

SB

27

<TARGET><BILL>SB 27</BILL><SUBJECT>SB
27</SUBJECT><COMM>SRES28</COMM></TARGET>

SENATE COMMITTEE REPORT First Committee of Referral

DATE: 1/18/13

FURTHER: Finance

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 2/8/13

Resources Committee considered SENATE BILL NO. 27

SB 27-REGULATION OF DREDGE AND FILL ACTIVITIES

"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."

and recommends:

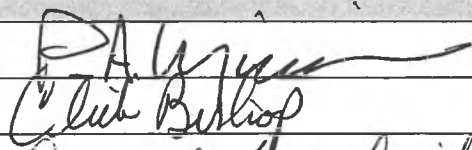
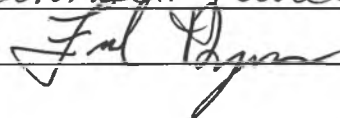
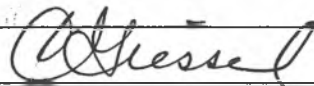
- be replaced with CS _____ (_____) Same Title New Title
- adopt previous CS _____ (_____) Same Title New Title
- attached amendment(s)
- adopt _____ Letter of Intent
- further referral to _____ Committee

Dept Abbr.	
ADM	LWF
CED	LAW
COR	LEG
CRT	MVA
EED	DNR
DEC	DPS
DFG	REV
GOV	DOT
DHS	UA

NEW FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #

PREVIOUS FISCAL NOTE(S)				
Dept.	Fiscal	Indet.	Zero	FN #
DEC	✓			1
DNR	✓			2
LAW			✓	3

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	Do PASS	Do NOT PASS	No REC	AMEND
	MICHELLE			✓	
Clint Bishop	BISHOP			✓	
Annal. Fairclough	FAIRCLOUGH			✓	
	DYSON	✓			
CHAIR: 	GIESSEL	✓			



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Environmental
Conservation

OFFICE OF THE COMMISSIONER

Post Office Box 111800
410 Willoughby Avenue, Suite 303
Juneau, Alaska 99811-1800
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January 23, 2013

The Honorable Cathy Giessel, Chair
Senate Resources Committee
State Capitol Room 205
Juneau, AK 99801

Dear Senator Giessel:

The Departments of Environmental Conservation and Natural Resources respectfully request a hearing in the Senate Resources Committee on SB 27, "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).

A copy of Governor Parnell's transmittal letter, the bill, fiscal note and sectional analysis accompany this request.

Your favorable consideration of this request is appreciated.

Sincerely,

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

Larry Hartig
Commissioner

Enclosures

cc: Heather Brakes, Legislative Director, Office of the Governor

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 black ink that reads "Sean Parnell". The signature is written in a cursive, flowing style.

Sean Parnell
Governor

Enclosure

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)						
		FY14	FY15	FY16	FY17	FY18	FY19	
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							
	FY14	FY15	FY16	FY17	FY18	FY19	
Full-time	5	0	8	8	8	8	
Part-time							
Temporary							

CHANGE IN REVENUES	FY14	FY15	FY16	FY17	FY18	FY19
	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				
			FY15	FY16	FY17	FY18	FY19
OPERATING EXPENDITURES	FY14	FY14	FY15	FY16	FY17	FY18	FY19
Personal Services	231.4		425.6	425.6	425.6	425.6	425.6
Travel	9.4		14.1	14.1	14.1	14.1	14.1
Services	111.0		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

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
	TOTAL	361.8	0.0	566.7	561.7	561.7	561.7

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

CHANGE IN REVENUES							
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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
Division Commissioner's Office
Approved by Daniel S. Sullivan, Commissioner
Department of Natural Resources

Phone 269-8423
Date/Time 1/5/13 10:30 AM
Date 1/14/2013

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 Phone 465-5427
Division Administrative Services Date/Time 1/11/13 12:00 AM
Approved by Michael C. Geraghty, Attorney General Date 1/11/2013
Department of Law

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.

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.

