

USB

27

<TARGET><BILL>SB 27</BILL><SUBJECT>SB
27</SUBJECT><COMM>HRES28</COMM></TARGET>

STATE CAPITOL
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Governor Sean Parnell
STATE OF ALASKA

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January 17, 2013

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

Dear President Huggins,

Alaskans have the right to have a say over regulation of our own resources including land and water. To that end, I am transmitting a bill under the authority of Article III, Section 18 of the Alaska Constitution, authorizing the State of Alaska to assume primacy for administering permitting under the Clean Water Act for dredge and fill activities allowed to individual states under federal law. The current federal process has resulted in a large number of projects in Alaska being subject to an expensive and bureaucratic federal permitting system and litigation, delaying and restricting opportunities for Alaskans.

The purpose of this legislation is to provide State authority to develop and implement State primacy of dredge and fill activities in waters and wetlands located within the state, in accordance with the regulating program allowed states under 33 U.S.C. 1344 (Section 404, Clean Water Act). This change will limit federal overreach in Alaska by giving the State authority to make jurisdictional determinations, timely process permits, and allow responsible resource development. Removing a significant amount of wetlands from federal authority also reduces the number of projects requiring an expensive and time-consuming federal National Environmental Policy Act (NEPA) process, since there would be fewer "major federal actions" associated with these projects.

There are millions of water bodies and tens of millions of acres of wetlands in Alaska. State primacy of dredge and fill activities under 33 U.S.C. 1344 is consistent with congressional intent under 33 U.S.C. 1251 that the states have the primary responsibilities and rights in regulating activities involving lands and waters within their boundaries.

The legislation provides that the Department of Natural Resources, in coordination with the Department of Environmental Conservation, will take the reasonable steps to assume the authority to administer and enforce any authorized dredge and fill permitting allowed under 33 U.S.C. 1344 (Section 404, Clean Water Act).

The Honorable Charlie Huggins
January 17, 2013
Page 2

Alaska should assume primacy for permitting projects in the state. I urge your prompt and favorable action on this measure.

Sincerely,

A handwritten signature in cursive script that reads "Sean Parnell". The signature is written in dark ink and is positioned above the printed name and title.

Sean Parnell
Governor

Enclosure

AMENDMENT

OFFERED IN THE HOUSE
TO: SB 27

BY REPRESENTATIVE TARR

1 Page 4, following line 23:

2 Insert a new bill section to read:

3 **** Sec. 4. AS 46.03 is amended by adding a new section to read:**

4 **Sec. 46.03.021. Dredge and fill permitting program report to the**
5 **legislature. The commissioner, in coordination with the commissioner of natural**
6 **resources, shall provide to the legislature, on or before December 31 of each year, an**
7 **annual report of the cost of administering the state dredge and fill permitting program**
8 **described in AS 46.03.020(14)."**

9

10 Renumber the following bill sections accordingly.

SB 27 – Regulation of Dredge and Fill Activities
Sectional Analysis
January 22, 2013

“An Act establishing authority for the state to evaluate and seek primacy for administering the regulatory program for dredge and fill activities allowed to individual states under federal law and relating to the authority; and providing for an effective date.”

The purpose of this legislation is to provide authority for the state to evaluate and seek to develop a program for the regulation of dredge and fill activities in waters and wetlands located within the state, in accordance with the regulating program allowed states under 33 U.S.C. 1344 (sec. 404, Clean Water Act).

Section 1: provides legislative findings for the bill, including recognition that there are thousands of waterbodies and millions of acres of wetlands within the state. The findings further state that individual states are allowed to assume primacy to regulate dredge and fill activities under 33 U.S.C. 1344 and that this is consistent with congressional intent in 33 U.S.C. 1251 that the states to have the primary responsibilities and rights in regulating activities involving lands and waters within their respective states. The findings note that other states have assumed or continue to evaluate obtaining primacy for regulating dredge and fill activities under 33 U.S.C. 1344 and that the Department of Environmental Conservation and the Department of Natural Resources have substantial expertise such that they could ably regulate these types of activities. The findings also recognize that there are benefits to the state for the Department of Environmental Conservation and the Department of Natural Resources to assume the dredge and fill permitting responsibilities.

Section 2: amends AS 44.37.020 to provide that the Department of Natural Resources, in coordination with the Department of Environmental Conservation, may take action necessary to administer and enforce any authorized dredge and fill permitting program allowed under 33 U.S.C. 1344, including the adoption of regulations under AS 44.62 (Administrative Procedure Act).

Section 3: amends AS 46.03.020 to provide that, notwithstanding any other provision of law, the Department of Environmental Conservation may take all actions necessary to receive federal authorization of a state program for the Department of Environmental Conservation and the Department of Natural Resources to administer and enforce a dredge and fill permitting program allowed under 33 U.S.C. 1344.

Section 4: directs the Department of Environmental Conservation, in coordination with the Department of Natural Resources, to continue to evaluate the potential benefits, costs, and consequences to the state of assuming primacy of regulating dredge and fill activities under 33 U.S.C. 1344, and to take reasonable steps to assume primacy. The Department of Environmental Conservation would also have the authority under Section 4 of the bill to file an application seeking federal approval of a state program administered by the Department of Environmental Conservation and the Department of Natural Resources that regulates dredge and fill activities under 33 U.S.C. 1344. Section 4 of the bill also provides that the Department of Environmental Conservation and the Department of Natural Resources may adopt regulations under AS 44.62 that are necessary to obtain federal approval of and to implement a state program for the regulations of dredge and fill activities under 33 U.S.C. 1344.

Section 5: provides for an immediate effective date.

FISCAL NOTE

STATE OF ALASKA
2013 LEGISLATIVE SESSION

Bill Version SB 27
Fiscal Note Number 1
(S) Publish Date 1/18/13

Identifier (file name) LL0750-DEC-WQ-01-17-13 Dept. Affected Environmental Conservation
Title Section 404 Wetlands Program Appropriation Water
Allocation Water Quality
Sponsor Rules by Request of the Governor
Requester Governor OMB Component Number 2062

Expenditures/Revenues (Thousands of Dollars)

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

| | FY14 Appropriation Requested | Included in Governor's FY14 Request | Out-Year Cost Estimates | | | | | |
|-------------------------------|------------------------------------|--|-------------------------|----------------|----------------|----------------|----------------|-------|
| | | | FY14 | FY15 | FY16 | FY17 | FY18 | FY19 |
| OPERATING EXPENDITURES | | | | | | | | |
| Personal Services | 495.4 | | 883.5 | 883.5 | 883.5 | 883.5 | 883.5 | 883.5 |
| Travel | 22.3 | | 37.6 | 35.2 | 35.2 | 35.2 | 35.2 | 35.2 |
| Services | 879.5 | | 908.2 | 902.2 | 902.2 | 902.2 | 902.2 | 902.2 |
| Commodities | 37.5 | | 25.0 | 4.0 | 4.0 | 10.5 | 7.9 | |
| Capital Outlay | | | | | | | | |
| Grants, Benefits | | | | | | | | |
| Miscellaneous | | | | | | | | |
| TOTAL OPERATING | 1,434.7 | 0.0 | 1,854.3 | 1,824.9 | 1,824.9 | 1,831.4 | 1,828.8 | |

| 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 | 1,434.7 | | 1,854.3 | 1,824.9 | 1,824.9 | 1,831.4 | 1,828.8 |
| 1005 | GF/Prgm (DGF) | | | | | | | |
| 1037 | GF/MH (UGF) | | | | | | | |
| 1178 | temp code (UGF) | | | | | | | |
| TOTAL | | 1,434.7 | 0.0 | 1,854.3 | 1,824.9 | 1,824.9 | 1,831.4 | 1,828.8 |

| POSITIONS | | | | | | | |
|------------------|---|---|---|---|---|---|---|
| Full-time | 5 | 0 | 8 | 8 | 8 | 8 | 8 |
| Part-time | | | | | | | |
| Temporary | | | | | | | |

| CHANGE IN REVENUES | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
|---------------------------|-----|-----|-----|-----|-----|-----|-----|
|---------------------------|-----|-----|-----|-----|-----|-----|-----|

Estimated SUPPLEMENTAL (FY13) operating costs 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY14) costs 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended, or repealed? 6/30/2015 Discuss details in analysis section.

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version.

Prepared by Michelle Bonnet Hale, Director
Division Water
Approved by Lynn Kent
Deputy Commissioner, Dept. of Environmental Conservation

Phone 907-269-7599
Date/Time 1/11/13 1:00 PM
Date 1/11/2013

FISCAL NOTE ANALYSIS #1

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. SB 27

Analysis

Analysis/Assumptions:

Assumption of the Federal Clean Water Act Section 404 dredge and fill permitting program would allow the state to create streamlined processes for more efficient permit issuance, and to reduce redundancy between federal and state programs. Amended and new regulations will be required to comport with federal regulations to implement the 404 program. By the FY 16 budget cycle, there will be a decision point regarding whether to advance with the primacy effort and, if so, the pace of that effort. FY16 and beyond costs assume continued progress leading to a successful application approved by the Environmental Protection Agency, followed by full implementation of the program; these costs may change depending upon progress in FY14 and FY15 and a full analysis of the costs to implement the program. After FY16 and program approval some costs will be offset by program receipts.

FY14

Personal Services:

Three permanent positions for "program development" and to manage a workgroup of permittees that will assist in the analysis of 404 primacy and provide the state with recommendations about primacy; evaluate benefits and consequences of state primacy; conduct a fiscal analysis of the resource needs for state primacy; establish agreements with the EPA and the Corps that include a workplan, timeline, responsibilities, and requirements for the process to obtain state primacy; establish and manage contractor assistance to conduct a gap analysis and draft initial statutes and regulations for program implementation; develop work plan; begin development of program description; apply for wetlands program development grant from EPA; and develop a communications plan. Two permanent positions for "capacity development" to build the State's knowledge and capability in the 404 permit program; to negotiate with the Corps one or more statewide programmatic general permits that allow the State to implement small, targeted portions of the 404 program; and to establish a workshare agreement with the Corps for sharing staff resources. New positions: Project Coordinator (Anchorage, XE, 23C); Environmental Program Specialist IV (Anchorage, GG, Range 20C); Two Environmental Program Specialists III (Anchorage, GG, Range 18C); One Engineer I (Anchorage, GG, Range 22C). Three positions for 10 months to ramp-up of program.

Travel:

Travel is for workgroup and stakeholder meetings; meetings with EPA Region 10 and Headquarters and the Corps Alaska District and Headquarters; and staff training.

Services:

Position support costs, indirect, and public notices for workgroup meetings.

-- \$300.0 professional services contractor assistance for statutory gap analysis, draft regulations, assistance with primacy analysis; workgroup report; and assistance with drafting primacy application.

-- \$187.50 RSA to Department of Law to assist with the Department's and workgroup's legal questions; legal assistance with Department's preparation of a primacy application, including preparation of an Attorney General's statement; legal assistance with statutes and regulations; negotiations with EPA and the Corps; and potential appeals and judicial challenges relating to federal approval of the state's primacy application.

-- \$361.8 RSA to Department of Natural Resources for positions to participate with DEC in the program development tasks, including the analysis of the division of duties between agencies under primacy and development of a mitigation program required of State programs; and two positions for State program capacity development in wetlands jurisdictional determinations and permitting procedures.

Commodities:

Position support costs, including furniture and computers (one-time costs for new positions); standard office supplies.

FISCAL NOTE ANALYSIS #1

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. SB 27

Analysis Continued

FY2015

Personal Services:

Five positions established in FY2014 will continue with program development tasks including adopting regulations; negotiating primacy MOUs with the EPA, the Corps and the U.S. Fish and Wildlife Service; developing program forms and guidance; continuing to manage a workgroup of permittees that will assist in designing a State program; ongoing negotiations with the EPA and the Corps; managing contractor assistance with development of the program description; applying for wetlands program development grant from EPA; and revising and implementing the communications plan. Three new positions in FY2015 will continue to develop the State's program capacity to issue and manage permits and to ensure compliance with permit conditions; implement statewide programmatic general permits that allow the state to implement targeted portions of the 404 program; implement data systems that provide automation of permits; and participate in a workshare agreement with the Corps for sharing staff resources. Three new positions will be established in FY15: Analyst Programmer IV (Juneau, GG, Range 20C); Engineer Associate II (Anchorage, GG, Range 21C); EPS III (Anchorage, GG, Range 18C). All positions for 12 months.

Travel:

Travel for workgroup/stakeholder meetings; meetings with EPA Region 10 and Headquarters and the Corps Alaska District and Headquarters; staff training; and field work for wetlands jurisdictional determinations and permittee inspections.

Services:

Position support costs for existing new positions, indirect, and public notice for workgroup meetings and draft regulations.

- \$100.0 professional services contractor assistance for statutory gap analysis, draft regulations, assistance with primacy analysis; workgroup report; and assistance with drafting primacy application. New and amended regulations may be adopted by the end of FY2015. New regulations are required to be adopted to implement the federal program. Amended regulations may be necessary to align existing state regulations with program requirements.
- \$187.50 RSA to Department of Law to assist with the Department's and workgroup's legal questions; legal assistance with Department's preparation of a primacy application, including preparation of an Attorney General's statement; legal assistance with statutes and regulations; negotiations with EPA and the Corps; and potential appeals and judicial challenges relating to federal approval of the state's primacy application.
- \$566.7 RSA to Department of Natural Resources (DNR) for positions to participate with DEC in the program development tasks, including development of a mitigation program required of State programs and four positions for State program capacity development in permitting procedures.

Commodities:

Position support costs, including furniture and computers for three new positions (one-time costs for new positions); deletion of FY2014 one-time costs for furniture and computers; ongoing standard office supplies.

FY2016 and Beyond

By the FY16 budget cycle, there will be a decision point regarding whether to advance with the primacy effort and, if so, the pace of that effort. The fiscal note assumes a baseline budget to continue with primacy application efforts and some capacity development work; however, there will be a future determination about the pace of "ramping up" to the full program resources to implement the 404 program under primacy. Once the state assumes primacy, all but 2-3 of the program development positions will transition to program implementation (permitting, inspections, compliance, mitigation, recordkeeping, federal reporting).

