to a release or threatened release of oil or hazardous substances and the expense of establishing and maintaining spill prevention, preparedness and response programs that reduce the risk of oil and hazardous substance spills (A.S. 46.08.005 and .010). Also, in 1986, the Legislature adopted A.S. 46.08.030, which provides:

*"It is the intent of the Legislature and declared to be the public policy of the State that funds for the abatement of a release of oil or a hazardous substance will always be available."*

In the wake of the *Exxon Valdez* disaster in 1989, the Alaska Legislature passed a bill to levy a \$.05 per barrel "conservation surcharge" on crude oil production, to be deposited into the Response Fund and used to fund the State's spill prevention, preparedness and response programs.

Legislation passed in 1994 changed the 1989 conservation surcharge structure and created two separate accounts, the Response Account and the Prevention Account. The \$.05 per barrel surcharge was divided so that \$.02 was dedicated to building and maintaining a \$50.0 million Response Account and \$.03 was dedicated to funding a Prevention Account. The Response Account is a reserve that may be used to finance the State's response to an imminent and substantial release or threat of release of oil or another hazardous substance. The Prevention Account is used to pay the operating expenses for the State's spill prevention, preparedness and response programs.

The 1994 legislation and declining oil production has eventually resulted in the Prevention Account being unsustainable for operational funds for the Division of Spill Prevention and Response. In 2006, legislation changed the division of receipts so that \$.04 per barrel was dedicated to funding the Prevention Account, and \$.01 to the Response Account. This helped to slow the decline, but was not a complete solution.

As described below, the current and past administrations have worked with the Legislature to explore and implement different measures to slow the rate of drawdown of the Response Fund. Again, these measures have not been sufficient to counteract the effect of declining production and make the Response Fund sustainable. In the Office of Management and Budget's response to the legislative Intent in HB284 passed in 2012, OMB provided the following: "The options to address the declining balance of the Fund are clear: increase production, and utilize general funds to address the shortfall in the interim... Additional general funds, estimated to be \$6 million, will be needed on an annual basis for spill prevention and response until such time as there are increases in oil production that will offset the general fund requirements."

#### Prevention Account Funding Sources

The three primary sources of funds going into the Prevention Account are: the four-cent per barrel surcharge on crude oil produced in the State, interest earned on the principal balance held in the fund, and spill response costs recovered by the State from responsible parties. The amounts generated by the surcharge have historically been much larger than amounts generated by either interest on the balance in the account or cost recoveries. Due to the continued decline in crude oil production in the State, the amounts in the Prevention Account will not be sufficient in FY16 to fund the current level of services by SPAR even assuming no increases in costs from inflation and labor agreements. Without additional appropriations to the Prevention Account or fund source changes in SPAR's operating budget, there will be a continuing operating budget shortfall starting in FY16. The projected estimated shortfalls through FY22 are shown on Attachment 1.

This shortfall has been anticipated for a number of years and there have been discussions between the Legislature and the Administration on how to address the problem, at least until crude oil production rises sufficiently that the four cent per barrel surcharge once again generates sufficient funds to cover continuing operating costs (1,012,100 bbls/day would be needed).

#### Means to Help Sustain the Prevention Account

A number of measures have been implemented to increase the amounts going into the Prevention Account or to slow the draw down on the Prevention Account thus extending it to a point that increased crude oil production will again make the account sustainable. Measures to reduce the rate of the draw down on the account include:

- Restraining growth of SPAR and instituting program efficiencies

Over a ten year period (from the FY2005 Authorized budget to the FY2015 Governor's request), the Division of Spill Prevention and Response has grown by just 2 PCNs. Over that same period, the Department's appropriation from the Prevention Account has increased just 1.6% annually, a rate lower than inflation and the State's growth in negotiated personal services costs over the same period. This lower than expected rate of growth is the result of \$1,062,000 in budget decrements in FY2006, FY2007, and FY2011. During this same time period, SPAR avoided compromising its level of service delivery by increasing the efficiency of program operations. Meanwhile, the Division also

took on new responsibilities such as regulating the operation of flow lines, non-tank vessels over 400 gross ton and the transportation of fuel by the railroad.

- Cutting back on uses of the Prevention Account

The Legislature also eliminated expenditures from the Response Fund to Local Emergency Planning Committees (LEPCs), Department of Military and Veteran Affairs (DMVA), and Department of Transportation and Public Facilities (DOT&PF) to offset declining surcharge revenue.

DEC has eliminated a loan and grant program for the removal of underground storage tanks, withdrew efforts to fund a statewide hazmat team, and eliminated funding for any purposes outside SPAR's core mission. While these activities were all allowable uses of the account, in light of declining funds, they were eliminated in favor of only the most germane activities.