- With over 174 million acres of wetlands (65% of all wetlands in the nation), Alaska's stake in administering the 404 program is significant and unlike that of any other state.
- Virtually all major projects such as roads, mines, and other industrial development, and many minor projects, like housing pads and community infrastructure – require 404 permits.
- The federal government including the Corps is experiencing budget cuts and staff reductions.
- In a state like Alaska with a very narrow window for construction, permit delays can and do result in significant project delays of a year or more.
- A state-run program that is accountable to Alaskans and the legislature will assure that Alaska will have control of its permitting priorities.
- Benefits of a state-administered program include:
 - 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.
 - An improved and timely appeals process.
 - Judicial jurisdiction in Alaska courts rather than federal courts.
 - A stable, risk-based and predictable permitting process and enforcement regime.
- SB 27 is one step in a longer process. We are already aware of a considerable list of benefits to the state with primacy, the bill requires the state conduct a more thorough analysis of costs, benefits, geographic scope, and consequences.
- Even if the state ultimately chose not to assume 404 primacy, it's anticipated that substantial benefits would be realized from the evaluation process and the state's investigation of how to be more involved in the 404 permitting process.
- Armed with that information, the legislature remains the gatekeeper on whether the state should ultimately proceed with application for full primacy.

- Alaska should be in charge of our development and economic destiny. SB 27 is a step in the right direction towards establishing a streamlined yet conscientious permitting regime, performed by Alaskans and accountable to Alaskans.
- I urge your support.

- what is cost to S.O.A .
- how many new employees

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.

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.

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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

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.

Fact Sheet



Division of Mining, Land and Water – February 2006

Water Rights in Alaska

What are water rights?

A water right is a legal right to use surface or ground water under the Alaska Water Use Act (AS 46.15). A water right allows a specific amount of water from a specific water source to be diverted, impounded, or withdrawn for a specific use. When a water right is granted, it becomes appurtenant to the land where the water is being used for as long as the water is used. If the land is sold, the water right transfers with the land to the new owner, unless the Department of Natural Resources (DNR) approves its separation from the land. In Alaska, because water wherever it naturally occurs is a common property resource, landowners do not have automatic rights to ground water or surface water. For example, if a farmer has a creek running through his property, he will need a water right to authorize his use of a significant amount of water. Using water without a permit or certificate does not give the user a legal right to use the water.

How do I obtain a water right?

To obtain water rights in Alaska, you need to submit an application for water rights to the DNR office in the area of the water use. After your application is processed, you may be issued a permit to drill a well or divert the water. Once you have established the full amount of water that you use beneficially and have complied with all of the permit conditions, a certificate of appropriation may be issued. This is the legal document that establishes water rights.

What costs are involved?

An application for water rights must be accompanied by the appropriate filing fee as determined by 11 AAC 05.010(a)(8) :

- \$100 for one single-family residence or duplex, or for water use associated with one single-family residence or duplex
- \$1,200 for activities related to oil and gas and associated substances
- Fee varies for activities related to locatable minerals, unless the application is filed under 11 AAC 05.010(a)(9)(E)(i) or (9)(F)(i) - *contact Water Resources Section for pre-application meeting*

- Fee varies for hydroelectric power generation - *contact Water Resources Section for pre-application meeting*
- Fee varies for water removal out of a hydrologic unit under AS 46.15.035 or 46.15.037 - *contact Water Resources Section for pre-application meeting*
- \$200 for 5,000 gallons per day (gpd) or less for a use not listed above
- \$450 for greater than 5,000 gpd and no more than 30,000 gpd for a use not listed above
- \$550 for greater than 30,000 gpd and no more than 100,000 gpd for a use not listed above
- \$900 for greater than 100,000 gpd for a use not listed above

To ensure that the public is notified of proposed water uses, you may be required to pay the cost of a legal advertisement in at least one issue of a local newspaper in the area of the proposed water use. Public notice is required if the appropriation is greater than 5,000 gpd. Public notice may be required for uses of less than 5,000 gpd if the water source is an anadromous fish stream or the water source has a high level of competition among water users. In addition, permit, certificate, and authorization holders are subject to an annual \$50 administrative service fee. Water appropriations of 500 gpd or less for any use, appropriations of 1,500 gpd or less for a single-family residence or duplex, and reservations of water for public benefit are exempt from the annual fee.

Why should I apply for water rights?

1. If you have water rights, you have legal standing to assert those rights against conflicting water users who do not have water rights.
2. A person with water rights has priority to use water over persons who later file for water rights from the same source.
3. Anyone who diverts, impounds, or withdraws a significant amount of water for use, without a permit, certificate, or authorization is guilty of a misdemeanor (AS 46.15.180). A significant amount of water is defined by 11 AAC 93.035(a) and (b) as:

- the consumptive use of more than 5,000 gallons of water from a single source in a single day;
 - the regular daily or recurring consumptive use of more than 500 gpd from a single source for more than 10 days per calendar year;
 - the non-consumptive use of more than 30,000 gpd (0.05 cubic feet per second) from a single source; or
 - any water use that may adversely affect the water rights of other appropriators or the public interest.
4. By filing for water rights, you provide valuable information about water use and water availability in Alaska. Water right records are updated and maintained in an online database. This system contains data on customers, water right status, water source (well depth or water body name), type of water use, water quantity, period of water use, water right priority date, and property description (meridian, township, range, section, quarter sections, latitude and longitude, subdivision name or survey number, tract, block, and lot). Currently, the water right database has over 24,000 records. This information allows state water managers to estimate present uses of water, determine how much water is available from streams and aquifers in the state, protect established water right holders, prevent over-appropriation of water sources, and manage the state's water resources.