Services:

RSA with DOL continues. Once primacy is approved, estimated to be in year 4 or 5, efforts by the DOL will shift to counseling the agencies on implementation of the primacy program, and the nature of Law's work will likely vary based upon the specific projects and dredge and fill permit applications that need state approval. RSA with DNR continues.

Commodities:

Reflects the reduction of FY15 one-time costs for furniture and computers for three positions, computer replacements in FY18 (five positions) and FY19 (three positions).

FISCAL NOTE

STATE OF ALASKA
2013 LEGISLATIVE SESSION

Bill Version SB 27
 Fiscal Note Number 2
 (S) Publish Date 1/18/13

Identifier (file name) LL0750-DNR-OPMP-1-14-13 Dept. Affected Natural Resources
 Title State Assumption of 404 Wetlands Permitting Appropriation Administration & Support
 Allocation Office of Project Management & Permitting
 Sponsor Rules by Request of the Governor
 Requester Governor OMB Component Number 2733

Expenditures/Revenues (Thousands of Dollars)

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

| | FY14 Appropriation Requested | Included in Governor's FY14 Request | Out-Year Cost Estimates | | | | | |
|-------------------------------|------------------------------------|--|-------------------------|--------------|--------------|--------------|--------------|--------------|
| | | | FY14 | FY14 | FY15 | FY16 | FY17 | FY18 |
| OPERATING EXPENDITURES | | | | | | | | |
| Personal Services | 231.4 | | 425.6 | 425.6 | 425.6 | 425.6 | 425.6 | 425.6 |
| Travel | 9.4 | | 14.1 | 14.1 | 14.1 | 14.1 | 14.1 | 14.1 |
| Services | 111.0 | | 122.0 | 122.0 | 122.0 | 122.0 | 122.0 | 122.0 |
| Commodities | 10.0 | | 5.0 | | | | | |
| Capital Outlay | | | | | | | | |
| Grants, Benefits | | | | | | | | |
| Miscellaneous | | | | | | | | |
| TOTAL OPERATING | 361.8 | 0.0 | 566.7 | 561.7 | 561.7 | 561.7 | 561.7 | 561.7 |

| FUND SOURCE | | (Thousands of Dollars) | | | | | | |
|--------------|-------------------|------------------------|------------|--------------|--------------|--------------|--------------|--------------|
| 1002 | Federal Receipts | | | | | | | |
| 1003 | GF Match | | | | | | | |
| 1004 | GF | | | | | | | |
| 1005 | GF/Prgm (DGF) | | | | | | | |
| 1037 | GF/MH (UGF) | | | | | | | |
| 1007 | I/A Rcpts (Other) | 361.8 | | 566.7 | 561.7 | 561.7 | 561.7 | 561.7 |
| TOTAL | | 361.8 | 0.0 | 566.7 | 561.7 | 561.7 | 561.7 | 561.7 |

| POSITIONS | | | | | | | | |
|-----------|--|---|--|---|---|---|---|---|
| Full-time | | 2 | | 4 | 4 | 4 | 4 | 4 |
| Part-time | | | | | | | | |
| Temporary | | | | | | | | |

| CHANGE IN REVENUES | | | | | | | |
|--------------------|--|--|--|--|--|--|--|
| | | | | | | | |

Estimated SUPPLEMENTAL (FY13) operating costs _____ (separate supplemental appropriation required)
 (discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY14) costs _____ (separate capital appropriation required)
 (discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
 If yes, by what date are the regulations to be adopted, amended, or repealed? N/A Discuss details in analysis section.

Why this fiscal note differs from previous version (if initial version, please note as such)

Initial version, not applicable

Prepared by Ed Fogels, Deputy Commissioner Phone 269-8423
 Division Commissioner's Office Date/Time 1/5/13 10:30 AM
 Approved by Daniel S. Sullivan, Commissioner Date 1/14/2013
Department of Natural Resources

FISCAL NOTE ANALYSIS #2

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. SB 27

Analysis

This bill provides the Department of Natural Resources (DNR), in coordination with the Department of Environmental Conservation (DEC), the authority to take actions necessary to administer and enforce any dredge and fill permitting program allowed under 33 U.S.C. 1344 (sec. 404, Clean Water Act).

FY 14

Personal Services - DNR will receive interagency receipts from DEC to fund positions needed to assist DEC in its analysis of state assumption of the CWA Section 404 ("404 program"). The Office of Project Management and Permitting will require 2 new positions: one project coordinator to participate with DEC in the program development tasks, including the analysis of the division of duties between agencies under primacy and development of a mitigation program required of State programs; and one position for State program capacity development in wetlands jurisdictional determinations and permitting procedures. Capacity development will allow DNR to pursue development and administration of regional general permits for some classes of activities, resulting in more state control over 404 permitting during the interim period before the state obtains 404 primacy.

One Project Coordinator (Anchorage, XE, Range 23C) \$134,298

One Natural Resource Specialist III (Anchorage, GG, Range 18C) \$97,108

Travel - Travel costs will be incurred for attending DEC work group and stakeholder meetings, meetings with EPA Region 10 and US Army Corps of Engineers Headquarters staff, and for staff training opportunities.

Services - Contractual costs will be incurred for hiring consultants to assist the state in designing regional general permits and other capacity building. The intent of this capacity building will be to improve the efficiency of 404 permitting in Alaska even prior to the state obtaining 404 primacy.

Commodities - Position support costs, including furniture and computers (one-time costs for new positions); standard office supplies.

FY 15

Personal Services - DNR will receive interagency receipts from DEC to fund positions needed to assist DEC in state assumption of the CWA Section 404 ("404 program"). The Office of Project Management and Permitting will require two additional positions to assist in State program capacity development in permitting procedures. The Project Coordinator will continue to help in the program development tasks, including development of a mitigation program required of State programs.

Two positions established in FY2014

Two Natural Resource Specialist III (Anchorage, GG, Range 18C) \$97,108 each

Travel - Travel costs will be incurred for attending DEC work group and stakeholder meetings, meetings with EPA Region 10 and US Army Corps of Engineers Headquarters staff, and for staff training opportunities.

Services - Contractual costs will be incurred for hiring consultants to assist the state in designing regional general permits and other capacity building.

Commodities - Position support costs, including furniture and computers (one-time costs for new positions); standard office supplies.

Associated Regulations: DNR does not anticipate any regulation changes to our department's regulations at this time. However, as the evaluation of the 404 primacy program develops, we may identify changes to DNR regulations in future years.

FISCAL NOTE

STATE OF ALASKA
2013 LEGISLATIVE SESSION

Bill Version SB 27
 Fiscal Note Number 3
 (S) Publish Date 1/18/13

Identifier (file name) 0750-LAW-CIV-01-14-13 Dept. Affected Law
 Title Section 404 Wetlands Program Appropriation Civil
 Allocation Environmental
 Sponsor Rules by Request of the Governor
 Requester Governor OMB Component Number 2092

Expenditures/Revenues (Thousands of Dollars)

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

| | FY14 Appropriation Requested | Included in Governor's FY14 Request | Out-Year Cost Estimates | | | | |
|-------------------------------|------------------------------------|--|-------------------------|-------------|-------------|-------------|-------------|
| | | | FY15 | FY16 | FY17 | FY18 | FY19 |
| OPERATING EXPENDITURES | FY14 | FY14 | FY15 | FY16 | FY17 | FY18 | FY19 |
| Personal Services | | | | | | | |
| Travel | | | | | | | |
| Services | | | | | | | |
| Commodities | | | | | | | |
| Capital Outlay | | | | | | | |
| Grants, Benefits | | | | | | | |
| Miscellaneous | | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

FUND SOURCE (Thousands of Dollars)

| | | | | | | | |
|--------------|------------------|------------|------------|------------|------------|------------|------------|
| 1002 | Federal Receipts | | | | | | |
| 1003 | GF Match | | | | | | |
| 1004 | GF | | | | | | |
| 1005 | GF/Prgm (DGF) | | | | | | |
| 1037 | GF/MH (UGF) | | | | | | |
| | #N/A | | | | | | |
| TOTAL | | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

CHANGE IN REVENUES

| | | | | | | |
|--|--|--|--|--|--|--|
| | | | | | | |
|--|--|--|--|--|--|--|

Estimated **SUPPLEMENTAL (FY13) operating costs** _____ (separate supplemental appropriation required)
 (discuss reasons and fund source(s) in analysis section)

Estimated **CAPITAL (FY14) costs** _____ (separate capital appropriation required)
 (discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
 If yes, by what date are the regulations to be adopted, amended, or repealed? _____ Discuss details in analysis section.

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Loretta Withington, Division Operations Manager
 Division Administrative Services
 Approved by Michael C. Geraghty, Attorney General
Department of Law

Phone 465-5427
 Date/Time 1/11/13 12:00 AM
 Date 1/11/2013

FISCAL NOTE ANALYSIS #3

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. SB 27 _____

Analysis

RSA with Department of Environmental Conservation (DEC) to assist with the Department's and workgroup's legal questions; legal assistance with Department's preparation of a primacy application, including preparation of an Attorney General's statement; legal assistance with statutes and regulations; negotiations with EPA and the Corps of Engineers; and potential appeals and judicial challenges relating to federal approval of the state's primacy application.

Funding for the RSA is included in the DEC fiscal note. The Department of Law has sufficient interagency receipt authority for the proposed \$187.5 agreement. See DEC's fiscal note for more detailed information.

**Senate Finance Committee
Testimony of
Alaska Department of Environmental Conservation
Senate Bill 27
“404 Primacy”
February 26, 2013**

What is a 404 program?

Section 404 of the Clean Water Act requires that all dredge and fill activities in surface waters (the ocean, lakes, rivers, streams) and wetlands be permitted. This permitting is done by the U.S. Army Corps of Engineers under what is known as the “404 program.” Per the Clean Water Act, EPA retains oversight over the Corps’ 404 program.

Wetlands provide valuable functions that include habitat for plants and animals, wildlife corridors, improvements to water quality, and flood and storm attenuation. Wetlands in Alaska range from North Slope tundra to forested wetlands in the mountains of Southeast. With over 174 million acres of wetlands (65% of all wetlands in the nation), Alaska’s stake in administering the 404 program is unlike that of any other state.

Examples of activities requiring 404 permits include filling in wetlands for any purpose such as roads, or residential or commercial building pads; and construction of breakwaters, dams, and levees. The 404 permitting process itself involves an evaluation of the dredge and/or fill activity to identify the “least environmentally damaging practicable alternative” (LEDPA) for a project. An authorization for a dredge or fill activity must be accompanied by what is known as 404(b)(1) findings on potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment. This also includes an evaluation of cumulative impacts.

The goal of 404 permitting is to avoid or minimize impacts to aquatic resources, including wetlands. Where impacts are unavoidable, actions are taken or required to mitigate those impacts.

The Clean Water Act intends for states to implement (to assume primacy for) the 404 program with the Corps of Engineers and the Environmental Protection Agency (EPA) acting in an oversight role. States seeking primacy for the 404 program require EPA’s approval.

SB 27 gives the authority to DEC and DNR to evaluate the costs and benefits of a state run program; begin the application development process and to seek approval to implement the program if it makes sense to do so.

How do states assume the 404 program, and what can states gain authority over?

The Clean Water Act spells out the requirements for a state's application for 404 primacy. These include a formal request by the governor; a description of the program as the state will run it; the state Attorney General's declaration that the state program is consistent with the federal program; memoranda of agreement with EPA and the Corps; a description of staffing and funding; and copies of all applicable state statutes, regulations, and administrative procedures. EPA will not approve a program that is less stringent than the federal program.

States may assume primacy for the permitting and compliance program for all waters and wetlands except tidally influenced waters and waters that are or could be used for interstate and foreign commerce and wetlands adjacent to those waters. The Corps will retain authority for permitting dredge and fill activities in these waters in Alaska even after Alaska formally assumes the 404 program.

Two other states already have primacy for the program, New Jersey and Michigan, while other states are considering it. The Department of Environmental Conservation (DEC) currently plays a secondary role in the 404 program in Alaska, reviewing permit applications, in some cases applying Alaska-specific conditions, and "certifying" that the Corps' permits meet State water quality standards.

While I have described the formal process for 404 assumption from the Corps, there is a second mechanism where states can administer Section 404 dredge and fill permits. This is done by partnering with the Corps in the issuance and administration of what are known as State programmatic general permits, or State PGPs. These permits are general permits for dredge and fill actions that are similar in nature and have minimal individual or cumulative effects. The Department likely already has statutory authority to administer State PGPs, but the proposed legislation and fiscal note provide for the state to explore and pursue both this option and the formal primacy option.

Multiple Alaska administrations over many years have considered primacy for the 404 program with the most serious consideration about 10 years ago. The decision at that time was to first pursue State primacy from EPA to implement the federal Clean Water Act (Section 402), National Pollutant Discharge Elimination System Program – the wastewater discharge permitting program. DEC has completed that process with EPA approval of the program in 2008 and the State's final step to have full authority in 2012, when we accepted responsibility for the final industrial sector's permits.

With that recent experience, now is a good time for the Alaska to expand control over its waters, recognizing state priorities for prompt permitting for economic development while protecting water quality. The application process for 404 primacy will be similar, as will program development and implementation. The lessons learned from that experience will apply directly to 404 assumption.

One lesson, however, is that we know that it will take time. There are multiple opportunities along the way for the public to weigh in on program development as well as opportunities for the legislature to have a say in whether the state proceeds with primacy – when we may seek additional statutory changes to ensure the program will be consistent with the federal program and when we seek the budget necessary to implement the program.

Why is assumption of the 404 program important?

Almost half of Alaska is considered wetlands – 65 % of the nation’s wetlands are in Alaska. With wetlands so omnipresent in Alaska, most major projects – and a very large number of minor projects, like housing pads – require 404 permitting. Yet the Corps is experiencing budget cuts and staff reductions. In a state like Alaska with a very narrow window for construction, such delays can and do result in project delays of a year or more. A state-run program that is accountable to Alaskans and the legislature will assure that it is the State that decides the level of resources to devote to a program that is so essential to the state’s economy. The state will have control of its permitting priorities.