Most significantly, after FY 2011, DEC stopped requesting capital appropriations from the Prevention Account for cleanup of state-owned contaminated sites<sup>1</sup>. DEC had been coordinating cleanup on state-owned sites since 1991 under a Memorandum of Agreement (MOA) with other state agencies. Funds from the Prevention Account, totaling \$17.090 million, had been spent on assessment, management and cleanup of state-owned or managed contaminate sites. Again, this was an appropriate use of the Prevention Account<sup>2</sup>, but by stopping this practice and turning to general funds for appropriations to pay for expenses on these sites, this significantly reduced the rate of drawdown of the Prevention Account. This does not mean that DEC has reduced the level of effort in addressing these sites. As explained below, DEC anticipates a relatively level amount of requests for general funds for state clean-up projects going forward that will allow DEC to timely and efficiently address priority sites.

Measures designed to increase amounts going into the Prevention Account include:

- The 2006, legislative increase in the surcharge from \$.03 to \$.04 per barrel to the Prevention Account to compensate for declining surcharge revenue from reduced crude oil production.
- Appropriations into the Prevention Account from other sources:
  - a. FY2006: \$655,500 underground storage tank revolving loan funds<sup>3</sup>
  - b. FY2007: \$1,800,000 commercial passenger vessel funds<sup>4</sup>

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<sup>1</sup> Several legislative appropriations from FY2011 and prior funded by the Prevention Account for state-owned/lead contaminated site cleanup remain active, but the remaining balances are nearly fully expended.

<sup>2</sup> The account was audited by the Legislature in 2008 and no unauthorized uses of the account were noted.

<sup>3</sup> Ch4, FSSLA05, p73, 128 – due to an insufficient balance in the USTRLF, only \$665,500 of the \$991,187 appropriated was transferred into the fund. This transfer was for the full final balance of the USTRLF, which was subsequently closed with no remaining balance.

<sup>4</sup> Ch33, SLA06, p75, 13

c. FY2008: of \$2,000,000 general funds<sup>5</sup>

- Increase collections from Potentially Responsible Parties. DEC and the Department of Law have been evaluating cost recovery procedures with an aim to making them more efficient and effective. In 2013, DEC overhauled the administrative cost recovery process and automated many cost tracking and accounts receivable activities. By automating this process, DEC now issues cost recovery statements that are more accurate and timely, and has much better data available to pursue aged receivables.

Other potential means to increase amounts going into the Prevention Account include expanding the surcharge to apply it to refined products produced, stored or transported within the State, initiate fees for services currently funded through the Prevention Account and increasing the amount of the surcharge on crude oil production. Each of these would require legislation. Among the factors that the Legislature might want to consider if it entertains any of these potential options is the financial and reporting burdens it might impose on the public and industry, the costs of administering the collection of the new fees or taxes and what, if any, impact the fees and costs would have on efforts to increase crude oil production and lower energy costs in the State. These issues are beyond the purview of DEC's authorities.

Conclusion:

DEC will continue to only fund maintenance of existing core prevention and response services and only fund increases related to inflation (no increment in services, despite increases in oil and gas development and production).

Once oil production increases to 1,012,100 bbls/day, surcharge receipts will once again provide sufficient funding for the prevention and response programs at current levels. Until then, DEC will require general funds to address anticipated annual shortfalls and continue critical programs. Projections provided by DEC show that the Prevention Account will be depleted by the end of FY2015. General funds will likely be required in FY2016. DEC will provide the Legislature with the updated analysis of the balance and expenditures from the oil and hazardous substance release prevention and response funding during the upcoming legislative session.

Any further efforts to reduce expenditures from the Prevention Account, without support from other fund sources, would impair DEC's ability to prevent and respond to spills both large and small. With increasing exploration and production, and so much new activity in Cook Inlet and the Arctic, DEC must maintain its robust spill prevention and response capacity.