What other water resources authorizations are available from the Department of Natural Resources?

- Dam Safety: A certificate of approval is required for constructing or modifying a dam that impounds 50 acre-feet of water and is at least 10 feet high, or is at least 20 feet high, or poses a threat to life and property. An application form and the fee prescribed by 11 AAC 05.010(a)(8) should be filed with the Department of Natural Resources.
- Instream Flow: A certificate is required for maintaining a specific flow in a portion of stream or water level in a lake. An instream flow reservation can be made to protect fish and wildlife habitat, migration, and propagation; recreation and park purposes; navigation and transportation purposes; and sanitary and water quality purposes. An application form and the fee prescribed by 11 AAC 05.010(a)(8) should

be filed with the Department of Natural Resources.

How do I obtain authorization for short-term water use (temporary water use authorization)

A temporary water use authorization may be needed if the amount of water to be used is a significant amount, the use continues for less than five consecutive years, and the water to be used is not appropriated. This authorization does not establish a water right but will avoid conflicts with fisheries and existing water right holders. The application fee for a temporary water use authorization is \$350 for all uses of water from up to five water sources.

Where can I get more information?

More information is available in the Department of Natural Resources' fact sheets on Administrative Service Fee, Dam Safety in Alaska, Reserving Water for Instream Use, Federal Reserved Water Rights, and Alaska Hydrologic Survey. Further information and application forms may be obtained from the following offices or visit www.dnr.state.ak.us/mlw/water/index.htm.

**Department of Natural Resources
Water Resources Section**

Anchorage Office

550 West 7th Avenue, Suite 1020
Anchorage, AK 99501-3562
Phone: (907) 269-8600
Fax: (907) 269-8947

Fairbanks Office

3700 Airport Way
Fairbanks, AK 99709-4699
Phone: (907) 451-2790
Fax: (907) 451-2703

Juneau Office

PO Box 111020
400 Willoughby Avenue
Juneau, AK 99811-1020
Phone: (907) 465-3400
Fax: (907) 586-2954

State or Tribal Assumption of the Section 404 Permit Program

The Clean Water Act provides States and Tribes the option of assuming administration of the Federal Section 404 permit program in certain waters within State or Tribal jurisdiction. This fact sheet describes reasons why States and Tribes might assume administration of the Section 404 program from the Federal government, which waters could be administered by States or Tribes under this program, and the process for assuming administration of these waters.

Why Assume Administration of the Section 404 Program?

More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the Federal Section 404 program. This makes sense because 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. By formally assuming administration of the Federal regulatory program, States or Tribes can eliminate unnecessary duplication between programs. If States or Tribes assume program administration, Section 404 permit applicants would need only a State or Tribal permit for dredged or fill material discharges in certain waters.

Which Waters Can States/Tribes Administer under the Section 404 Program?

States and Tribes can assume the Federal Section 404 program only in certain "nonnavigable" waters. The U.S. Army Corps of Engineers retains jurisdiction in -

- tidal waters and their adjacent wetlands
- navigable waters and their adjacent wetlands.

The Corps continues to regulate navigable waters under Section 10 of the Rivers and Harbors Act of 1899.

How to Assume the Section 404 Program

To assume the Section 404 program, States or Tribes need to develop a wetlands permit program similar to the Federal program and submit to the EPA an application to assume the program. (See the box on page 2 for details on this process.) Even for States or Tribes with an existing wetlands regulatory program, this process can require the passage of new legislation. To be eligible to assume the Federal program, State or Tribal programs must

- have an equivalent scope of jurisdiction as the Federal program
- regulate at least the same activities as the Federal program
- provide for sufficient public participation
- ensure compliance with the Section 404(b)(1) guidelines, which provide environmental criteria for permit decisions
- have adequate enforcement authority.

What Happens After States or Tribes Assume the Program?