Both DEC and DNR have placed significant emphasis in recent years on permit reform. From automated permit application to improved business processes, the State is well-poised to apply these streamlining improvements to the 404 program. These faster, streamlined practices place more emphasis on results – protection of wetlands and water resources – and less on cumbersome processes.

With a state-run program, two agencies – DEC and DNR – that have a long history of successful interaction – will run the program, rather than the four currently involved: The Corps, EPA, DEC, and DNR. Two vs. four simply means less bureaucracy. ADF&G will, of course, retain its Title 16 permitting authorities and DEC and DNR will coordinate and consult with ADF&G as part of the 404 process.

Other benefits of a State-administered program:

- Cost savings for applicants in permitting major new projects.
- Greater certainty of adequate funding and staffing for the program.
- Permits and mitigation solutions that truly reflect Alaska’s priorities and unique conditions with Alaska specific program guidance.
- An improved appeals process that is timelier and less apt to stall projects needlessly and indefinitely.
- Judicial proceedings generally decided by Alaska courts instead of outside federal courts.
- A stable, risk-based, and predictable enforcement regime.
- Replacement of formal federal ESA and EFH consultation processes with less formal, faster processes while still achieving the objectives of those programs.

What does the legislation do?

The legislation before you provides two parallel tracks: Study 404 primacy and prepare an application for the program, and begin capacity building from the start. First, it directs DEC and DNR to evaluate costs, benefits, and consequences of the state assuming primacy for the 404 program, providing resources to the departments to do so. At the same time as the agencies are performing this evaluation, State staff can partner with Corps staff in the issuance of state Programmatic General Permits and authorizations under these general permits, assist the Corps with priority permit issuance, and work alongside the Corps in implementing mitigation projects associated with permitted projects in a way that works for Alaska's unique situation. This capacity building provides tremendous benefit to the state agencies when the state does gain primacy for the program, providing trained staff and tested processes for running the actual program. Additionally, it provides benefits to Alaska's permit applicants who will gain from the state staffing addition: shorter turnaround times for 404 permits, while continuing to protect water quality.

In addition, this legislation provides the authority for DNR and DEC to administer the program and provides the authority for DEC to apply to EPA for authorization for the state-run program, as well as providing both agencies the authority to issue regulations needed for the program.

Because the state is still early in the process of fully understanding the ramifications of 404 assumption, this bill will likely not be the last 404 legislation that comes before you. As we research statutory requirements, it is likely that we will back with needed changes: Statutory change has been required of other states seeking authority for the program. In addition, DEC and DNR will be evaluating the resources necessary to implement and run a state 404 program. The estimates in the fiscal notes that accompany this bill are for the application process and to begin the initial capacity building I've mentioned. By the FY16 budget cycle, however, we expect a decision point regarding whether to advance the primacy effort. At that point, DEC and DNR will have a much better understanding of the resources that will be required for the full program. We expect that additional resources, likely significant because it is a significant program, will be required at that time.

Fiscal Impacts

There are three fiscal notes for SB 27. The dollar amounts from the DNR and Law fiscal notes are included in the services line of the DEC fiscal note – DEC's fiscal note represents the full funding request for the early stages of evaluating and beginning preparation for a potential primacy application; and to increase the State's understanding of the program through capacity development. The fiscal note does not include the full costs to implement a State 404 program.

During the Senate Resources committee meeting, Senator Fairclough asked for a comparison between the steps the State took to evaluate and assume primacy for the Clean Water Act Section 402 National Pollutant Discharge Elimination System wastewater discharge permitting program and

the steps we would take relating to the CWA Section 404 program if SB 27 passes. The federal procedures and the requirements for a state's application for primacy are very similar for the two programs.

One difference in the two paths to primacy is that DEC was already operating a robust wastewater permitting program and the existing 29 positions transitioned to the 402 program. While DEC and DNR have significant experience on large projects with the 404 program, the current DEC investment is about 3-4 FTE spread over approximately 7 employees.

The fiscal note for SB 27 represents a faster pace than DEC's pace with the similar effort for Section 402 primacy. The first several years of Alaska's 402 primacy effort were spent learning about the application process for primacy; working with EPA to help them understand that the State was serious in its desire and plan to seek primacy; and helping Alaskan stakeholders understand costs, benefits, and consequences of primacy. This effort and preparation of the primacy application was accomplished with 2-4 full-time positions and existing staff over a period of about 6 years.

The State has learned from this process, as has EPA, and much of the early work done for 402 primacy can be compressed during the 404 primacy application process. The fiscal note for SB 27 represents the most efficient way to timely analyze the costs, benefits, and consequences of 404 primacy; to work with the EPA and the Army Corps of Engineers to resolve the complex questions that 404 assumption raises; begin to increase program capacity; and to apply for the program.

Once we have evaluated the overall costs for operating a state 404 program, the legislature will have one or more opportunities to weigh in on whether to proceed with primacy when it considers any additional statutory authority needs, and when it evaluates whether and how fast the state adds sufficient resources to implement the 404 program.

Department of Environmental Conservation
SB 27 and HB 78: "Regulation of Dredge and Fill Activities"
Primacy for the Clean Water Act Section 404 Permitting ("404 Program")
January 24, 2013

Background

Section 404 of the Clean Water Act (CWA) established the "404 Program" requiring that all dredge or fill activities in waters of the U.S., including wetlands, be permitted by the Corps of Engineers. Examples of regulated activities include filling in wetlands for any purpose such as roads or residential and commercial building pads, and construction of breakwaters, dams, and levees. The CWA directs states to manage and implement the permitting program.

With over 174 million acres of wetlands (65% of all wetlands in the nation), Alaska's stake in administering the 404 program is unlike that of any other state.

Proposed Legislation

- Gives DEC and DNR, working together, authority to evaluate, seek approval, and implement a State-managed 404 permitting program from the EPA and the Corps of Engineers.
- Primacy does not apply to tidally influenced areas and navigable waters that are or could be used to transport interstate or foreign commerce and wetlands adjacent to those areas.
- Under primacy, the state gains authority to exercise discretion whenever possible while EPA and the Corps retain oversight authority.

Benefits of State Primacy

- Reduced bureaucracy. Two State permitting agencies involved, rather than four.
- State, instead of federal management of water, land use, and permitting priorities.
- A faster permitting process and a stable, risk-based, and predictable enforcement regime.
- Cost savings in permitting major new projects.
- Permits that reflect Alaska's unique conditions with Alaska-specific program guidance.
- Less emphasis on cumbersome process and more emphasis on results.
- A vastly improved appeals process that is timelier, conducted by Alaskans, and less apt to stall projects needlessly and indefinitely.
- Judicial proceedings generally decided by Alaska courts instead of outside federal courts.
- Accountability to Alaska's elected officials and the Alaskan public.
- Use of 404 permitting guidelines for environmental review, eliminating lengthy NEPA process for many projects, while still protecting the environment.
- Robust public notification and participation.
- Federal laws, such as the Endangered Species Act, would be addressed through EPA's oversight of the state program.

State of Alaska
Departments of Environmental Conservation and Natural Resources
Clean Water Act Section 404 Dredge and Fill Permitting and Compliance
State Primacy

Primacy Benefits – Why Should Alaska Invest in 404 Program Primacy?

February 22, 2013

Fifty years ago the delegates for statehood promised that the State of Alaska would act like a state and not continue to expect federal assistance to run programs that the state can and should run. The State has recently completed taking over primacy for the wastewater discharge permitting program (Clean Water Act Section 402) from the Environmental Protection Agency (EPA), and assuming primacy for the Clean Water Act (CWA) Section 404 dredge and fill permitting and compliance program (the “404 program”) will further advance the State in upholding that promise.

The 404 program requires a permit from the U.S. Army Corps of Engineers (the Corps) for all dredge or fill activities that affect “waters of the United States.” Because of Alaska’s vast wetlands, most construction projects for facilities and infrastructure require a 404 permit. This permitting program has far-reaching effects on development in Alaska.

BENEFITS of a State-managed 404 Program

- **Accountability.** State primacy means that the 404 program is accountable to Alaskans and to the Alaska legislature for implementation of the permit and compliance program (EPA and the Corps are not directly accountable to Alaskans).
- **State, instead of federal, management of water and land use priorities.** A State-run 404 program would help to insulate 404 permitting in Alaska from the uncertainties resulting from shifting national priorities and policies which necessarily must be nationwide in scope, but which are often difficult to apply in Alaska.
- **Reduced bureaucracy.** Currently the Corps is the permitting agency with input from the EPA and certification by DEC that the Corps’ permits meet Alaska’s water quality standards. DNR is involved in coordinating permitting for large projects. Under primacy, 404 permitting activities will be administered by DEC and DNR. Two state agencies, rather than four state and federal agencies, will result in a faster permitting process and a more streamlined program.
- **Time and cost savings in permitting major new facilities and infrastructure.** While permit fees will likely increase under primacy, the cost to the permit applicant 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 two State agencies rather than four federal and state agencies, reduced travel costs for meetings with multiple agencies, and working with permit writers familiar with Alaska conditions.
- **Greater state role in project planning.** A State-issued 404 permit would not trigger the NEPA review process, as does the Corps’ issuance of the permit. However, some projects with other federal actions or federal funding would trigger the NEPA process (for example, a Federal Energy

Regulatory Commission (FERC) license for a hydroelectric dam). Even within a NEPA process, there is benefit in the state playing a greater role as the 404 permitting authority. There is also potential benefit in replacing the formal ESA and EFH consultation processes required of the Corps and EPA with the less formal and faster processes under state primacy while still achieving the objectives of those programs.

- A program tailored to Alaskan needs, to the greatest extent allowed by federal law. Permit requirements tailored to Alaska conditions, resulting in a more flexible approach to wetlands permitting and compensatory mitigation.
- Less emphasis on cumbersome process and more emphasis on results. More timely permitting. The Corps and EPA are both experiencing significant budget reductions. A State-run 404 program will result in more certain funding and staffing, and more timely permitting of projects important to the State. The State will be setting the priorities.
- More predictable enforcement. The state can build specific, timely, and predictable steps into a risk-based enforcement program while maintaining a commitment to compliance assistance.
- Robust public notification and participation opportunities.
- State judicial review. Judicial review of state permitting decisions under primacy would generally be handled in the Alaska courts instead of the federal courts. State judicial review of permitting decisions means better consideration of local issues and the potential for more timely resolution to permit challenges.
- Alaska-specific guidance documents. The state can develop guidance documents that are prepared for the specific needs of Alaska's waters and projects, replacing and/or enhancing Corps and EPA developed guidance which is based on those agencies' national perspectives.
- Availability of efficiency tools. Streamlining the administrative permitting process is a potential advantage of a state 404 permitting program. The State already has tools such as on-line permit applications, on-line permit fee payments, and electronic permit tracking that can be amended to accommodate 404 permitting.
- Predictability and stability in funding. The Army Corps in Alaska has recently taken about a 20% reduction in staff and is facing additional cuts and reductions, at the same time it is facing the need to prepare very large Environmental Impact Statements under NEPA and permit many state projects from large capital budgets in the last few years, which will draw a lot of Corps' staff time. Not taking primacy has consequences that need to be considered as the State tries to build up its infrastructure and put citizens to work.

State of Alaska
Departments of Environmental Conservation and Natural Resources
Clean Water Act Section 404 Dredge and Fill Permitting and Compliance
State Primacy

404 Program Assumption Methods

January 31, 2013

404 Program Assumption Methods

There are two basic ways the state could administer Section 404 dredge and fill permits. They are not mutually exclusive; that is, they can be pursued and implemented simultaneously or separately.

- (1) **State Primacy.** Under CWA Section 404, a state may administer a program to issue and enforce Section 404 permits, subject to certain geographic exceptions. A state program would require federal approval, be subject to the oversight by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, and permits that the state may issue will be subject to EPA's veto authority. Proposed legislation (HB 78 and SB 27) expressly authorizes the state to pursue and administer the program if it is reasonable to do so.
- (2) **State Programmatic General Permits (State PGPs).** The Corps of Engineers has authority to issue general permits for dredge and fill actions that are similar in nature with minimal cumulative effects. These permits can be implemented by the state under agreement with the Corps of Engineers and are not subject to the geographic limitations associated with state primacy. The State of Alaska likely already has statutory authority to administer State PGPs, but the proposed legislation (HB 78 and SB 27) provides funding for the state to explore and pursue both this option and the primacy option.

State Primacy

Under Option 1, to assume state primacy, Alaska must submit an application to EPA. That application includes:

- A *letter from the Governor* requesting approval of the State's application;
- An *Attorney General statement* of legal authority that confirms that the State's laws and regulations are sufficient to implement the 404 program and that will ensure consistency with the federal program;
- The State's applicable *statutes and regulations*;
- A detailed *program narrative* that describes how the state will issue permits, ensure permit compliance and perform enforcement, track issued permits and enforcement actions, and submit an annual report to EPA;
- A description of the State's *resources* (staff, job classes, duties, stable funding sources) sufficient to implement and enforce the program;

- *Memoranda of Agreement* with EPA and the Secretary of the Army that describe the relationships and duties between the agencies under 404 program assumption.

EPA is the approval authority for State 404 programs and must consult with the Secretary of the Army and the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service. The Clean Water Act sets specific timeframes for the federal agencies to review a State's application for 404 program primacy.

- Program Assumption should be expected to take a minimum of 4-5 years.

State PGPs

Option 2 provides states the ability to cooperatively issue and administer programmatic general permits with the Corps.

- State PGPs are general permits issued by the Corps of Engineers and managed by the state that authorize and identify the terms, limitations, and conditions under which classes of projects and activities may be authorized under Section 404, with a much more efficient and abbreviated review by the Corps of Engineers; the Corps retains oversight of the state's administration of the PGPs.
- State PGPs may be issued on a local, regional, or statewide basis. The state could pursue administration of Corps-issued PGPs under an MOU regardless of whether it seeks primacy of Section 404 permitting.
- Authorizations to conduct dredge or fill activities under State PGPs are issued to applicants with small projects and minimal adverse environmental impacts, individually or cumulatively.
- A PGP is designed to: simplify the evaluation process; provide equivalent environmental protection; reduce unnecessary duplicative project evaluation; and promote more efficient use of resources.
- PGPs offer more flexibility and can apply to areas subject to the federal navigational servitude.