Remediation of State-owned contaminated sites

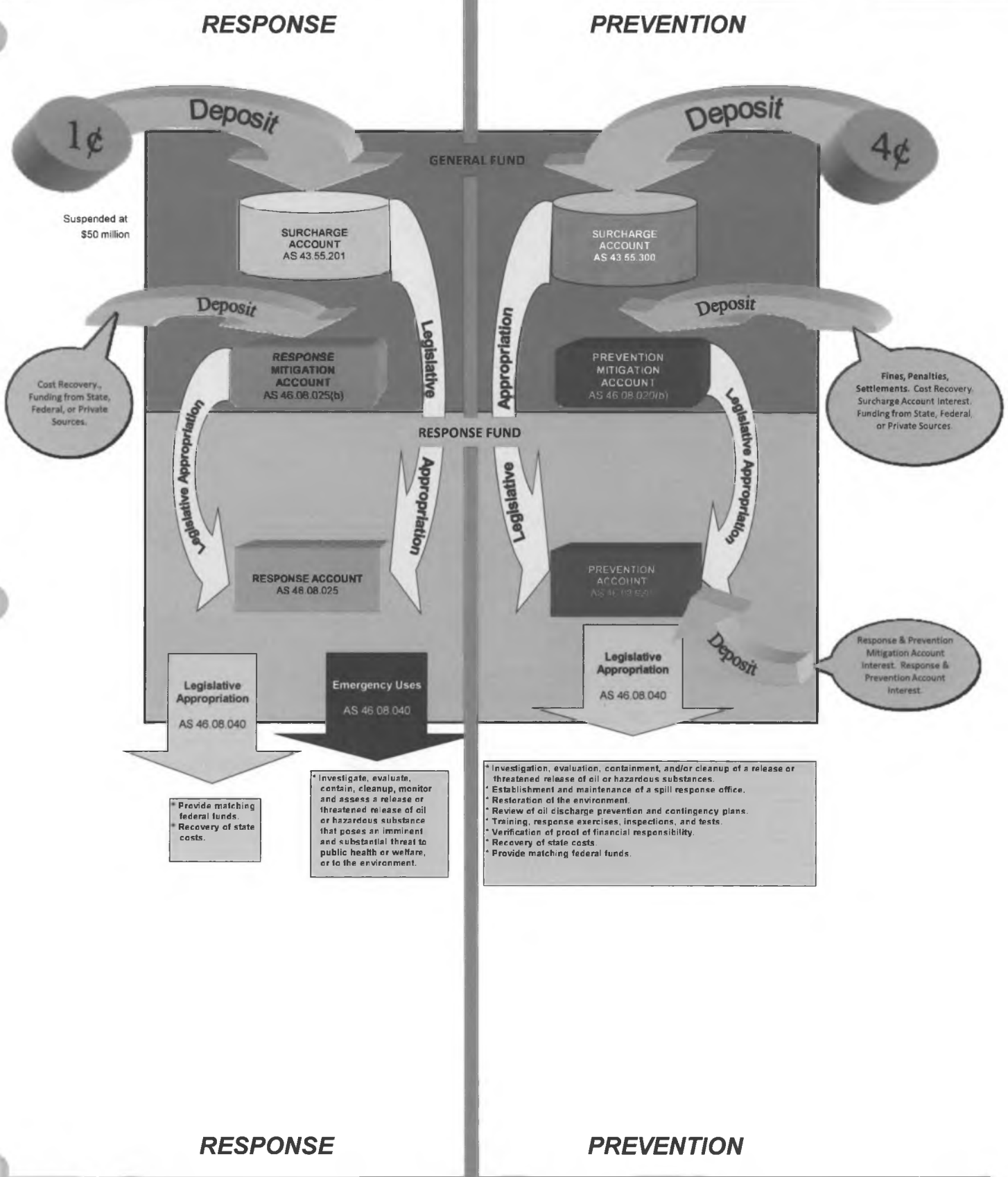
DEC stopped requesting capital appropriations from the Prevention Account for the clean-up of contaminated sites after FY2011, however, the clean-up work continued using the balances from previous Capital appropriations beyond FY2011. Between FY1999 and FY2012, the Department expended \$17.09

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<sup>5</sup> Ch29, SLA08, p211, 131

million from the Prevention Account for the remediation of state-owned contaminated sites. DEC estimates a backlog of over \$50 million for sites where work remains to be done. Expeditious remediation of these sites will require significant general fund investment in the coming years. The Legislature appropriated \$3.0 million in the FY2014 budget, and DEC is actively engaged in cleanup efforts with these funds.