When States or Tribes assume administration of the Section 404 program, the Corps no longer processes Section 404 permits in waters under State or Tribal jurisdiction. The State or Tribe assumes responsibility for the program, determines what areas and activities are regulated, processes individual permits for specific proposed activities, and carries out enforcement activities. EPA reviews the program annually to ensure the State or Tribe is operating its program in compliance with requirements of the law and regulations. In addition, for some activities, which generally include larger discharges with serious impacts, EPA and other Federal agencies review the permit application and provide comments to the State or Tribe; the State or Tribe cannot issue a permit over EPA's objection.

Status of State/Tribal Section 404 Program Assumption

To date, two States, Michigan and New Jersey, have assumed administration of the Federal permit program. Other States and some Tribes are working toward or investigating the possibility of assuming the permit program. Reasons States have expressed for not more actively pursuing assumption of the program include lack of funding, limit of program administration to "non-navigable waters," concerns regarding Federal requirements and oversight, availability of alternative mechanisms for State/Tribal wetlands protection, and the controversial nature of regulation of wetlands and other aquatic resources.

For More Information

If your State or Tribe is interested in assuming administration of the Federal Section 404 permit program, contact the EPA Regional Office in your area. Call the EPA Wetlands Information Hotline (contractor operated) to determine the appropriate EPA contact. EPA also can provide technical assistance (and may also be able to provide some financial assistance through the State Wetlands Grants Program) to help State Wetlands and Tribes develop the authority, capability, and documentation needed to assume the Federal permit program.

Publications of Interest

- Clean Water Act, Section 404 Program Definition and Permit Exemptions; Section 404 State Program Regulations, June 6, 1988, Federal Register, 40 CFR Parts 232 and 233.
- Clean Water Act, Section 404 Tribal Regulations, February 11, 1993, Federal Register, 40 CFR Parts 232 and 233.

State or Tribal 404 Assumption Process

State or Tribe submits a complete assumption application

The Governor of the State or Equivalent Tribal entity* submits to EPA a full and complete description of the program it proposes to establish and administer under State law or an interstate compact. The State must also submit a statement from the State Attorney General certifying that the State laws provide adequate authority to



EPA Reviews Application

EPA is responsible for reviewing and approving/ denying a State or Tribe's request to assume the Federal permit program within 120 days of receipt of the completed application.



Distribution of Application for Public Comment

EPA distributes application for State or Tribal assumption to other Federal agencies



Public Hearing

EPA also makes the State/Tribal application available for public review and comment and holds public hearing(s) in the State.



EPA Decision

After reviewing the State or Tribal application and considering any Federal agency and public comments, EPA makes a decision of the requirements to assume the Federal permit program. EPA's decision is based on whether the State or Tribe meets the applicable statutory and regulatory requirements for an approvable



Assumption Approved

Assumption Denied

*NOTE: Tribes are eligible to apply to assume the Federal permit program after they have met requirements for "treatment as a state." See the February 11, 1993, Federal Register notice. (See Publications of Interest for details.)

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Last updated on Wednesday, February 22nd, 2006
URL: <http://www.epa.gov/owow/wetlands/facts/fact23.html>

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
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MEMORANDUM

July 14, 2011

SUBJECT: Questions related to the Clean Water Act, wetlands mitigation, and Alaska (Work Order No. 27-LS0907)

TO: Senator Cathy Giessel
Attn: Lindsay Williams

FROM: Alpheus Bullard *LAB*
Legislative Counsel

You asked a number of questions relating to wetlands mitigation. Your questions are addressed below.¹

How is wetlands mitigation addressed by the Clean Water Act?

Section 404² of the Clean Water Act (CWA)³ requires that any person, company, tribe, or government agency planning to work in waters⁴ (including wetlands)⁵ of the U.S. must

¹ Please note that I have taken the liberty of paraphrasing Lindsay's questions for clarity.

² 33 U.S.C. § 1344.

³ 33 U.S.C. § 1251 et. seq. (also known as the Federal Water Pollution Control Act or FWPCA), Pub. L. 92-500, as amended by Pub. L. 95-217.

⁴ Under 40 C.F.R. 230.3(s), "waters of the United States" means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

first obtain a permit from the Army Corps of Engineers (Corps). The Corps administers the permit program that regulates proposed discharges of dredged or fill material into waters and wetlands of the United States. The federal Environmental Protection Agency (EPA) is responsible for developing, in cooperation with the Corps, environmental guidelines under the CWA's sec. 404(b)(1) for these proposed discharges.⁶ A 1990

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

⁵ Under 40 C.F.R. 230.3(t), "wetlands" means:

. . . those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

⁶ "The section 404 permit process is governed simultaneously by Corps regulations, 33 C.F.R. Parts 320 - 329 [see also part 332], and by EPA guidelines, 40 C.F.R. Part 230. Both sets of rules must be observed." *Bearing Strait Citizens for Responsible Resource Development et al. v. United States Corps of Engineers*, 524 F.3d 938, 947 (9th Cir. 2008), citing *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986).