State of Alaska
Departments of Environmental Conservation and Natural Resources
Clean Water Act Section 404 Dredge and Fill Permitting and Compliance
State Primacy

Public Process

February 22, 2013

The public process will be informed by and similar to the process followed leading up to and after delegation of the Alaska Pollutant Discharge Elimination System (APDES) program from EPA to DEC.

As DEC and DNR study assumption of the program, the agencies will seek input on issues, and costs and benefits from affected industries, agencies, tribal and local governments, and the public.

Public Notice Processes

Public notice processes provide transparency of DEC and DNR actions to the public, provide an opportunity for the public to comment upon and inform agency actions, and provide the agencies input to views and ideas to incorporate into agency action.

- Statutory changes that may be required will go through legislative process, including hearings
- Public notice and comment on regulation changes, including public meetings/hearings
- The application submitted to the Environmental Protection Agency (EPA) will go through EPA's public notice and comment process
- The State will provide notice of EPA's public notice of the state's application as part of their program approval process

Public Process after Program Assumption

- After assumption, the State will have a robust public notification and participation similar to that used by the APDES program
- The State will have a public, and tribal and local government notification and communication process similar to that developed and used by the APDES program

**Study of the Costs and Benefits of State Assumption of the
Federal § 404 Clean Water Act Permitting Program**

*A Report to the Honorable Robert F. McDonnell, Governor
and the General Assembly of Virginia*

Department of Environmental Quality

December 2012

Introduction

This report was prepared by the Virginia Department of Environmental Quality (DEQ) pursuant to House Joint Resolution 243 (HJ 243) passed during the General Assembly's 2012 Session. This report sets forth the potential costs and benefits of the Commonwealth seeking authority from the U.S. Environmental Protection Agency (EPA) to administer the § 404 permitting program under the federal Clean Water Act (CWA).

Executive Summary

The CWA's § 404 State assumption process provides the mechanism for individual States to realize enhanced water resource protection while providing a streamlined regulatory program with a single point of contact. Currently, only two States have assumed the § 404 program within their borders and this is due mainly to the prohibitive costs and complexities involved with the assumption process.

If the Commonwealth were to decide to seek assumption of the § 404 program, it would enter into a complex and lengthy process that could last up to two years with no certainty that EPA would approve the request. Section 404 assumption would require new funding for additional staff, training, and database improvements in advance of the Commonwealth requesting the program from EPA. Virginia's laws and regulations would need to be amended to provide the authorities to implement the CWA and ensure consistency with implementation requirements under the CWA, including potentially requiring changes or elimination of existing State regulatory exemptions for activities that are not authorized under the Federal program (e.g., the exemption for septic tank placement).

The potential benefits of § 404 assumption include improved efficiency, timeliness, certainty, consistency in permitting and improved accountability with a single point of contact for the regulated community.

The potential costs of § 404 assumption include among other things, the expense of acquiring the staff, administrative resources and information technology infrastructure needed to handle the expanded workload at the State level and in the short-term also include a potential loss of the knowledge and technical expertise of the existing Corps staff .

DEQ's cost and benefits analysis included internal research, input from stakeholders in the Commonwealth's regulated community and comments from natural resource organizations. DEQ also referenced research provided by the Environmental Council of States (ECOS) and the Association of State Wetland Managers (ASWM) summarizing the experiences of States that have previously studied § 404 assumption, or have actually assumed the program like Michigan and New Jersey. Reference materials from ECOS and ASWM are provided in Appendix E and at <http://www.aswm.org/wetland-programs/s-404-assumption>. From this broad range of data sources, a list of recurring benefits and costs associated with assuming the § 404 program has emerged:

Benefits:

- **Regulatory streamlining and increased efficiency:**
State program assumption may significantly reduce duplicative State and Federal permitting requirements, resulting in reduced time for review of regulated activities.
- **Increased consistency in permit decisions:**
A State run § 404 program provides a single point of contact for the regulated community and can eliminate potentially conflicting permit decisions and conditions.
- **Increased regulatory program stability and certainty:**
During times of jurisdictional uncertainty at the federal level, such as in the wake of an individual federal legal decision, State governments are able to maintain a consistent and predictable definition of the waters they regulate.
- **State-specific resource policies and procedures tailored to address specific conditions and needs of the State:**
A State run § 404 program can be designed in accordance with the individual State's unique water resources, geographic features and water protection goals.

Costs & Barriers

- **High financial cost:**
The initial cost of program assumption includes development of an application to EPA, modification of State statutes and regulations and development of procedures for coordinating with federal agencies. The yearly costs to administer the program include hiring and retaining 40 new full time employees, providing ongoing training and expanding administrative and information technology resources. DEQ estimates that assumption will cost 18 million dollars over the first 5 years, and 3.4 million dollars annually thereafter.
- **Lack of dedicated federal funding for 404 program operation and administration:**
Funding is not currently available from the federal government for implementation of the Section 404 program. While there are federal funds potentially available for a State's development of the 404 program, it is the implementation phase that is financially challenging.
- **Difficulty in meeting the program requirements:**
In order to be approved to administer the federal program at the State level, a State must demonstrate that it has equivalent authority in all areas of the program. This can be difficult because the basis for State authority is different than the basis for federal authority.

- Lack of a partial assumption option:
The Section 404 program does not include an option for partial assumption by States. States cannot seek to assume the 404 program for only specific geographic areas or certain types of activities; they must assume the entire program.
- Section 10 Navigable Waters that remain under Corps jurisdiction:
Pursuant to § 10 of the River and Harbors Act, even if Virginia assumes the § 404 program, the Corps will retain authority over the Commonwealth's waters that have been defined by the Corps as navigable, including the wetlands adjacent to the navigable waters. In coastal States like Virginia a greater geographical extent of waters are defined as navigable, and the Corps would retain jurisdiction over those waters and their adjacent wetlands.
- Loss of Corps' knowledge base:
State assumption of the federal program may potentially result in the loss of the knowledge and technical expertise of the existing Corps staff, especially with respect to wetlands delineation confirmations.

Pursuant to HJ 243, DEQ convened a group of stakeholders to advise DEQ on the costs and benefits of assuming the program. The Stakeholder Group provided many valuable comments and expressed concerns regarding assumption. Notes from the Stakeholder Group meetings are provided as Appendix A in this report. Two overarching themes emerged from the Stakeholder Group meetings. One theme is that the regulated community is largely content with the existing federal and State wetland programmatic structure, aside from some minor improvements that were suggested. Secondly, when polled, the majority of the members of the Stakeholder Group believed that the costs of assuming the § 404 program outweigh the potential benefits of assumption. Some of the Stakeholder Group members suggested that the only acceptable assumption scenario would be one that ensures significant improvements in every category to the level of service that is currently being provided by the dual programs. DEQ believes these goals could be met with an adequately funded State program.

The regulated community has expressed concern about the potential for DEQ to charge higher permit fees to help finance the costs of assuming the § 404 program. The Corps of Engineers does not charge a permit fee and DEQ charges no fee for a General Permit authorizing less than 1/10 acre of wetland impacts. For wetland impacts above 1/10 of an acre, DEQ assesses fees on a sliding scale based on the size of the wetland impact. This fee structure allows the regulated community to pursue projects involving minimal wetland impacts without an additional financial burden from permit fees. The percentage of the current program costs covered by permit fees has ranged from 25% in 2010 to 10% in 2012, a fluctuation due primarily to the effect of the economic slowdown on the construction industry. Under an assumed federal program DEQ would adjust the fee structure to preserve the fee exemption for the smaller, less complex projects. DEQ's costs analysis determined that financing the assumed program through fee funding above the current level is not viable as it would likely require fees for all permit authorizations and would disproportionately affect the proponents of smaller projects that are currently authorized under Nationwide Permits or DEQ's General Permits.

Virginia's current State Programmatic General Permit (SPGP) has helped to reduce duplicative permitting processes. Virginia's SPGP has reduced regulatory duplication for projects that qualify for the SPGP, but there is still a "two-stop shopping" experience for the regulated community for projects that are beyond the SPGP thresholds of 1.0 acre of wetland impacts and 2000 linear feet of stream impacts. Given the concerns expressed by the Stakeholder Group regarding § 404 assumption and, in the absence of a viable funding source, renegotiation and expansion of the SPGP may provide a viable alternative to § 404 assumption that would protect Virginia's wetland resources and improve consistency, timeliness and certainty for a broader range of projects.

Background

Congress passed the CWA in 1972, and it is the primary federal law governing water quality in the United States. The goal of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Section 404 of the federal CWA establishes a permitting program to regulate the discharge of dredge and fill material into waters of the United States. This permitting program is administered by the U.S. Army Corps of Engineers (the Corps) with oversight from the U.S. Environmental Protection Agency (EPA). Section 401 of the CWA requires that any person applying for a federal permit, which may result in a discharge of pollutants into waters of the United States, must also obtain a State water quality certification that the activity complies with all applicable State water quality laws and standards. DEQ implements a permitting program for wetland impacts under the Virginia Water Protection (VWP) program which also serves as § 401 Certification for § 404 federal permits. In 2002 Virginia sought and was granted an SPGP that allowed the State Water Control Board to be the sole permitting authority for projects impacting nontidal wetlands or streams up to ½ acre and 300 linear feet. In 2007 negotiations between the Corps and DEQ resulted in Virginia's SPGP impact thresholds increasing to 1 acre of non tidal wetlands and 2000 linear feet of streams. The SPGP allows the processing and authorization of permits without Corps participation.

The CWA includes a provision whereby States may seek EPA's approval to assume and implement certain parts of the CWA under State law, including § 404. *See* CWA § 404(g); 33 U.S.C. 1344(g). The primary requirement for assuming the federal program is that the State program must be *no less stringent* than the assumed federal program. Additionally, EPA retains authority under the CWA to review a State's actions when implementing the program. EPA also retains the authority to oversee and object to a State's issuance of a specific § 404 permit should EPA determine that the permit issuance does not uphold the CWA. This is consistent with EPA's oversight authority of the Corps' administration of the § 404 permit program.

Assumption of the § 404 program does not give a State sole permitting authority over all of its waters. Section 10 of the Rivers and Harbors Appropriation Act (RHA) prohibits the creation of any obstruction to the navigable capacity of any of the waters of the United States not affirmatively authorized by Congress. Pursuant to § 10 of the RHA, even if Virginia assumes the § 404 program, the Corps would retain authority over the Commonwealth's waters that have been defined as navigable, including the wetlands adjacent to the navigable waters for purposes

of RHA §10. The Corps would continue to review projects and issue permits for any projects that result in the discharge of fill into Virginia's RHA §10 waters and adjacent wetlands. DEQ would need to formally request mapping of Virginia's RHA § 10 waters from the Corps and then draft a Memorandum of Agreement (MOA) with the Corps to establish procedures for coordinating and permitting projects that are conducted in those waters.

Currently, Michigan and New Jersey are the only States that have assumed the § 404 program. This is in contrast to the 46 States, including Virginia, that have been authorized by EPA to implement and enforce the § 402 National Pollutant Discharge Elimination System (NPDES) permit program. This disparity highlights the financial and administrative barriers that are specifically associated with § 404 assumption. Unlike the § 402 program, Federal funding is not currently available for State implementation of the § 404 program. The § 404 program is transferred to a State through primacy, more commonly called "§ 404 assumption". The § 404 assumption process differs from the transference of § 402 implementation authority, which is *delegated* to States by the EPA. This distinction between assumption and delegation renders States seeking to implement § 404 ineligible for federal funding. While there are federal funds potentially available for development of a State 404 program, there is no Federal funding available for State implementation of the program and it is the implementation phase that is financially challenging as an assumption State must hire new staff, fund new training programs, and expand administrative resources in advance of assumption.

Costs and Benefits Study Method

Pursuant to HJ 243, the purpose of this study is to evaluate the benefits and costs to the Commonwealth of Virginia for seeking authority from the EPA to administer the § 404 permitting program under the federal CWA. DEQ also convened a representative group of stakeholders to assist it in determining the benefits and costs of seeking § 404 program assumption.

For this study, DEQ assessed the current wetlands program including regulatory structure; jurisdictional scope; permit processing procedures; compliance mechanisms; existing staff; existing workloads; and cost analysis of permit fees, salaries and other expenditures. DEQ assessed the respective permit workloads for the VWP program and the Corps' Norfolk District for the period from calendar years 2010 through 2011, including permit types and processing timeframes. DEQ incorporated existing workload analysis data and previous status and trends reports as appropriate. DEQ's Human Resources and Finance staff provided estimates for salaries, expenditures, and revenue from current permit fees. The Corps' Norfolk District provided DEQ with an assessment of the Corps' existing program using data comparable to data available for the DEQ VWP program.

DEQ analyzed operations reports for both programs to identify areas where effort is duplicated, where the Corps is performing duties that DEQ is not (e.g. nationwide permits), and where DEQ's jurisdiction exceeds the Corps', as with isolated wetlands and excavation in jurisdictional waters. DEQ identified the necessary additional training and skill sets that would be required for DEQ staff if the § 404 program were assumed, e.g. wetland delineation training and training on § 404 permitting processes. DEQ also identified differences in permit workloads and processing

times, and analyzed them against existing available full time employees in both programs. DEQ then incorporated input from the agency's finance, human resources and Office of Information Systems (OIS) staff to identify changes necessary to assume the responsibilities of the existing Corps' program.

Potential Benefits

HJ 243 identifies inefficiencies in Virginia's dual federal and State wetlands regulatory programs and notes potential benefits of assuming the federal program. HJ 243 acknowledges that Virginia's existing regulatory structure is comprised of parallel State and federal wetland programs; a system that creates duplication of effort and may present unnecessary challenges to an applicant who must deal with two separate agencies with two sets of regulations. HJ 243 also states that the requirements of the Corps' permitting process can be unpredictable and inconsistent and that Virginia is better positioned than the federal government to create a consistent and sustainable permitting program across the State.