# Oil & Hazardous Substance Release Prevention and Response Fund

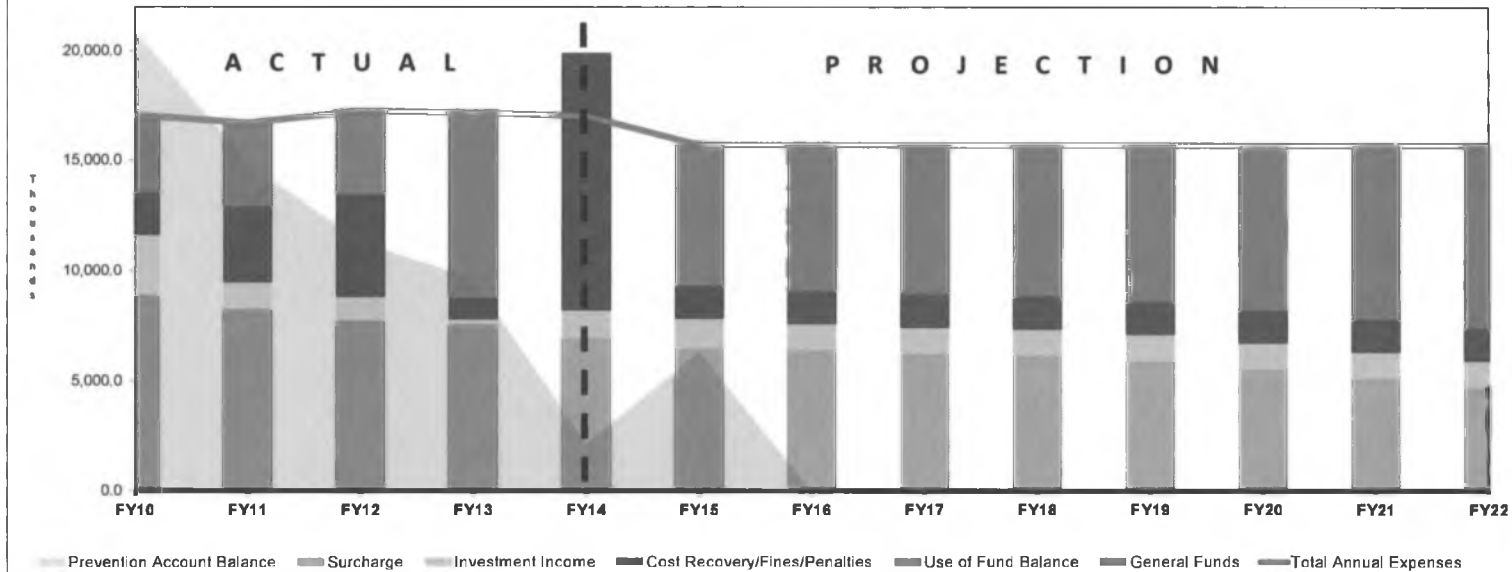


**DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
PREVENTION ACCOUNT REVENUES, EXPENDITURES, AND BALANCE PROJECTION**

*Actuals FY 2010 - FY 2013, Projected FY 2014 - FY 2022 based on 12.05.2013 Fall 2013 Forecast - Current 4 cent Surcharge*

Line	FY10	FY11	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19	FY20	FY21	FY22
1 Unobligated Beginning Balance	20,891.9	14,870.3	11,323.0	9,599.2	2,139.3	6,325.6	(40.2)	0.0	0.0	0.0	0.0	0.0	0.0
<b>2 REVENUE to PREVENTION ACCOUNT</b>													
3 Surcharge Revenue	8,922.5	8,255.2	7,736.1	7,558.6	6,951.2	6,480.0	6,400.0	6,240.0	6,160.0	5,920.0	5,520.0	5,120.0	4,720.0
4 Cost Recovery/Fines/Penalties	1,911.9	3,425.0	4,625.4	976.4	11,689.3	1,500.0	1,500.0	1,500.0	1,500.0	1,500.0	1,500.0	1,500.0	1,500.0
5 Investment Income	2,660.2	1,199.7	1,079.8	215.8	1,238.5	1,334.9	1,185.0	1,185.0	1,185.0	1,185.0	1,185.0	1,185.0	1,185.0
<b>6 Total Annual Revenue</b>	<b>13,524.6</b>	<b>12,879.9</b>	<b>13,441.3</b>	<b>8,750.8</b>	<b>19,879.0</b>	<b>9,314.9</b>	<b>9,085.0</b>	<b>8,925.0</b>	<b>8,845.0</b>	<b>8,605.0</b>	<b>8,205.0</b>	<b>7,805.0</b>	<b>7,405.0</b>
<b>7 EXPENSES from PREVENTION ACCOUNT</b>													
8 Operating	13,334.3	14,447.3	15,030.7	15,344.8	15,692.7	15,680.7	15,680.7	15,680.7	15,680.7	15,680.7	15,680.7	15,680.7	15,680.7
9 Capital	3,710.3	2,250.4	2,210.5	1,806.3	1,320.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
<b>10 Total Annual Expenses</b>	<b>17,044.6</b>	<b>16,697.7</b>	<b>17,241.2</b>	<b>17,151.1</b>	<b>17,013.5</b>	<b>15,680.7</b>	<b>15,680.7</b>	<b>15,680.7</b>	<b>15,680.7</b>	<b>15,680.7</b>	<b>15,680.7</b>	<b>15,680.7</b>	<b>15,680.7</b>
11 Use of Fund Balance	3,520.0	3,817.8	3,799.9	8,400.3	0.0	6,365.8							
12 Obligations and Other Activity													
13 New Capital Appropriations	5,750.0	2,000.0	100.0	750.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
14 Less: Capital Expenses	(3,710.3)	(2,250.4)	(2,210.5)	(1,806.3)	(1,320.8)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
<b>15 Increase (Decrease) in Outstanding Capital Appropriations</b>	<b>2,039.7</b>	<b>(250.4)</b>	<b>(2,110.5)</b>	<b>(1,056.3)</b>	<b>(1,320.8)</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
16 Other Activity - Changes in Receivables and Liabilities	461.9	(20.1)	34.4	115.9	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
<b>17 Total Increase (Decrease) in Obligations and Other Activity</b>	<b>2,501.6</b>	<b>(270.5)</b>	<b>(2,076.1)</b>	<b>(940.4)</b>	<b>(1,320.8)</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
<b>18 Summary</b>													
19 Unobligated Beginning Balance	20,891.9	14,870.3	11,323.0	9,599.2	2,139.3	6,325.6							
20 Add: Total Annual Revenue	13,524.6	12,879.9	13,441.3	8,750.8	19,879.0	9,314.9							
21 Less: Total Annual Expenses	(17,044.6)	(16,697.7)	(17,241.2)	(17,151.1)	(17,013.5)	(15,680.7)							
22 Less: Total Increase (Decrease) in Obligations and Other Activity	(2,501.6)	270.5	2,076.1	940.4	1,320.8	0.0							
<b>23 Unobligated Ending Balance</b>	<b>14,870.3</b>	<b>11,323.0</b>	<b>9,599.2</b>	<b>2,139.3</b>	<b>6,325.6</b>	<b>(40.2)</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>
24 Other Appropriations:													
25 General Fund Other							6,595.7	6,755.7	6,835.7	7,075.7	7,475.7	7,875.7	8,275.7
26 Transfers from Other Funds	0.0	0.0	0.0	0.0	0.0	0.0	6,595.7	6,755.7	6,835.7	7,075.7	7,475.7	7,875.7	8,275.7