The Section 404 permitting process is also governed by the National Environmental Policy Act (NEPA). NEPA was enacted in pursuit of two objectives: "First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas & Elec. Co. v. Nat'l Res. Def. Coun., Inc.*, 462 U.S. 87, 97 (1983) (internal citations and quotation marks omitted). Unlike CWA, NEPA does not contain

"Memorandum of Agreement" between the EPA and the Corps (1990 memorandum) states that discharges of dredged or fill material into the wetlands of the United States should be remedied with wetland mitigation measures that provide "at a minimum, one for one functional replacement (i.e. no net loss⁷ of values)" to satisfy the requirements of CWA.⁸

Is there an exemption to the "no net loss" wetland mitigation requirements of CWA for wetlands in Alaska?

The federal "no net loss" policy described in the 1990 memorandum is not absolute in application to Alaska. A May 13, 1994 EPA memorandum (1994 memorandum) recognizes that:

... one to one replacement of wetlands may be impractical in Alaska, where "there is a high proportion of land in a watershed or region which is wetlands." Accordingly, "emphasis is placed on minimizing project impacts to wetlands by reducing the footprint of the project, using co-location of facilities whenever possible, and seeking to locate the project in lower value wetlands."

Bearing Strait Citizens for Responsible Resource Development et al., 524 F.3d at 951 (9th Cir. 2008), *citing* Alaska Wetlands Initiative Summary Report, May 13, 1994, available July 13, 2011, at <http://www.epa.gov/owow/wetlands/pdf/alask.pdf>.

substantive environmental standards, nor does it mandate that agencies achieve particular substantive environmental results. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003).

Note also that the federal Fish and Wildlife Service (USFWS) and the National Fisheries Service (NMFS) also have advisory roles under CWA.

⁷ "No net loss" is the federal government's overall policy relating to wetlands preservation. For a general overview, see EPA Wetlands Fact Sheets, available on July 13, 2011, at <http://www.epa.gov/owow/wetlands/facts/>.

⁸ See generally "Memorandum of Agreement Between The Department of the Army and The Environmental Protection Agency, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines," Sept. 6, 1990, available on July 13, 2011, at <http://www.epa.gov/owow/wetlands/regs/mitigate.html>.

Note that the provisions relating to the amount, type, and location of compensatory mitigation projects, including the use of preservation, in the 1990 "Memorandum of Agreement" between the Corps and the EPA on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines have been supplanted by 40 C.F.R. 230.

The 1994 memorandum also notes, "In Alaska, minimization of impacts has been in many circumstances the only mitigation required." *Id.* at 951 (discussing and citing the 1994 memorandum). While this is an exception to the federal "no net loss" wetlands mitigation policy, it is not an exemption to other mitigation requirements adopted by the EPA and the Corps.⁹

Explain "compensatory mitigation," "in-lieu fee programs," and "mitigation banks" in the context of CWA.

From the definitions found in 40 C.F.R. 230.292:

[c]ompensatory mitigation means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved[;]¹⁰

[an] [i]n-lieu fee program means a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument[;] and¹¹

⁹ There was a proposed EPA rule for an "Exception from Wetlands Mitigation Sequence for Alaska" (57 FR 52716, November 4, 1992) that would have excepted discharges of dredged or fill material into wetlands in Alaska from requirements that all proposed discharges represent the least environmentally damaging practicable alternative and that all practicable measures to compensate for unavoidable adverse impacts on the aquatic ecosystem be undertaken. This proposed rule was withdrawn in 1994. See <http://www.gpo.gov/fdsys/search/pagedetails.action?granuleId=94-12245&packageId=FR-1994-05-19&acCode=FR> (accessed July 13, 2011).

¹⁰ The amount of compensatory mitigation required is determined under 40 C.F.R. 230.93(f). Note that a compensatory mitigation project must include appropriate compensation required for unavoidable impacts to aquatic resources authorized by that permit. See 40 C.F.R. 230.93(i). Use of mitigation banks and in-lieu fee programs is addressed by 40 C.F.R. 230.93(g) and 40 C.F.R. 230.98.

¹¹ For examples of Alaska fee-based compensatory programs or mitigation banks, see <http://www.greatlandtrust.org/whatwedo/wetlandmitigation.html> and <http://www.su-knikmitigationbank.com/>.