DEQ utilized the research that the Environmental Council of the States (ECOS) and the Association of State Wetland Managers (ASWM) have conducted to identify the advantages and challenges of § 404 assumption. ECOS is the national non-profit, non-partisan association of State and territorial environmental agency leaders. The potential benefits identified by DEQ are in line with other States' findings as set out in the ECOS resolution broadly adopted by its State members. Namely, that assumption of the § 404 program could provide a consistent, streamlined permitting process with a single point of contact and broader resource protection than the CWA. Reference materials from ECOS and ASWM are provided in Appendix E and at <http://www.aswm.org/wetland-programs/s-404-assumption>.

A State administered program could be tailored to provide a regulatory structure that is consistent, responsive to Virginia's regulated community, and protective of the Commonwealth's unique wetland and stream resources. During times of jurisdictional uncertainty at the federal level, such as in the wake of the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC") decision¹, States are able to maintain a consistent and predictable definition of the waters they regulate.

In addition to consistency, a State administered § 404 program can provide the regulated community with an efficient and streamlined "one-stop permitting" experience, effectively removing the duplication of effort that often occurs with parallel State and federal programs while still retaining the protections provided by the CWA. EPA's website that provides resources to States assessing § 404 assumption acknowledges that, "State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with local resources, issues, and needs than are Federal regulators," and concludes, "by formally

¹ The Court held that the Corps' assertion of jurisdiction over isolated waters on the basis of the "migratory bird rule" exceeds the authority granted under § 404(a) of the CWA. The Court based its decision on the CWA alone, thereby avoiding the constitutional question of whether the regulation was within Congress' power under the Commerce Clause. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)

assuming administration of the Federal regulatory program, States or Tribes can eliminate unnecessary duplication between programs.”

Costs

DEQ’s analysis of the costs revealed that the single largest impediment to Virginia’s assumption of the federal program is the expense of acquiring the staff, administrative resources, and information technology (IT) infrastructure needed to handle the expanded workload. DEQ would need to create 40 new full time positions, more than doubling the size of the existing program to 76 total employees. The cost associated with upgrading DEQ’s legacy databases and other IT infrastructure to adequately address the expanded workload is significant. As shown in Table 1, DEQ is projecting a total cost of assumption at \$3.4 million in year one, \$4.0 million in year two, \$3.8 million in year three, \$3.4 million in year four, and \$3.4 million annually thereafter. Some of this cost could be defrayed through the phasing in of key personnel with the full workforce coming on line towards the end of the assumption process.

Note that these costs do not include rent or other common (overhead or indirect) costs. These costs also do not include any type of contingency amount added to these direct costs. These calculations were completed using the standard procedures for cost/benefit and fiscal impact analyses used in DEQ. To allow for economic fluctuations DEQ also analyzed costs for potential permit workload increases of 15% and 20% beyond what was used in the baseline data from 2010 and 2011.

Table 1: Baseline Cost Estimates

| | Estimated Annual Costs - Year 1 | Estimated Annual Costs - Year 2 | Estimated Annual Costs - Year 3 | Estimated Annual Costs - Year 4 | Estimated Annual Costs - Year 5 |
|------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| Salaries and Benefits | 1,160,450 | 2,593,890 | 3,044,310 | 3,044,310 | 3,044,310 |
| Information Technology | 2,037,533 | 1,076,103 | 570,688 | 164,238 | 164,238 |
| Furniture | 59,500 | 85,000 | 25,500 | | |
| Training | 62,900 | 100,800 | 44,200 | 49,500 | 49,500 |
| Travel | 20,175 | 73,575 | 92,325 | 92,325 | 92,325 |
| Public Notices | 19,000 | 36,500 | 36,500 | 19,000 | 19,000 |
| Field Equipment | 3,500 | 8,000 | 3,000 | 2,900 | 2,900 |
| Total Estimate | \$3,363,058 | \$3,973,868 | \$3,816,523 | \$3,372,273 | \$3,372,273 |

For a point of comparison, DEQ estimates that based on average salaries, the number of full time employees and administrative costs, the Corps' Norfolk District that currently administers Virginia's § 404 Program has an annual budget of 7.3 million dollars. A detailed cost analysis including the baseline plus 15% and 20% figures are included in Appendix B.

In addition to the cost estimates evaluated by DEQ, the Department of Historic Resources (DHR), the Department of Game & Inland Fisheries (DGIF), and the Department of Conservation & Recreation-Division of Natural Heritage (DCR-DNH) submitted comments to DEQ that those agencies will each need additional staff to handle the increased workload associated with § 404 assumption.

The initial staffing estimates for DEQ are based on the premise that DEQ staff would take over all the functions currently carried out by the USACE. This should minimize the need for additional resources at DCR, DHR, and DGIF. However, in developing a memorandum of agreement with EPA, DEQ may be required to consult with the other State Natural Resources agencies at a higher level than is currently required of the Corps. In this case, some additional responsibility would be shifted to those agencies lessening the staffing requirements at DEQ. Until that agreement is finalized, the distribution of required staffing among the agencies can not be stated with certainty. To provide for a margin of safety, we added three additional FTEs to the estimated staffing requirements. DEQ believes this adequately represents the staffing needed for Natural Resources agencies with the understanding that distribution among them would be determined later.

Costs and adequate funding were a primary concern of the Stakeholders Group. Group members expressed concern that as the State faced continuing budget concerns and agencies face continuing budget cuts, maintaining sustainable funding and staffing for the program could be a challenge. A straw poll of the Stakeholder Group taken at the conclusion of the final meeting showed that most of the Group members present believed the costs of assumption outweighed the benefits at this time.

Stakeholder Group Meetings

HJ 243 directed DEQ to "convene a representative group of stakeholders to assist it in determining the benefits and costs of seeking [§ 404 assumption] from EPA." On May 7, 2012, DEQ issued a "Public Notice of Intent to Convene A Stakeholder Group on the Virginia Regulatory Town Hall". DEQ received 38 expressions of interest to serve on the stakeholder group, and the DEQ Director accepted all 38 interested parties to ensure that the group was as representative of as many interests as possible. The complete list of stakeholders can be found in Appendix A.

The Stakeholder Group met on June 21 and August 30, 2012 to assist DEQ in determining the benefits and costs of seeking authority for the Commonwealth to administer the § 404 permitting program under the federal Clean Water Act. DEQ staff facilitated discussions by the Stakeholder Group and provided data and information, including current staffing levels for DEQ and the Corps and estimated resource needs. Detailed meeting notes from both meetings are provided in Appendix A.

During both meetings, Stakeholder Group members discussed both the positive and negative aspects of the existing system, and whether there were problems with the current system that needed addressing, through assumption, or otherwise. During these meetings, some Stakeholder Group members expressed concern about what they perceived as a lack of “need” for State assumption of the § 404 program.

Stakeholder Group members noted that there were several aspects of the existing program that are working well. Specifically, Group members noted that Virginia’s SPGP works well and provides a more predictable process than was the case prior to the renegotiated SPGP. Some Group members suggested that an improvement to the existing system would be to raise the threshold for the SPGP so that more projects would qualify for that process. Some Group members noted the value the regulated community placed on the Corps’ expertise and institutional knowledge of the program. Stakeholder Group members noted that DEQ tends to be more consistent in its interpretation of the regulations than some Corps staff. Some Group members noted the value of DEQ’s ability to stick to timelines. Some Group members value the pre-application process that the Corps provides. Additionally, some Stakeholder Group members believe the non-reporting nationwide permits work well.

Stakeholder Group members also identified aspects of the existing program that are not working well. Specifically, some Stakeholder Group members noted that the individual permit (IP) process, which generally involves more complex projects, needs improvement. Some Group members from the consulting and regulated community noted that the lack of timelines, or of agencies sticking to the timelines, can be a problem, specifically with respect to the IP process and Jurisdictional Determinations by the Corps. Some Group members noted concerns with the lack of consistency of some regulatory determinations by the Corps. Other Group members noted that there can be a lack of consistency in policy determinations across the State within both agencies. Group members also noted concerns with the issue of ephemeral streams, the ability of Federal agencies to comment at any time related to Threatened and Endangered Species with no regard for permitting timelines, the lack of clarity/definition with respect to the State Protected Species Mitigation Policies and the cumbersomeness of the DEQ’s enforcement program for smaller impacts compared to the Corps’ enforcement program. At least one Group member noted a concern about a lack of a level playing field because there appear to be different requirements for the mining industry. Some Group members suggested that finding ways to make improvements in these areas may reduce the perceived interest for the Commonwealth to assume the § 404 program.

Through its discussions, the Stakeholder Group identified costs (and concerns) and benefits of the Commonwealth assuming the § 404 program. Those costs/concerns and benefits are set forth below.

Costs/Concerns

Adequate and Consistent Program Funding

A number of Group members expressed concerns about funding and resources for an assumed § 404 program. Group members expressed concern that funding estimates would be based on the

current economic climate, which would leave DEQ with inadequate funding, staffing and resources to manage the program once the economy recovered. Stakeholder Group members expressed concern about identifying and maintaining a consistent and sustainable source of funding for the program to ensure that the program would have consistent staffing and resource levels. Group members expressed concern that as the State faced continuing budget issues and agencies face continuing budget cuts, maintaining sustainable funding and staffing for the program could be a challenge. At least one Group member representing a conservation group expressed her concern and experience that there has never been a natural resources agency that has not been “woefully underfunded.”

Recognizing that DEQ would be questioned about the costs of the program beyond the “bare minimum” for § 404 program assumption, Group members suggested that DEQ prepare a range of costs to show not just the “bare minimum” but to show cost estimates with a 15-40% “buffer,” as Group members believed any business would, to account for the unknowns and the unexpected and to ensure sufficient program funding, including funding for additional staff, training, equipment, facilities and information technology needs. DEQ did analyze potential future permit workload increases beyond the baseline data to provide the requested buffer estimates. However, DEQ’s analysis of the permit workload during calendar year 2012 indicated that permit load growth scenarios of 15% to 20% adequately account for unknowns and reasonably address anticipated base workload increases related to economic recovery. Additionally, some Group members suggested that the range of costs should include estimates for improving the program, not just assuming the current § 404 program. Among the resource needs that the Group recommended, was the need for additional legal resources at the Office of the Attorney General due to the potential for more litigation since the Commonwealth would now have a much larger program and, like the COE, may see numerous lawsuits over issues such as ephemeral streams. Some Group members suggested that there may be additional and/or undetermined, costs to other State agencies as well.

Potential for Increased Permit Fees

Stakeholder Group members from the regulated community expressed concern about the potential for higher permit fees to cover the costs or portions of the costs of the Commonwealth assuming the § 404 program. In the absence of increased permit fees, Group members questioned how the program would be funded and, as discussed above, whether such funding would be sustainable and consistent over time.

Loss of Knowledge

Some Stakeholder Group members expressed concern over the potential loss of knowledge and technical expertise of the Corps staff, especially with respect to wetlands delineation confirmations. These members noted the importance of sufficient funding for training to ensure DEQ staff have the knowledge and skills they need to quickly transition to assuming the § 404 program, and funding to ensure that once achieved that level of training and expertise is maintained. These Group members also expressed concern about DEQ’s ability to retain experienced staff during times when State budgets are shrinking and there are limited resources for hiring and retaining experienced staff.

Loss of Checks and Balances

Some Stakeholder Group members expressed concern about the potential loss of checks and balances that they believe are in the current system. Two Group members expressed their belief that the protections of Virginia's wetlands and streams would diminish with an assumed program, because both agencies, the Corps and DEQ, bring their own strengths to the program. Additionally, these Group members expressed their concern that the General Assembly may be working under a misunderstanding about what assumption of the program would mean and noted that it would not mean that Virginia gets to run the program without oversight from EPA. Finally, these members noted their belief that there has never been a natural resource agency that was not “woefully underfunded” and their expectation that, if assumed, this program would not be adequately funded and DEQ would not be provided adequate resources to run the program.

Benefits

Improved Efficiency

Some Stakeholder Group members noted that there may be an improvement in the efficiency of the overall § 404 program if the Commonwealth assumed it. Those members noted that, although the program will still be subject to federal oversight, assumption of the program would eliminate the duplication of permit and compliance review by two agencies and provide “one-stop” permitting. Group members also noted that there would be more efficiency in dealing with one agency contact. As an example, one Group member noted that under the current process, when there are disagreements on delineation and one of the regulators is not available then it is difficult to get a resolution. If the program is assumed then one of those parties would be eliminated from the process, which would eliminate one opportunity for disagreement and speed up the process. Group members also noted that when problems arise the State may be more responsive and resolution may be found more quickly when working with a single agency.

Shorter Time Frames

Given the importance of timeliness to the regulated community, some Group members noted that they would benefit from shorter timeframes under an assumed program. Those members noted that under an assumed program, time frames may be reduced and permits may be issued faster because the process would be more streamlined.

More Consistency

Some Stakeholder Group members noted that one of the potential benefits of the Commonwealth assuming the § 404 program would be that there would be more consistency in the process and in regulatory interpretation. Group members noted that the benefit of consistency is that it provides the regulated community with predictability.

Increased Accountability

Some Stakeholder Group members noted that an assumed program would provide more accountability because there would be a single point of contact.

Improvements In Lieu Of or In Addition to Assumption of the § 404 Program (Wish List)

Through this process, the Stakeholder Group also identified a “wish list” of items that they believed would improve the existing program whether the program is assumed or not, and that these ideas may be worth considering in lieu of assumption (and should be considered if the program were assumed by the State). Some Group members suggested that an improvement to the existing system would be to raise the threshold for the SPGP so that more projects would qualify for that process. Another potential improvement to the existing system would be to have an on-line permit tracking system that would allow the regulated community to easily check the status of a permit and provide more transparency to the program. Another potential improvement discussed by Group members was to increase staffing at the Corps to expand the number of staff who could perform wetland delineations.

Straw Poll

A straw poll of the Stakeholder Group taken at the conclusion of the final meeting showed that the majority of the Group members present believed the costs of assumption outweighed the benefits. At least one member believed the benefits outweighed the costs and four members indicated they needed more information. DEQ sent the final draft of the § 404 Assumption Feasibility Study to the Stakeholder Group on November 7, 2012 to solicit comments for a one week period ending on November 14, 2012. The Stakeholder Group’s responses to the final draft report are located in Appendix G.