**Prevention Account Revenues, Expenditures and Balance Projection**



**Linda Hay**

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**From:** Trevor Fulton  
**Sent:** Sunday, February 02, 2014 7:53 PM  
**To:** Anna Latham; Chere Klein; Joshua Walton; Julie Koehler; Linda Hay; Louie Flora; Rena Delbridge; Rep. Craig Johnson; Rep. Eric Feige; Rep. Geran Tarr; Rep. Kurt Olson; Rep. Lindsey Holmes; Rep. Mike Hawker; Rep. Paul Seaton; Rep. Peggy Wilson; Rep. Scott Kawasaki; Riley Leonard; Robert Ervine; Samantha Weinstein  
**Subject:** DEC 404 Wetlands Primacy Update  
**Attachments:** 14.007 404 Leg Letter Fnal 01 24 14.pdf; 14.007 Enclosure Accomplishments Matrix.pdf

All,

Please find the attached documents relating to the Department of Environmental Conservation's 404 Wetlands Primacy efforts and provided as follow up to their 1/22/14 overview to HRES.

Regards,

**Trevor Fulton**

House Resources Committee Aide  
Office of Rep. Dan Saddler  
907-465-3768  
[trevor.fulton@akleg.gov](mailto:trevor.fulton@akleg.gov)



THE STATE  
of **ALASKA**  
GOVERNOR SEAN PARNELL

Department of Environmental  
Conservation

OFFICE OF THE COMMISSIONER

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**14.007**

January 24, 2014

The Honorable Charlie Huggins  
President of the Senate  
Alaska State Capitol, Room 111  
Juneau, AK 99801-1182

The Honorable Mike Chenault  
Speaker of the House  
Alaska State Capitol, Room 208  
Juneau, AK 99801-1182

Re: Assumption of Clean Water Act Section 404

Dear President Huggins and Speaker Chenault:

The first session of the 28<sup>th</sup> Legislature passed Senate Bill (SB) 27 establishing authority for the Departments of Environmental Conservation (DEC) and Natural Resources (DNR) to evaluate and apply to assume the regulatory program for dredge and fill activities, as provided to individual states under the Clean Water Act (CWA) Section 404. Governor Parnell signed SB 27 into law on May 21, 2013. As we informed the legislature last session, there is a significant amount of work to do to evaluate the costs, benefits and consequences of State assumption of the program. Because assumption would require additional resources, there will be future opportunity for the legislature to weigh in on a final decision whether to go forward with the program. A summary of major accomplishments to date can be found in the enclosed table. This letter provides additional background and details on the progress made by the Department of Environmental Conservation (DEC), Department of Natural Resources (DNR) and Department of Law (*Law*) since SB 27 was signed. We are pleased to report our progress on many fronts.

**Background**

Section 404 of the CWA establishes a program to regulate discharges of dredged or fill materials into waters of the United States, including wetlands. Section 404 allows the U.S. Army Corps of Engineers (Corps) and states with approved programs to issue permits authorizing discharges after notice and opportunity for public comment. While Section 404 is often described as a wetlands program, it applies to navigable waters and other waters of the U.S., not just wetlands. Examples of regulated activities typically requiring a 404 program permit under the CWA include:

- discharging dredged or fill material in waters of the U.S., including wetlands;
- addition of site improvement fill for residential, commercial, or recreational development;
- construction of revetments, groins, breakwaters, levees, dams, dikes, and weirs; and
- placement of riprap and fill material for roads, airports, or buildings.

An application for a state to assume the permitting and compliance work from the Corps must be submitted to, and approved by, the U.S. Environmental Protection Agency (EPA).

**Planning**

DEC is leading a State team with members from DNR and Law who work collaboratively, share knowledge, plan events, stay informed about relevant issues, and resolve issues that may arise during the Section 404 evaluation and assumption effort.

Early on the team started consulting with other states that have either already assumed Section 404 Programs (Michigan and New Jersey) or are in the process of evaluating assuming a Section 404 Program (Oregon). These states have provided guidance and suggestions to help Alaska as it evaluates and considers assumption.