[m]itigation bank means a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by [Department of the Army] permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.¹²

Most required wetlands mitigation in Alaska is achieved by avoiding or minimizing impacts, but on occasion the Corps requires compensatory mitigation.¹³ Compensatory mitigation, or requiring an applicant to replace affected wetlands as a condition of a 404 permit, usually occurs only when the most fragile wetlands are disturbed.

Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the 404(b)(1) Guidelines compliance analysis, the district engineer may determine that a [404] permit for the

¹² For a detailed explanation of mitigation banking, see <http://www.mitigationbanking.org/about/whatismitigationbanking.html> (accessed on July 13, 2011).

¹³ Compensatory mitigation is actually the third step in a sequence of actions that must be followed to offset impacts to aquatic resources. The 1990 Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Department of Army establishes a three-part process, known as the mitigation sequence to help guide mitigation decisions and determine the type and level of mitigation required under Clean Water Act Section 404 regulations.

Step 1. Avoid - Adverse impacts to aquatic resources are to be avoided and no discharge shall be permitted if there is a practicable alternative with less adverse impact.

Step 2. Minimize - If impacts cannot be avoided, appropriate and practicable steps to minimize adverse impacts must be taken.

Step 3. Compensate - Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain. The amount and quality of compensatory mitigation may not substitute for avoiding and minimizing impacts.

proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options.

40 C.F.R. Part 230.91(c)(3).¹⁴

40 C.F.R. 230.93(a)(1) provides:

[t]he fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [404] permits. The district engineer must determine the compensatory mitigation to be required in a [404] permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. In many cases, the environmentally preferable compensatory mitigation may be provided through mitigation banks or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success. Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular

¹⁴ Note that under 40 C.F.R. Part 230(e), 33 C.F.R. Parts 325 and 332, and 40 C.F.R. Part 230 apply instead of

(1) the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks," issued on November 28, 1995;

(2) the "Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act," issued on November 7, 2000;

(3) Regulatory Guidance Letter 02-02, "Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899" issued on December 24, 2002; and

(4) the provisions relating to the amount, type, and location of compensatory mitigation projects, including the use of preservation, in the February 6, 1990, Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (all other provisions of the 1990 memorandum remain in effect).

[404] permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.


If you are interested in more information, perhaps the best nuts and bolts summary of existing wetlands compensatory mitigation requirements in Alaska is found in Alaska District Corps "Regulatory Guidance Letter, RGL ID No. 09-01."¹⁵

What are our state laws relating to wetlands mitigation?

The state does not have any laws that directly pertain to wetlands mitigation. The Corps, in partnership with the EPA, is responsible for implementing the 404 wetlands permitting program in Alaska. EPA staff in Alaska review projects and have the authority to prohibit, deny, or restrict the use of any defined area of wetlands as a disposal or fill site. EPA enforces Clean Water Act Section 404 provisions.¹⁶

While the Corps and the EPA are responsible for implementation of the 404 program in Alaska, Section 401 of CWA provides Alaska with the legal authority to review an application or project that requires a permit that might result in a discharge into waters of the U.S. The state uses 401 water quality certification as its primary mechanism to regulate wetlands at the state level. The applicant must apply for and obtain a Certificate of Reasonable Assurance from the Alaska Department of Environmental Conservation (DEC) to conduct a regulated activity. By agreement between the Corps and the DEC, the "Public Notice of Application for Permit" noticed by the Corps for an individual permit serves as the DEC application for a Certificate of Reasonable Assurance. DEC reviews the project as described in the Corps project public notice; coordinates with other state and federal agencies and local governments; reviews any public comments; and either approves, approves with conditions, waives, or denies a project based on compliance with CWA, state water quality standards, and other applicable state laws.¹⁷

¹⁵ Available July 13, 2011, at http://www.su-knikmitigationbank.com/images/AK_District_Mitigation_RGL-1.pdf.

¹⁶ Under 33 U.S.C. 1344(g), a state that desires to administer its own individual and general 404 permit program for the discharge of dredged or fill material into navigable waters may assume control of its own 404 permitting program if certain conditions are met. Alaska has not assumed 040 permitting. 

¹⁷ Note that the state may also regulate wetlands under AS 16.05.871:

Sec. 16.05.871. Protection of fish and game. (a) The commissioner shall, in accordance with AS 44.62 (Administrative Procedure Act), specify the various rivers, lakes, and streams or parts of them that are important for the spawning, rearing, or migration of anadromous fish.