Small Impoundments and Mitigation Ratios

Pursuant to HJ 243, DEQ also reviewed the exemptions for small impoundments and the mitigation ratio for ponds and ephemeral streams. There are exemptions for farm and stock ponds in both State and federal law. Other types of ponds, for instance the construction of recreational ponds or impoundments that impact water of the United States or State surface waters, enjoy no such exemption in State or federal law.²

Small Impoundments

Both § 404 of the CWA and federal regulations set forth exemptions for construction and maintenance of farm or stock ponds, except that the exemption does not apply to discharges “of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be

² References in this section to “pond exemptions” refer to farm and stock ponds.

reduced.” See CWA 404(f), 33 U.S.C. 1344(f), 33 C.F.R. 232.3, 323.4; see also Army Corps of Engineers Nationwide Permit 40 & Norfolk District Regional Permit 5. The Corps has a nationwide permit (Nationwide Permit 40) for farm ponds (and some other agricultural activities) that does not qualify for the exemption. Nationwide Permit 40 identifies the availability of the exemption on the permit document itself. The Corps’ Norfolk District utilizes a regional permit (Regional Permit 5) for farm ponds that do not qualify for the exemption. Unfortunately, because Regional Permit 5 makes no reference to the availability of the exemption on the permit, the Norfolk District’s use of Regional Permit 5 has caused confusion about whether the Corps recognizes the farm pond exemption in Virginia.

With respect to the treatment of farm ponds in States that have assumed the § 404 program, it appears that both New Jersey and Michigan have provided farm pond exemptions, but the States have taken slightly different approaches. New Jersey has a farm pond exemption, and a similar recapture provision similar to the recapture language provided in Federal law. Michigan has a farm pond exemption; however, the exemption does not have any provisions similar to the recapture provisions found in Federal law and regulations regarding activities in or impairing navigable waters. At this time, and in the absence of detailed and holistic programmatic discussions with EPA, it is unclear whether Virginia, if it were to seek assumption of the § 404 program would need to take an approach to the farm pond exemption similar to the New Jersey approach or whether Virginia would be able to apply its current farm pond exemption with minimal changes for activities regulated under § 404.

Mitigation ratios for ponds and ephemeral streams

Per 9VAC25-690-70.I, compensation for permanent open water (non-exempt ponds) impacts *may* be required at a 1:1 replacement to impact ratio, as calculated on an area basis, to offset impacts to State waters and fish and wildlife resources from significant impairment. DEQ has determined that the issue of mitigation ratios for ponds may need additional evaluation and is planning to convene a group of interested stakeholders to focus on that issue and discuss whether there is more information that needs to be considered.

Regarding compensatory mitigation requirements for impacts to ephemeral streams, DEQ and the Corps, in a collaborative effort, developed the Unified Stream Methodology (USM), to establish a unified and consistent method for use in Virginia to rapidly assess proposed stream impacts and determine the appropriate amount of stream mitigation needed to offset those impacts. This methodology is designed to assess impacts to “wadable” streams, which include perennial, intermittent and ephemeral streams. These three stream types are defined as:

- **Perennial Streams** - Perennial streams were not defined in the USM, however, generally speaking they are streams that have flowing water year round in a typical year.
- **Intermittent Streams** - streams that have flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

- **Ephemeral Streams**³ - streams that have flowing water only during and for a short duration after, precipitation events in a typical year. Ephemeral streambeds are located above the groundwater table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for these streams.

DEQ and the Corps' Norfolk District determine compensatory mitigation requirements for stream impacts using the USM. The USM can be modified to assess ephemeral streams. Parameters evaluated for intermittent and perennial streams are channel condition, riparian buffer, in-stream habitat, and previous channel alteration. For ephemeral streams, the USM only looks at the riparian buffer parameter. For a given length of impact and impact severity, ephemeral streams generally require less compensatory mitigation than intermittent and perennial streams. Mitigation ratios for impacts to ephemeral streams range from 0:1 to 0.75:1 depending on the condition of the riparian buffer surrounding the ephemeral stream and the severity of the impact.⁴

Conclusion

The CWA's § 404 State assumption process provides the mechanism for individual States to realize enhanced water resource protection while providing a streamlined regulatory program with a single point of contact. States implement regulations protective of water resources such as groundwater, ephemeral streams, and isolated wetlands that the federal program does not address. Currently, only two States have assumed the § 404 program within their borders and this is due mainly to the prohibitive costs and complexities involved with the assumption process.

If the Commonwealth were to decide to seek assumption of the § 404 program, it would enter into a complex and lengthy process that could last up to two years with no certainty that EPA would approve the request. Section 404 program assumption would require new funding for additional staff, training, and database improvements in advance of the Commonwealth requesting the program from EPA. Virginia's laws and regulations would need to be amended to provide the authorities to implement the CWA and ensure consistency with implementation requirements under the CWA, including potentially requiring changes or elimination of existing State regulatory exemptions for activities that are not authorized under the Federal program (e.g., the exemption for septic tank placement).

In spite of these hurdles, DEQ has identified a number of potential efficiencies from § 404 assumption. In addition to consistency, a State administered § 404 program can provide the regulated community with an efficient and streamlined "one-stop permitting" experience,

³ Ephemeral streams fall under the category of "non-navigable, not relatively permanent tributaries" and, following the U.S. Supreme Court's decision in *Rapanos v. United States and Carabell v. United States*, fall under Federal jurisdiction when they have a "significant nexus" to traditionally navigable waters.

⁴ DEQ has determined that the issue of mitigation ratios for ponds and ephemeral streams may need additional evaluation and is planning to convene a group of interested stakeholders to focus on that issue and discuss whether there is more information that needs to be considered or whether the USM needs modification.

effectively removing the duplication of effort that often occurs with parallel State and federal programs while still retaining the protections provided by the CWA.

The Stakeholder Group provided many valuable comments and expressed concerns regarding assumption. Two overarching themes emerged from the Stakeholder Group meetings. One is that the regulated community is largely content at present with the existing federal and State wetland programmatic structure, especially with the implementation of the SPGP, aside from some improvements that were suggested. Secondly, when polled, the majority of the members of the Stakeholder Group believed that the costs of assuming the § 404 program outweigh the potential benefits of assumption. Some of the Stakeholder Group members suggested that the only acceptable assumption scenario would be one that ensures significant improvements in every category to the level of service that is currently being provided by the dual programs.

Virginia's SPGP allows the State to be the sole permitting authority for impacts of up to 1 acre of non tidal wetlands and 2000 linear feet of streams. Virginia's existing SPGP provides many of the benefits identified as potential benefits of § 404 assumption without the costs associated with assumption. In lieu of, or until a stable funding mechanism is identified, the Commonwealth could explore working with the Corps to renegotiate and expand the SPGP to provide resource protection as well as consistency, timeliness and certainty to a broader group of projects.

Building and Preserving Alaska's Future

Regulatory Program Update

Dave Casey

Supervisor, Kenai and Juneau Field Offices

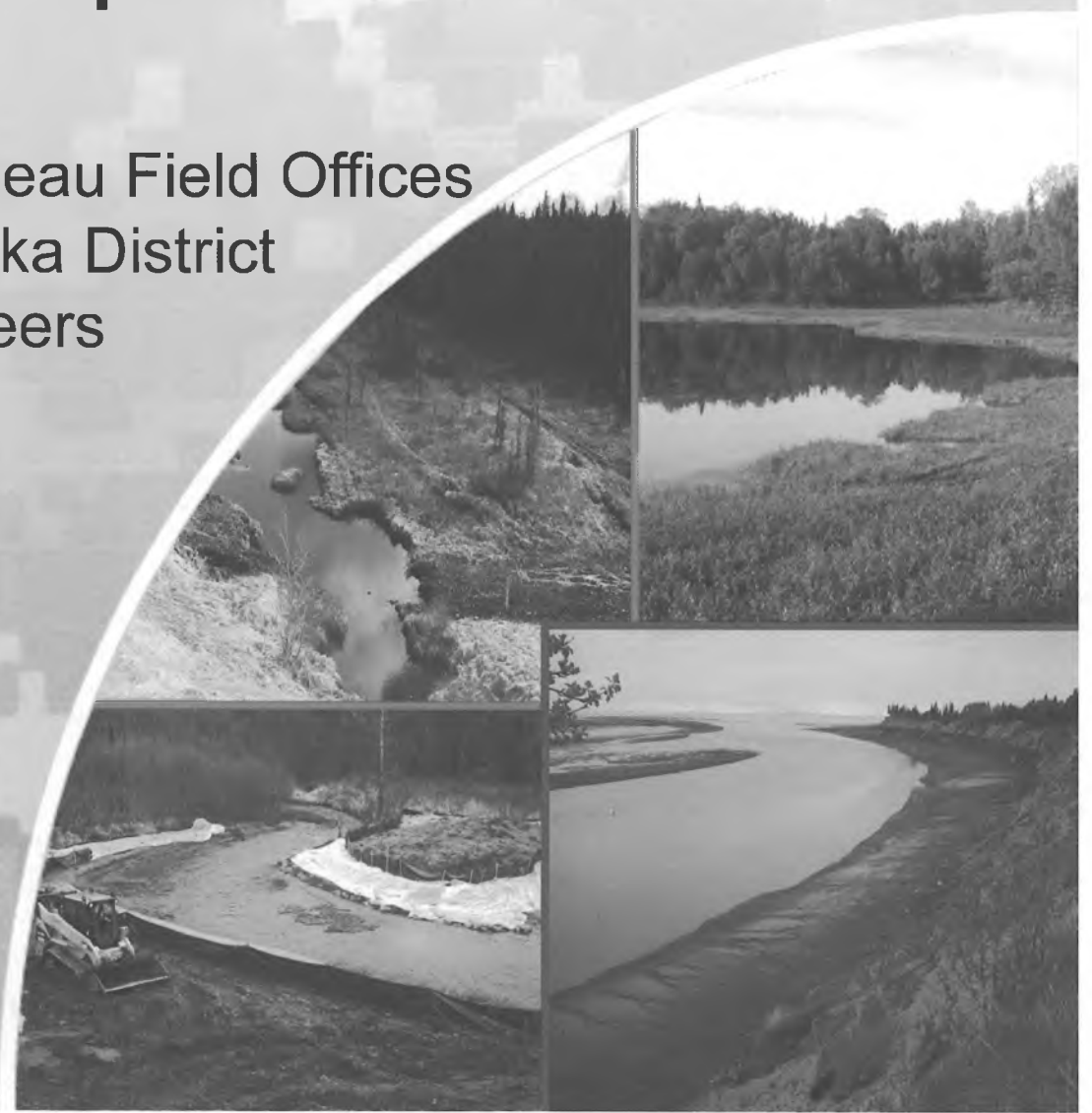
Regulatory Division – Alaska District

U.S. Army Corps of Engineers

February 28, 2013



US Army Corps of Engineers
BUILDING STRONG®



REGULATORY PROGRAM

Mission – Protect the Nation’s aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions.

4 Goals:

- Protect the aquatic environment
- Enhance regulatory program efficiency
- Make fair, reasonable, and timely decisions
- Achieve no net loss of aquatic resources

Authorities

- Section 10 Rivers and Harbors Act of 1899
- Section 404 Clean Water Act (1972)
- Section 103 Marine, Protection, Research and Sanctuaries Act (1972)

The Corps Regulatory Program is neither a proponent or an opponent of the projects we review for permits.



REGULATORY PROGRAM

Corps of Engineers in Alaska

- Largest district in nation (geographically)
 - 43% of state is wetlands
 - 3 million lakes
 - 15 million miles of potentially navigable waterways
- 2nd largest regulatory division in nation
 - \$7.9 million annual budget
 - 54 employees
 - 1,536 actions per year (average for past nine years)
- Alaska District Headquarters is on JBER – Elmendorf
 - Fairbanks and Juneau Field Office (since 1991)
 - Kenai Field Office (since 2001)
 - Anchorage Field Office and staff in Sitka (since 2008)
 - Our Regulatory Division website is
<http://www.poa.usace.army.mil/Missions/Regulatory.aspx>



RIVERS AND HARBORS ACT OF 1899

Section 10 authorizes the Department of the Army (DA) is to issue permits for work in or affecting the navigable waters of the United States

- For RHA purposes, navigable waters are:
 - Waters subject to ebb and flow of the tide *and/or*,
 - Those waters that are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce
- Activities that require a DA permit in Section 10 waters
 - Structures and/or work in or affecting navigable waters of the United States
 - Structures and/or work outside the limits of navigable waters, IF these structures or work could affect the course, location, or condition of the water body so as to impact its navigable capacity
 - Artificial islands, installations, or other devices on the outer continental shelf



CLEAN WATER ACT (1972)