In addition to consulting with other states, the State team has also been consulting with staff from the EPA and Corps, building a foundation of positive communication. DEC, DNR, the Corps and EPA signed a November 2013 Memorandum of Understanding (MOU) identifying points of contact and describing processes for communication, information exchange, and resolving issues that may arise during Alaska's program analysis and assumption effort. This MOU establishes a single point of contact (POC) for each agency and provides for regular meetings which will allow the agencies to share knowledge, keep others informed about relevant issues, and ensure that communication among the team is occurring.

**Capacity Development**

SB 27 provided funding to enable the agencies to prepare the assumption application and to develop the capacity to implement the program. DEC and DNR have developed position descriptions and hired 4 of the 7 positions. Recruitment is almost complete for the remaining vacancies. Law has assigned two assistant attorneys general to assist. In addition to hiring staff, funding was provided for contracts with professional experts in the field. DEC has retained a technical contractor, a professional wetlands scientist who has significant experience with 404 assumption efforts. DEC and DNR are both in the process of obtaining additional contractual support for this effort.

Recognizing that the Corps has limited resources, the Corps and the State have implemented an Interagency Personnel Agreement (IPA) that allows DEC staff to work closely with the Corps staff at their Anchorage office as they process permits. This opportunity allows DEC staff to gain a working knowledge of the current Section 404 processes as implemented by the Corps and potential improvements the State may want to make upon program assumption. This provides the State agencies with valuable experience and insight into the process, decision making, and data collection and tracking necessary to implement a 404 Program. The State staff will assist the Corps with responding to State information requests to the Corps -- information necessary for the State evaluation of 404 Program assumption. This agreement also allows the State to build a knowledgeable staff without reducing workload capacity of the Corps. To date, DEC has two permitting staff members who are working part time at the Corps.

**Outreach**

The State team has developed a consistent communication message that outlines the goals and objectives of a potential State 404 Program, as well as our plans for gathering information and evaluating the potential costs, benefits, and consequences of assuming this program. The team has been discussing potential 404 Program assumption with stakeholders and at conferences and is planning a structured and robust outreach effort.

DEC has established a webpage (<http://dec.alaska.gov/water/wetlands404/index.htm>) as a tool to share information about SB 27, the evaluation of a State 404 Program, and the development of State Programmatic General Permits. The webpage includes Frequently Asked Questions (FAQs) that will be

updated over time, a list serve that allows individuals to sign up for program updates, and additional information on the program.

DEC, DNR and Law staff have presented information regarding SB27 and efforts to evaluate assumption of a Section 404 Program and capacity development at various conferences, symposiums, and seminars. Staff will continue to participate in these events over the coming year to provide information to various stakeholders.

### **Mitigation Program Development**

As part of the evaluation of 404 Program assumption, the State is looking at developing a comprehensive program for compensatory mitigation which is required by the 404 Program "to offset unavoidable adverse impacts to wetlands, streams and other aquatic resources authorized by Clean Water Act section 404 permits." Compensatory mitigation may be achieved by some combination of four methods --- restoration, rehabilitation, enhancement or preservation --- which can be performed either onsite or offsite. It is a critical issue with the current Section 404 Program and will play a large role in the evaluation of a state managed Section 404 Program. Compensatory mitigation is viewed on a macro-scale in that rules and guidance are generated at the national level, but implemented at the local, site-specific level. This national approach to mitigation is not the most effective for Alaska and the team is reviewing options for flexibility that may be available under a State-administered program.

The state team is exploring how to incorporate the CWA Section 404(b)(1) Guidelines into the State program. The guidelines, adopted in 1980 by the EPA, state that discharge of dredged or fill material can only be permitted when appropriate and practicable steps have been taken which minimize potential adverse impacts on the aquatic ecosystem. Subpart II (§230.70-.77) of the guidelines identifies 40 categories of possible steps to avoid, minimize, and compensate for adverse impacts. In 2008, the EPA and the Corps jointly adopted new regulations (*Compensatory Mitigation for Losses of Aquatic Resources; Final Rule*) that were informed by the prior three decades of national experience.

The 2008 Final Rule provides for three mechanisms – permittee-responsible, Mitigation Banks, and In-Lieu Fee mitigation – for achieving compensatory mitigation. With Mitigation Banks and In-Lieu Fee programs, a permittee can purchase mitigation credits and the permittee's liability for achieving successful compensatory mitigation is transferred to the Bank or In Lieu Fee program. The 2008 Final Rule also requires Interagency Review Teams to review and provide recommendations for all applications from potential In-Lieu Fee operators and Mitigation Banks. Multiple state and federal agencies have recently come together to establish a Statewide Interagency Review Team (SIRT) for Alaska. The purpose of the SIRT is to address compensatory mitigation issues of broad or statewide applicability. The intent is to provide consistency between the various agencies involved in Interagency Review Teams. Both DEC and DNR represent the State as members of the SIRT created in September 2013. The SIRT is important for the state to encourage flexibility in implementing mitigation requirements in Alaska regardless, of whether the State ultimately assumes the 404 Program.