(b) If a person or governmental agency desires to construct a hydraulic project, or use, divert, obstruct, pollute, or change the natural flow or bed of a specified river, lake, or stream, or to use wheeled, tracked, or excavating equipment or log-dragging equipment in the bed of

Final note

This is a complex area of law that defies abbreviated explanation. While I'll be out of the office on mandatory leave until August 1, if you have specific questions, please do not hesitate to contact our office.

TLAB:ljw
11-342.ljw

Attachment

a specified river, lake, or stream, the person or governmental agency shall notify the commissioner of this intention before the beginning of the construction or use.

(c) The commissioner shall acknowledge receiving the notice by return first class mail. If the commissioner determines that the following information is required, the letter of acknowledgement shall require the person or governmental agency to submit to the commissioner:

(1) full plans and specifications of the proposed construction or work;

(2) complete plans and specifications for the proper protection of fish and game in connection with the construction or work, or in connection with the use; and

(3) the approximate date the construction, work, or use will begin.

(d) The commissioner shall approve the proposed construction, work, or use in writing unless the commissioner finds the plans and specifications insufficient for the proper protection of fish and game. Upon a finding that the plans and specifications are insufficient for the proper protection of fish and game, the commissioner shall notify the person or governmental agency that submitted the plans and specifications of that finding by first class mail. The person or governmental agency may, within 90 days of receiving the notice, initiate a hearing under AS 44.62.370. The hearing is subject to AS 44.62.330 - 44.62.630.

For a quick overview of the role of the various federal and state agencies and local governments in relation to Alaska's wetlands, see <http://www.dec.state.ak.us/water/wwdp/wetlands/index.htm> (accessed on July 13, 2011).

Wetlands Compensatory Mitigation

The objective of the Clean Water Act (CWA) is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Toward achievement of this goal, the CWA prohibits the discharge of dredged or fill material into waters of the United States unless a permit issued by the Army Corps of Engineers or approved State under CWA Section 404 authorizes such a discharge.

For every authorized discharge, the adverse impacts to wetlands, streams and other aquatic resources must be avoided and minimized to the extent practicable. For unavoidable impacts, **compensatory mitigation** is required to replace the loss of wetland and aquatic resource functions in the watershed. Compensatory mitigation refers to the restoration, establishment, enhancement, or in certain circumstances preservation of wetlands, streams or other aquatic resources for the purpose of offsetting unavoidable adverse impacts.



The Mitigation Sequence

Compensatory mitigation is actually the third step in a sequence of actions that must be followed to offset impacts to aquatic resources. The 1990 Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Department of Army establishes a three-part process, known as the mitigation sequence to help guide mitigation decisions and determine the type and level of mitigation required under Clean Water Act Section 404 regulations.

Step 1. Avoid - Adverse impacts to aquatic resources are to be avoided and no discharge shall be permitted if there is a practicable alternative with less adverse impact.

Step 2. Minimize - If impacts cannot be avoided, appropriate and practicable steps to minimize adverse impacts must be taken.

Step 3. Compensate - Appropriate and practicable **compensatory mitigation** is required for unavoidable adverse impacts which remain. The amount and quality of compensatory mitigation may not substitute for avoiding and minimizing impacts.

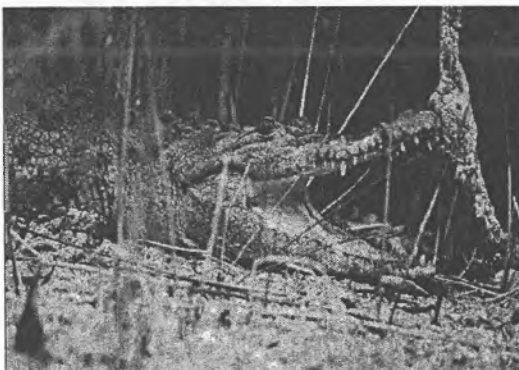


Photo by James Valentine

The American Crocodile, a Federal Endangered Species, makes its home in the Everglades Mitigation Bank.

Methods of Compensatory Mitigation:

Even after avoiding and minimizing impacts, projects that will cause adverse impacts to wetlands, streams and other aquatic resources typically require some type of compensatory mitigation. The Army Corps of Engineers (or approved state authority) is responsible for determining the appropriate form and amount of compensatory mitigation required. Methods of compensatory mitigation include restoration, establishment, enhancement and preservation.