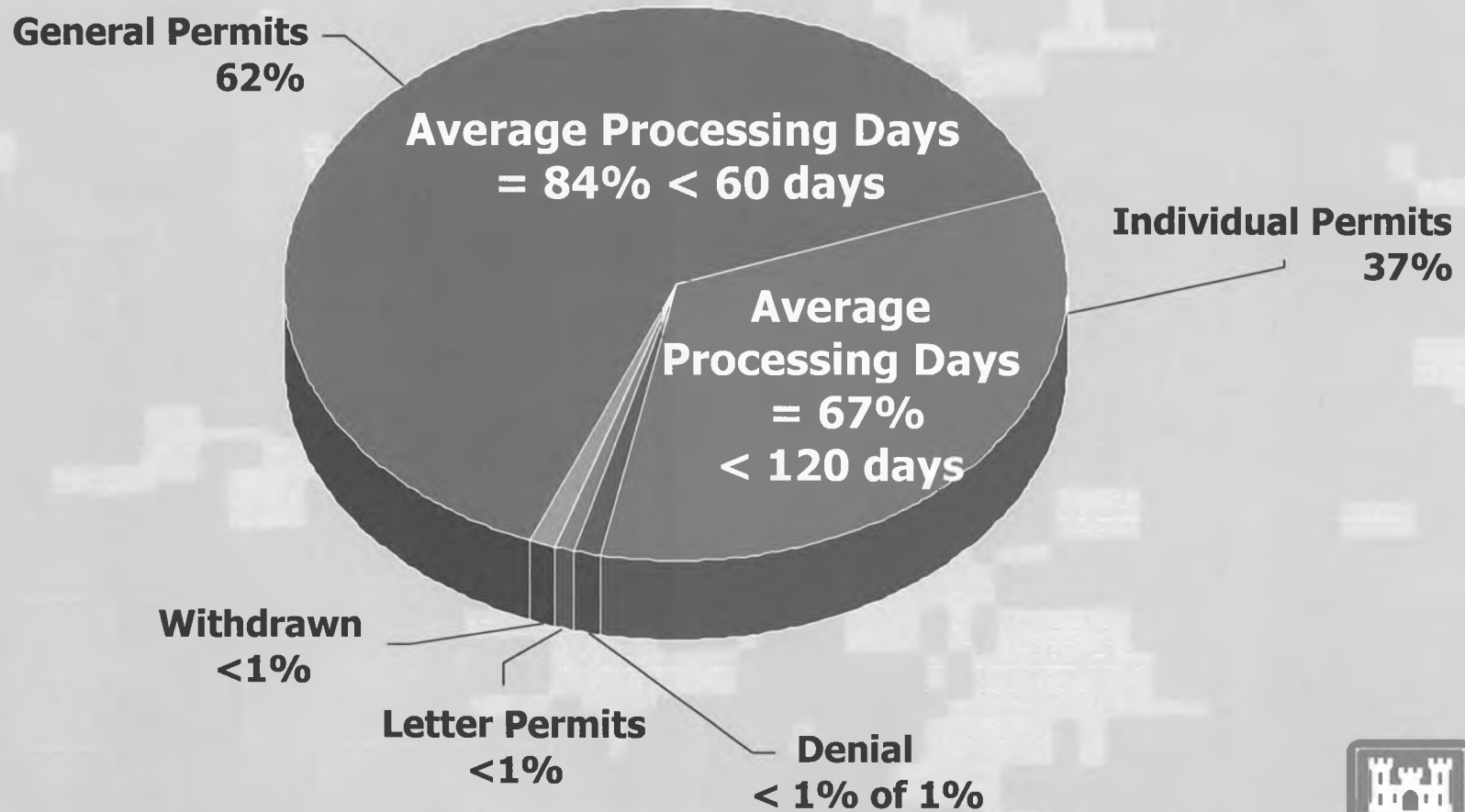
Section 404 authorizes the DA to issue permits for the discharge of dredge and/or fill material into waters of the U.S.

- For CWA purposes, waters of the U.S. include
 - All navigable waters (Section 10)
 - Rivers, most tributaries and lakes
 - Wetlands (like bogs, marshes, fens, swamps) adjacent to the above waters
- Activities that require a DA permit in Section 404 waters
 - Discharge of dredge and/or fill material
 - Activities that have the “affect fill”
- “*Adjacent*” means “Boarding, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands’.”



PERMIT ACTIONS FY12

1,100 Decisions



SECTION 404(g) OF CLEAN WATER ACT

Assumption of Program by States or Tribes

- **EPA has the authority to delegate to a State or tribe the administration of the Section 404 Program for certain non-navigable waters. (40 CFR parts 232 and 233)**
- **Corps would retain jurisdiction for:**
 - Tidal waters and adjacent wetlands
 - Navigable and adjacent wetlands
 - Navigable waters under Section 10. These include:
 - Waters subject to ebb and flow of the tide and/or;
 - Those waters that are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce.



SECTION 404(g) OF CLEAN WATER ACT

Assumption of Program by States or Tribes

- **EPA's process for a State or tribe to assume Section 404 Program**
 - State or tribe submits complete assumption application
 - EPA reviews application
 - Distribution of application for public comment
 - Public hearing
 - EPA is decision maker, but Corps provides information and data



CORPS AND STATE RELATIONSHIPS

- **Regulatory Roles**
 - **AK Department of Environmental Conservation (DEC)**
 - **Water Quality Certifications (WQC) - Section 401 of the CWA**
 - Determines if the discharge of dredged and/or fill material satisfies the State's water quality standards
 - State may issue, deny or waive WQC
 - If WQC is issued any conditions become are incorporated as special condition on a DA permit, if issued.
 - If the DEC denies the WQC, a DA section 404 permit is invalid
 - **Section 404 Individual permit applications**
 - Corps sends the applicant's complete application to DEC
 - Corps prepares and publishes a joint Corps/DEC public notice activity
 - **AK Department of Fish and Game (ADF&G)**
 - Fish bearing freshwater rivers/streams/lakes
 - State's legislatively designated special areas



CORPS AND STATE RELATIONSHIPS

- **Consultation Relationships**

- **Fish and Wildlife Coordination Act (FWCA)**

- Requires Federal agencies to consult with the State agency exercising administration over the wildlife resources of the affected state
- Corps gives full consideration to State comments received under FWCA.

- **National Historic Preservation Act**

- Requires Federal agency actions to consult with the AK DNR's State Historic Preservation Office (SHPO) when proposed activities affect historic properties that are eligible for or listed on the National Register of Historic Places
- SHPO allows Corps to access SHPO's statewide database of cultural resource sites to increase the efficiency of the consultation
- Corps does not make a permit decision until the consultation had ended



REGULATORY PARTNERSHIP EFFORTS

HOW YOU CAN HELP US

- **Submit application as early as possible**
- **Become familiar with requirements**
 - Allocate time and resources for permitting
 - Visit us online at:
<http://www.poa.usace.army.mil/Missions/Regulatory.aspx>
 - Use project checklist – drawings, adjacent property owners, etc.
 - Schedule pre-application meeting
 - Coordinate with appropriate agency on project issues and include findings with application
 - Endangered Species Act
 - Essential Fish Habitat
 - National Historical Preservation Act
 - Marine Mammal Protection Act

- Provide timely responses to requests for additional information *

HOW WE CAN HELP YOU

- **Make timely decisions**
- **Issue decisions that are defensible if challenged in court**
 - If we lose, the project is at-risk
- **Be accessible to the public**
- **Conduct outreach with the regulated community**

** A complete application does not mean we have enough information to make a permit decision, but rather enough to issue a public notice and receive meaningful comments*



CONCLUSION

- **We are continuing to improve our Regulatory Program through outreach and partnering efforts**
- **We value our long-term relationships with the State and continually seek new opportunities to increase the efficiency of our decision making process**





QUESTIONS?

Dave Casey
Supervisor, Kenai and Juneau Field Offices
Regulatory Division – Alaska District
U.S. Army Corps of Engineers

“Building and Preserving Alaska’s Future”



THE STATE
of **ALASKA**

GOVERNOR SEAN PARNELL

**Department of Environmental
Conservation**

OFFICE OF THE COMMISSIONER

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February 26, 2013

The Honorable Pete Kelly, Co-Chair
Senate Finance Committee
State Capitol Room 532
Juneau, AK 99801

The Honorable Kevin Meyer, Co-Chair
Senate Finance Committee
State Capitol Room 532
Juneau, AK 99801

Dear Senator Meyer and Senator Kelly:

Thank you for the opportunity to provide testimony to the Senate Finance Committee today regarding SB 27. This letter provides additional information to address questions asked by committee members at the hearing.

Senator Hoffman asked about the federal budget for the current program run by the U.S. Army Corps of Engineers (the Corps), and how many positions are in the federal program. In providing these numbers, it is important to note that the uncertainties of the actual balance between State and federal responsibility at primacy make an attempt to estimate State costs at primacy rough.

Currently, the Corps' regulatory program in Alaska has 49 full-time positions and an annual budget of \$7.9 million. However until the State performs the detailed evaluation of assumption of the program as provided for in SB 27, it is impossible to forecast the cost or size of a State program.

Senator Meyer asked if the federal funding for dredging at the Port of Anchorage would be affected by the State assuming primacy for the 404 program. The answer is no. The federal funding for dredging is through the Corps' Civil Works Program while the 404 program is managed through the Corps' Regulatory Program. In addition, because the Port of Anchorage is located in, tidally influenced by, and adjacent to a navigable water used for commerce, the Corps would retain permitting jurisdiction for this area if the State assumes primacy.

Sincerely,

A handwritten signature in cursive script, appearing to read "Larry Hartig".

Larry Hartig
Commissioner

Alaska Oil and Gas Association



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Kara Moriarty, Executive Director

ALASKA OIL AND GAS ASSOCIATION STATEMENT ON SENATE BILL NO. 27, AUTHORIZING STATE REGULATION OF DREDGE & FILL ACTIVITIES

February 4, 2013

Good Evening. For the record, my name is Kara Moriarty and I am the Executive Director of the Alaska Oil and Gas Association, commonly referred to as "AOGA". On behalf of the 16 members of AOGA, who account for the majority of oil and gas exploration, development, production, transportation and refining of oil and gas onshore and offshore in Alaska, I appreciate the opportunity to testify on Senate Bill No. 27 which authorizes the State to evaluate and seek primacy for the permitting of dredge and fill activities under Section 404 of the Clean Water Act.

AOGA applauds the Governor's efforts to streamline permitting processes this session with the introduction of bills like this and SB 26, authorizing general permitting and reforming procedures relating to the disposal and exchange of state land. We appreciate the Administration's intent to encourage responsible development of Alaska's resources by simplifying the process. As we go through this process of assuming primacy, we will want to be careful to ensure that the assumption of Section 404 primacy tangibly streamlines the permitting process in Alaska and does not instead result in a duplicative or more cumbersome process, which we know is not the Administration's intent.

To date, only two states, Michigan and New Jersey, have assumed Section 404 primacy. This is in contrast to the forty-five states that have assumed primacy of the point source discharge program under Section 402, including Alaska which finished its phased implementation of the Alaska Pollutant Discharge Elimination System this past year. AOGA was proud to participate in that process which has resulted in a more efficient permitting process under Section 402. State primacy of dredge and fill permitting, however, may pose administrative and financial barriers unique to Section 404 assumption.

Some of the initial differences may include a lack of federal funding and the uncertainty surrounding development and projects near waters and wetlands that may or may not be subject to state assumption, which we will not know until the State is allowed to start this process.

The requirement that states assume the entire dredge and fill program all at once can result in a complex, lengthy and expensive process with no certainty that EPA will approve the request. And while a majority of the nation's wetlands are in Alaska, many of these may be non-assumable by the State under the Clean Water Act's geographical limitations and would remain subject to federal jurisdiction and duplicative Corps permitting. For this reason, we applaud the administration's spoken objective to also pursue shared general permitting responsibility with the Corps in these non-assumable waters by development of a State Programmatic General Permit.

AOGA is cognizant that many of these concerns will be examined more thoroughly by the administration after passage of this bill. If the bill is passed, we look forward to working in tandem with the administration and other stakeholders to ensure that Section 404 assumption will be effective both for the state and industry, and is achievable in Alaska without unduly burdening state resources.



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February 5, 2013

Via Email and Facsimile: governor@alaska.gov; (907) 465-3532

Governor Parnell
Alaska State Capitol Building
Third Floor
P.O. Box 110001
Juneau, AK 99811-0001

Dear Governor Parnell:

We write to express our opposition to legislation introduced by you and some legislators that is currently making its way through House and Senate committees: HB 77/SB 26; HB 47; SB 32; and HB 78/SB 27. The bills HB 77/SB26 and HB 47 roll back protections for fish and game habitat as well as restrict the democratic process of public notice and comment on administrative decisions and to redress grievances in court regarding legally questionable decisions. Senate Bill 32 designates a hydroelectric site at Chikuminuk Lake as not being an incompatible use in Wood-Tikchik State Park. The bill HB 78/SB 27 appears to be an expensive way to fix a problem that does not exist.

Nunamta Aulukestai ("Nunamta") comprises directors appointed by eleven Native Corporations and nine tribes, including Ekwok Natives Limited, Koliganek Natives Limited, Saguyak Inc., Aleknagik Natives Limited, Choggiung Limited, Stuyahok Limited, Manakotak Natives Limited, Togiak Natives Limited, Levelock Natives Limited, Bristol Bay Native Corporation, Twin Hills Native Corporation, Ekwok Village Council, New Koliganek Village Council, Clarks Point Village Council, Aleknagik Traditional Council, Curyung Tribal Council, New Stuyahok Traditional Council, Manakotak Village Council, Togiak Traditional Council, Levelock Village Council. Nunamta represents Alaska residents in the Bristol Bay region who rely on the land, fish, wildlife, cultural resources and waters of the region for subsistence and their cultural way of life. Since its founding in 2006, Nunamta has actively advocated to protect the natural resources of Bristol Bay from the threats to those resources, namely offshore oil and gas development in Bristol Bay and the proposed Pebble Mine. That advocacy has involved active participation in the public notice and comment periods for state-issued permits — to the extent such notice is provided — as well as subsequent litigation. In fact, the pending legislation appears to be, in part, a reaction to Nunamta's activities to protect the resources that are so vital to tens of thousands of Alaskans by taking measures to legally curtail such activities.

Regardless of whether and how nonrenewable resources are ultimately developed in our region, we urge you to desist from stripping from law the processes that help provide for more transparent government, airing of grievances and hopefully resolutions of some of our differences in a way that protects fish, wildlife, the land and our way of life that depends on it.

Nunamta strongly opposes the following legislation for the reasons provided:

SB 26/HB 77

The bill makes many significant, unrelated changes to the statutes that govern DNR: (1) the creation of a general permitting system for any activity “unlikely to result in significant and irreparable harm”; (2) changes the law on notice and comment for preliminary best interest findings; (3) liberalizes the number of temporary water use permits that can be issued to a single project; (4) changes the law that governs exchanges of state land; (5) severely limits who can participate in the administrative process before DNR; and (6) eliminates an entire class of in-stream flow applicants and rejects 30 years worth of pending applications. This bill contains so many significant changes that it is difficult to articulate all the issues with it in just one letter.