### **Review of Regulations**

As the State team evaluates and prepares the regulations that will be needed for an Alaska 404 program, the agencies are reviewing EPA and the Corps' Section 404 implementing regulations, as well as regulations from those states that have previously assumed the Section 404 Program (Michigan and New Jersey). The agencies are also reviewing draft regulations that Oregon has prepared for its proposed 404 program. A strawman draft of potential Alaska regulations is being prepared by Law. The evaluation process provides the agencies an opportunity to consider potential state flexibility in a state-administered program and whether Alaska may need additional statutory authority to implement a 404 program.

#### **404 Program Evaluation**

One of the major tasks under SB 27 is an evaluation of the costs, benefits, and consequences of the State assuming the Section 404 program. This analysis will support the development of a formal application to assume and administer a Section 404 Program. The team has developed a list of key program elements that EPA will expect to review as a part of Alaska's formal submittal. The State team will continue to evaluate key program elements such as the development of a permit application and permit issuance process, compliance assurance process, a process for jurisdictional determinations, mitigation requirements, program guidance, regulations and resources.

One important aspect of the State's evaluation is to better understand the current 404 permitting universe, potential future State workload, and necessary resources. In Alaska, the Corps authorizes approximately 750 activities annually in Waters of the U.S. including wetlands. Authorizations for new activities are issued under three types of permits: individual, nationwide, and general permits. Approximately 26 percent of all permits issued by the Corps over the last three fiscal years were general permits. The State's information requests to the Corps and monthly meetings with the Corps and EPA are the primary means of exploring this issue.

#### **State - Assumable Waters and CWA Jurisdiction Over Waters**

In the next several months, the State will be meeting with the Corps and EPA to explore the question of which specific waters and wetlands that the State can assume jurisdiction over under a State-administered 404 program. The waters and wetlands which would be subject to a State program are referred to as "assumable waters." Under Section 404(g), there are certain waters that will be non-assumable and which would remain under the Corps' Section 404 regulatory authority, namely waters which are now used, or could be used, as a means of transport in interstate and foreign commerce; waters subject to the ebb and flow of the tide; and wetlands adjacent to these waters. The allocation of waters and wetlands that will be assumable by the State given the limitation in Section 404(g) is another key consideration in evaluating whether the State should move forward with a State 404 Program.

Federal jurisdiction over waters covered by the CWA is also in question. This issue has been the focus of several Supreme Court decisions within recent years and the issue of jurisdiction will continue to be a significant discussion over the next year. In September 2013 the EPA prepared and released the draft report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. This study is considered a precursor to provide support of future federal rulemaking that will likely expand the definition of "Waters of the U.S." to include disconnected wetlands and other waterbodies over which the federal government does not currently have clear jurisdiction. Alaska resource agencies submitted joint comments on the study to the federal docket prior to the November 6 deadline. Shortly thereafter a leaked copy of the draft Waters of the U.S. rule was obtained by the press. While EPA's Science Advisory Board (SAB) convened a Peer Review Panel meeting December 16-18, 2013 in Washington D.C. to review the study and afford the public an opportunity to comment, commenters made reference to the leaked draft rule as well. DNR represented the State with public testimony at the Peer Review Panel meeting. The State of Alaska's primary concern is that the leaked rulemaking will lead to most if not all waters and wetlands being classified as jurisdictional Waters of the U.S., and thus subject to expensive and time-consuming Clean Water Act Section 404 permitting and mitigation. There is also the potential for the rule to further restrict waters a state may assume jurisdiction over for a state 404 program.

#### **State Programmatic General Permits (SPGPs)**

The State team is exploring the development of State Programmatic General Permits (SPGPs). As the name implies, SPGPs are State-administered General Permits which can be issued for certain categories of activities. SPGPs are for recurring activities that are similar in nature and cause only minimal individual and cumulative adverse impacts. They can apply statewide or regionally. Under an SPGP, the Corps' Regulatory

Division would issue a general permit and authorize the State to administer it. These state-administered permits do not have the same geographic limitations that apply to state assumption of the 404 Program. They can be administered by a state *instead of* program assumption, or *in addition to* program assumption – they can be a tool for a state to administer permits in waters and wetlands not otherwise allowed under the CWA restrictions on program assumption. There is no comparable mechanism for individual permits.

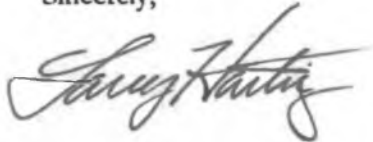
The State team has been collaborating with the Corps on the reissuance of a regional general permit for Placer Mining, which is a candidate for a state-administered SPGP.