A. Takes away individuals’ and NGOs’ ability to obtain in-stream water rights.

In-stream water rights exist to protect recreation and fish and wildlife habitat. DNR reports that it currently has 438 applications that are pending; 37 of those would be impacted by these changes and were filed by approximately 10 different groups, including one of our member organizations. The bill directs DNR to reject those pending applications for in-stream water rights and eliminates the opportunity for groups to apply for in-stream water rights in the future. Most of the pending applications are from Alaska Department of Fish and Game (“ADF&G”), U.S. Fish and Wildlife Service (“USFWS”), and the Bureau of Land Management (“BLM”). The rejected applications would be sent to agencies to review and possibly refile, but the applications have already been under review by the agency for years. If the bill passes and the applications are rejected, applicants would lose their priority date. First in time, first in right is fundamental to the water rights appropriation system in Alaska and protection of in-stream flow for fish and wildlife habitat.

Further, temporary water use permits, issued for resource exploration and extraction projects, require no public notice and comment and are generally issued in a matter of days or weeks. (And this legislation would ratify the continued renewal and use of temporary water use permits, no matter the size or length of a project). ADF&G also issues Title 16 fish habitat permits with no notice and comment; again, on a very short timeframe. In-stream flow applications are therefore the only vehicle for concerned citizens to request that DNR review and protect important fish habitat.

There is no valid reason to deprive the public of the ability to ask DNR to protect these important water resources. Nunamta opposes the enactment of this law.

B. Makes the Notice and Comment Process for Preliminary Best Interest Findings No Longer Mandatory and Raises the Bar for Standing before the Agency

DNR stated in the legislative hearings and in its sectional analysis that Section 3 “clarifies” that the director may provide a Preliminary Best Interest Finding for public comment under AS 38.05.035(e)(6). In the House Resources Committee hearing on February 1, 2013, a DNR representative indicated that this change increases public process. That statement is incorrect.

To comply with the Alaska Constitution, DNR must conduct a “best interest finding” (BIF) before it disposes of interests in state lands. Under current law, Alaskans have an opportunity to comment on the possible impacts a proposal may have on water, fish, and human health before DNR makes a final decision. The proposed changes will remove the requirement for public review and comment on preliminary BIFs for some kinds of decisions, including exploration licenses, removing the ability for the public to weigh in on these agency decisions regarding the impacts of development throughout the state. The proposed changes removing a requirement for notice and comment on these documents will strip the public of its ability to participate in decisions that may adversely affect fish and wildlife habitat. DNR has also raised the requirements for who may participate in the administrative process for most DNR decisions, further limiting the public’s ability to seek reconsideration of DNR decisions that impact subsistence and cultural resources.

C. Makes Administrative Standing Very Difficult to Establish

The new standard in the bill replaces “aggrieved” as the standard for someone to establish standing before DNR. Currently AS 44.37.011(b) states, “[i]f a person is aggrieved by a decision of the Department of Natural Resources . . . the person may appeal to the commissioner.” DNR interprets the term “aggrieved by” to mean “affected by.” 11 AAC 02.010(a).

“Aggrieved” is used as a standard in Alaska law — dozens of times. *See, e.g.*, AS 29.40.060(a) (“The assembly shall provide by ordinance for an appeal by a municipal officer or person aggrieved from a decision of a hearing officer, board of adjustment, or other body to the superior court.”); AS 34.45.400(a) (“A person aggrieved by a decision or action of the department under this chapter may apply to the department within 60 days after the mailing date of the department’s notice to the person, giving notice of the grievance and requesting an informal conference. At the conference the person aggrieved may present arguments and evidence relevant to the decision or action of the department. ”); AS 18.80.135(a) (“A complainant, or person against whom a complaint is filed or other person aggrieved by an order of the commission, may obtain judicial review of the order in accordance with AS 44.62.560 - 44.62.570.”). The Alaska Supreme Court views “aggrieved” as equivalent to the standard for judicial standing in Alaskan courts. As such, “aggrieved” does not describe someone who “just doesn’t like” a decision by DNR (something a DNR representative said during the House

Resource Committee hearing). Someone who is "aggrieved" "has an interest adversely affected by the conduct complained of." *Gilbert M. v. State*, 139 P.3d 581, 586 (Alaska 2006).

Sections 30 and 31 of these two bills require a person to be "substantially and adversely affected" in order to appeal a decision to the Commissioner. Section 33 of the bill defines "adversely affected" as creating or imposing "an adverse and direct effect or detriment on the person or the interests of that person." Similarly, Section 39 requires "physical or financial detriment" to be established to challenge a water appropriation. These new standards impose much higher burdens of proof for anyone to appeal a legally questionable decision by DNR. Impacts to cultural uses would be hard to prove. And subsistence impacts, no matter how concrete, would be insufficient to challenge water appropriations to other users, which are permanent property rights that can significantly affect fish, wildlife, habitat and other users. Providing input to the government and questioning its decisions is a basic tenet of democracy. Nunamta opposes these legislative changes.

D. Codifies in a Very Expansive Way DNR's Practice of Using General Permits

Section 1 of the bill adds general permitting authority to DNR's enabling statute. DNR stated that they are clarifying their already existing general permitting authority. A DNR representative told House Resources on January 30, 2013, that DNR already has this authority under AS 38.05.020, but that a specific reference to "general permitting" would avoid procedural lawsuits (which is another way of saying that a Court might not agree that the authority already exists). The referenced section provides the Commissioner's general authority to carry out the chapter. There is no express authority for general permits, and while creating such authority may make sense, the scope of authority that this bill creates is far too broad to be supportable.

The bill gives DNR general permitting authority whenever an activity is "unlikely to result in significant and irreparable harm." The examples mentioned by DNR in the House Resources Committee included general permits for nontimber forest products (e.g., commercial pine cone collection) and the Cook Inlet Boat Storage Area. Other possible areas cited by DNR as ripe for general permitting were commercial filming on state lands, personal use cabins, and float home renewals. But the permitting authority is much broader than that, and could include much bigger decisions, including some resource extraction decisions. Activities authorized under general permits would not be subject to any public notice and comment once the general permit is established. Because the general permitting authority is defined in a way that could lead to Alaskans receiving no public notice and comments on resource decisions that directly affect them, Nunamta opposes this change to the law. If there is to be general permitting, it should be restricted to those kinds of activities that "will not result in significant harm," rather than the proposed language "unlikely to result in significant and irreparable harm."

HB 47

If passed, HB 47 will impose a mandatory bond requirement on any person "seeking a restraining order, preliminary injunction, or order vacating or staying the operation of a permit that affects in industrial operation." HB 47 at § 1. "Industrial operation" includes "a construction, energy, or timber activity and oil, gas, and mineral exploration, development, and production." *Id.* Under this legislation, a party that challenges an industrial permit, whether they seek preliminary relief or not, will have to post a bond covering broad categories of project costs to even file a case or maintain an appeal. The costs the bond must cover include employee wages and benefits, as well as contractor or subcontractor payments.

The bill represents a significant change from the statutes, regulations, and court rules that are currently in place in Alaska. Indeed, it fundamentally changes the balance of the separation of powers that defines our government. In an original action, a court currently has considerable discretion regarding imposing a bond when a party seeks a temporary restraining order or preliminary injunction. Alaska R. Civ. P. 65(c). This broad discretion is consistent with Federal Rule of Civil Procedure 65(c). If a party files an appeal of a permitting decision, under Alaska Appellate Rules 204(d) and 603(a)(2), the Superior Court sitting as a court of review also has considerable discretion regarding imposing a bond to stay the decision of the agency. *See Breck v. Moore*, 910 P.2d 599, 609 (Alaska 1996). The Court also has broad authority to dismiss frivolous claims and to sanction parties who abuse the system.

Alaska is already the only state in the nation that imposes on litigants the cost of paying for an opposing party's costs and fees in court challenges. Thus, there are already substantial hurdles and significant deterrents to bringing lawsuits. This bill will effectively prevent anyone but the wealthiest corporations from being able to challenge resource permitting decisions in the state. Nunamta opposes this bill. It represents another shift in government favoritism to Outside and foreign interests seeking to exploit Alaskan resources while taking away the rights of Alaskans to seek balanced decisions that protect their fish and water resources.

SB 32

This bill states that in addition to Lake Elva and Grant Lake, "[d]evelopment and operation of a hydroelectric site at . . . Chikuminuk Lake is not considered an incompatible use" in Wood-Tikchik State Park. Chikuminuk Lake is important for subsistence and a hydroelectric site would have a significant adverse impact to the fish habitat there. Further, the enabling legislation for Wood-Tikchik State Park did not provide for Chikuminuk Lake as a hydroelectric site. SB 32 does not provide any basis for such a significant change to the lands and waters long protected as a state park. Nunamta strongly opposes this bill.

HB 78/SB 27

This bill authorizes DNR and DEC to apply for delegation of dredged and fill permitting under Section 404 of the Clean Water Act from the U.S. Army Corps of Engineers. The 404 Program is extremely expensive to implement and maintain, and only two other states (Michigan and New Jersey) have such oversight — and Michigan is trying to give the program back.

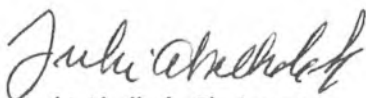
In December, Virginia released a feasibility study analyzing whether to seek delegation of the 404 Program and found it to be much too expensive. Virginia found that the delegation process was complex and lengthy, with no guarantee that the program would ultimately be delegated. The cost was estimated at \$18 million for the assumption of the program over five years and \$3.4 million annually thereafter. There is also no federal funding to defray the costs of the program. So, despite the fact Alaska is tightening its belt and is dealing with a permit backlog, this bill would commit significant financial resources for decades to come. Further, even if Alaska assumed authority over the 404 Program, the Army Corps retains jurisdiction over navigable waters — most waters in Alaska — and their associated wetlands.

The irony of the bill, however, is that it appears to be a reaction to the Environmental Protection Agency's watershed assessment in Bristol Bay and the potential decision to place certain areas off limits for dredged and fill permits for large-scale industrial mining in the world's premier salmon fisheries. EPA's jurisdiction and authority under Section 404(c) would not be affected by Alaska taking over the 404 Program.

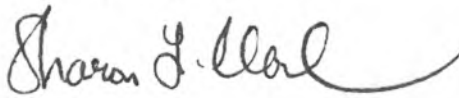
Nunamta is strongly opposed to the passage of this bill.

Thank you for your attention to these issues.

Sincerely,



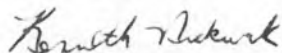
Luki Akelkok, Chairman



Sharon Clark, Secretary/Treasurer



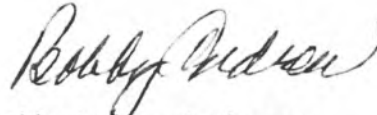
Jimmy Coopchiak, Boardmember



Kenneth Nukwak, Boardmember



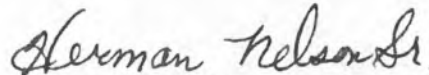
Thomas Tilden, Vice Chairman



Bobby Andrew, Spokesman




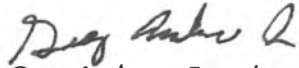
Moxie Andrew, Jr., Boardmember

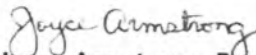


Herman Nelson, Boardmember

Governor Parnell
February 5, 2013
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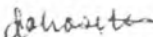

Dennis Andrew, Sr., Boardmember


Greg Andrew, Boardmember


Joyce Armstrong, Boardmember

Frank Logusak, Boardmember

cc: Bristol Bay Native Corporation
Bristol Bay Native Association
Sen. McGuire
Rep. Feige
Rep. Chenault
Rep. Johnson
Rep. Keller
Rep. Hughes
Rep. Hawker
Rep. P. Wilson
Rep. Thompson
Rep. Olson
Rep. Saddler
Rep. Stoltze
Rep. Pruitt
Rep. Lynn
Rep. Millett


Debbie Haseth Boardmember



THE STATE
of ALASKA
GOVERNOR SEAN PARNELL

Department of Environmental Conservation

DIVISION OF WATER
Director's Office

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Anchorage, Alaska 99501
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March 19, 2013

The Honorable Eric Feige, Co-Chair
The Honorable Dan Saddler, Co-Chair
House Resources Committee
State Capitol Room 124
Juneau, AK 99801

Dear Representative Saddler and Representative Feige:

Following are answers to questions raised by Representative Hawker regarding fiscal notes in the House Resources hearing for SB 27 on March 18, 2013.

DEC's fiscal note, Fiscal Note Number 1: Comparing the FY14 amount of \$879.5 in the Services line with the cost detail in the fiscal note analysis, \$30.2 of the FY14 services costs are not accounted for.

The \$30.2 in FY14 includes department-wide allocated common cost such as leases, personnel, information technology, and telecommunications, at \$29.7; and \$0.5 for public noticing costs. Similarly, in FY15, \$53.0 is included for allocated common costs and \$1.0 is included for public noticing costs. For FY16 through FY19, \$53.0 is included for allocated common costs. These costs are not detailed in the body of the fiscal note analysis.

What is the estimate for costs at full primacy?

A primary purpose of SB 27 is to determine costs at full primacy. The unknowns about this effort are significant, and until the State performs the detailed evaluation of assumption of the program as provided for in SB 27, it is impossible to forecast the cost or size of a State program.

Can the agencies provide an "escalator clause," estimating personal services costs in future years in the fiscal notes that reflect inflation?

It is the Administration's policy to develop fiscal notes without taking into account inflation. From page 10 of the *Memorandum from Karen Rehfeld and Heather Brakes to All Departments dated November 5, 2012*: "The Administration's policy is to develop fiscal notes without taking into account inflation, because most state programs do not receive automatic increases in funding for inflation."

Why is the Department of Law's fiscal note a zero fiscal note when Law will be getting \$187.5 from DEC?

To support DEC's 404 wetlands primacy evaluation pursuant to SB27, the Department of Law will reallocate legal staff from other projects, which may result in reductions to billings of other unidentified agencies or appropriations. This reallocation of staff does not require the Department to seek additional intra-agency receipt authority, but it still requires DEC to have the necessary resources to pay the Department of Law's billable costs, which is reflected in that agency's fiscal note.

Sincerely,

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

Michelle Bonnet Hale
Director