### **Funding**

Funding for the initial work (program evaluation, development of the application to assume the program and initial State capacity development) was appropriated via the fiscal vote for SB 27. The team expects to fully expend the FY 14 funding which is not a part of the base budget for FY 15. While the governor's budget does not include the FY 15 increment contemplated by the fiscal note, the team does not expect to experience delays in the program evaluation and assumption application development work.

Since SB 27 was signed, staff within DEC, DNR, and Law have all worked collaboratively to evaluate the assumption of a Section 404 Program and the development of SPGPs. We continue to believe that the state should take the lead in management of our waters and wetlands, and look forward to further exploring the possible benefits of assuming a state-administered program for dredge and fill activities. DEC intends to provide another status report to the legislature in January 2015.

Sincerely,



Larry Hartig  
Commissioner

Enclosure: State of Alaska 2013 Major Accomplishments Matrix for Senate Bill 27

cc: Liz Clark, Senate Secretary, Senate Secretary's Office w/enclosure  
Suzi Lowell, Chief Clerk, House Chief Clerk's Office w/enclosure

**Attachment 1: State of Alaska 2013 Major Accomplishments Matrix for Senate Bill 27**

		<b>MAJOR ACCOMPLISHMENTS</b>	<b>TIMELINE</b>
<b>404 ASSUMPTION EFFORT</b>	<b>Planning</b>	<ul style="list-style-type: none"> <li>▪ Met with other states regarding assumption (Oregon, Michigan, New Jersey) and Association of Wetlands Managers</li> <li>▪ Point of Contact (state and federal agencies) regular communication and information exchange</li> <li>▪ Work plan development and tracking</li> <li>▪ Memorandum of Understanding: <i>State of Alaska Assumption of CWA Section 404 Regulatory Program</i> between EPA, Corps, DNR, and DEC</li> </ul>	<p>June – Oct</p> <p>May – present</p> <p>Dec – Jan 2014 Nov</p>
	<b>Capacity Development</b>	<ul style="list-style-type: none"> <li>▪ Three DEC positions filled, two in recruitment</li> <li>▪ One DNR position filled, one in Position Description development</li> <li>▪ Staff wetland training                             <ul style="list-style-type: none"> <li>○ EPA Clean Water Act Section 404 Regulatory Training</li> <li>○ Corps of Engineers Wetland Delineation Training</li> </ul> </li> <li>▪ Interagency Personnel Agreement: two DEC staff job-shadowing at the Corps Alaska District Office</li> <li>▪ Contract support                             <ul style="list-style-type: none"> <li>○ DEC Reimbursable Services Agreement to obtain services from Commissioner’s Office Program Coordinator</li> <li>○ DEC contract retained professional wetland scientist with significant experience with Section 404 assumption</li> <li>○ DNR Request for Proposal for Consulting for State Assumption of Corps 404 Program</li> </ul> </li> </ul>	<p>Sept – present</p> <p>May – present</p> <p>May Nov</p> <p>Dec – present</p> <p>May – present</p> <p>Oct – present</p> <p>Dec</p>
	<b>Outreach</b>	<ul style="list-style-type: none"> <li>▪ Communication Plan development</li> <li>▪ Webpage and Frequently Asked Questions developed</li> <li>▪ Outreach and education efforts                             <ul style="list-style-type: none"> <li>○ State of Alaska’s Effort to Become the Primary Agency for 404 Permits: Law Seminars International, Oil and Gas Production and Mineral Mining in AK</li> <li>○ 2013 Southeast Alaska Watershed Symposium</li> <li>○ CWA Section 404 Assumption by the State of Alaska: Mining in Alaska: Law, Permitting Issues and Current Trends</li> </ul> </li> </ul>	<p>Dec – present</p> <p>Dec – present</p> <p>Nov Sept</p> <p>Nov Oct</p>
	<b>Mitigation</b>	<ul style="list-style-type: none"> <li>▪ State Interagency Review Team signed Memorandum of Understanding evaluating mitigation options and national implementation of EPA’s 404(b)(1) Guidelines</li> </ul>	<p>Nov – present</p>
	<b>Regulation</b>	<ul style="list-style-type: none"> <li>▪ Preliminary draft regulations developed</li> <li>▪ DEC and DNR roles and responsibilities identified</li> <li>▪ Draft Section 404(b)(1) Analysis Report (analysis of other states implementation of guidelines and provides recommendations for Alaska’s implementation strategy)</li> </ul>	<p>Sept – present</p> <p>Dec Dec</p>
	<b>Application</b>	<ul style="list-style-type: none"> <li>▪ Initial information data request to Corps</li> <li>▪ Identified critical program elements</li> <li>▪ Develop schedule and timeline for potential application submittal</li> </ul>	<p>Nov – Dec</p> <p>Nov Dec</p>
	<b>SPGP State Programmatic General Permits</b>	<b>Placer Mining</b>	<ul style="list-style-type: none"> <li>▪ Preliminary meetings with DEC, DNR, and Corps staff regarding renewal of Placer Mining General Permit</li> <li>▪ Review and comment on the draft public notice and revised Placer Mining General Permit</li> </ul>

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