- **Restoration:** Re-establishment or rehabilitation of a wetland or other aquatic resource with the goal of returning natural or historic functions and characteristics to a former or degraded wetland. Restoration may result in a gain in wetland function or wetland acres, or both.
- **Establishment (Creation):** The development of a wetland or other aquatic resource where a wetland did not previously exist through manipulation of the physical, chemical and/or biological characteristics of the site. Successful establishment results in a net gain in wetland acres and function.
- **Enhancement:** Activities conducted within existing wetlands that heighten, intensify, or improve one or more wetland functions. Enhancement is often undertaken for a specific purpose such as to improve water quality, flood water retention or wildlife habitat. Enhancement results in a gain in wetland function, but does not result in a net gain in wetland acres.
- **Preservation:** The permanent protection of ecologically important wetlands or other aquatic resources through the implementation of appropriate legal and physical mechanisms (i.e. conservation easements, title transfers). Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection or enhancement of the aquatic ecosystem. Preservation does not result in a net gain of wetland acres and may only be used in certain circumstances, including when the resources to be preserved contribute significantly to the ecological sustainability of the watershed.

Source: *Compensatory Mitigation for Losses of Aquatic Resources*, 40 CFR Part 230 Subpart J and 33 CFR Part 332.

Mechanisms for Compensatory Mitigation:

Compensatory mitigation for unavoidable wetland impacts may be accomplished through three distinct mechanisms. With permittee-responsible mitigation, the permittee maintains liability for the construction and long-term success of the site. Mitigation banking and in-lieu fee mitigation are forms of "third party" compensation, where the liability for project success is transferred to the mitigation bank or in-lieu fee sponsor.

- **Permittee-Responsible Mitigation:** Restoration, establishment, enhancement or preservation of wetlands undertaken by a permittee in order to compensate for wetland impacts resulting from a specific project. The permittee performs the mitigation after the permit is issued and is ultimately responsible for implementation and success of the mitigation. Permittee-responsible mitigation may occur at the site of the permitted impacts or at an off-site location within the same watershed.
- **Mitigation Banking:** A wetlands mitigation bank is a wetland area that has been restored, established, enhanced or preserved, which is then set aside to compensate for future conversions of wetlands for development activities. Permittees, upon approval of regulatory agencies, can purchase credits from a mitigation bank to meet their requirements for compensatory mitigation. The value of these "credits" is determined by quantifying the wetland functions or acres restored or created. The bank sponsor is ultimately responsible for the success of the project. Mitigation banking is performed "off-site," meaning it is at a location not on or immediately adjacent to the site of impacts, but within the same watershed. Federal regulations establish a flexible preference for using credits from a mitigation bank over the other compensation mechanisms.
- **In-Lieu Fee Mitigation:** Mitigation that occurs when a permittee provides funds to an in-lieu-fee sponsor (a public agency or non-profit organization). Usually, the sponsor collects funds from multiple permittees in order to pool the financial resources necessary to build and maintain the mitigation site. The in-lieu fee sponsor is responsible for the success of the mitigation. Like banking, in-lieu fee mitigation is also "off-site," but unlike mitigation banking, it typically occurs after the permitted impacts.

EPA-843-F-08-002

Compensatory Mitigation Resources

Federal Wetlands Mitigation Regulations and Guidance

Available at: www.epa.gov/wetlandsmitigation/

Section 404(b)(1) Guidelines. In 1980, EPA finalized regulations that constitute the substantive environmental criteria used in evaluating activities regulated under Section 404 of the Clean Water Act.

Compensatory Mitigation for Losses of Aquatic Resources; Final Rule. In 2008, EPA and the U.S. Army Corps of Engineers, through a joint rulemaking, expanded the Section 404(b)(1) Guidelines to include comprehensive standards for all three mechanisms for providing compensatory mitigation.

1990 Memorandum Of Agreement (MOA) Between The Department of the Army and The Environmental Protection Agency. This MOA contains the policy and procedures to be used in determining the type and level of mitigation necessary to demonstrate compliance with the Section 404(b)(1) Guidelines. (Portions of this MOA that concern the type and location of compensatory mitigation are superseded by the above 2008 rule.)

Recent Evaluations of Wetlands Compensatory Mitigation

The Status and Character of In-Lieu Fee Mitigation in the United States. 2006. Environmental Law Institute, Washington, D.C. Available at www.eli.org

2005 Status Report on Compensatory Mitigation in the United States. 2006. Environmental Law Institute, Washington, D.C. Available at www.eli.org

Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring. 2005. U.S. Government Accountability Office Report GAO-05-898, Washington, D.C. Available at www.gao.gov

BANKS AND FEES: The Status of Off-Site Wetland Mitigation in the United States. 2002. Environmental Law Institute, Washington, D.C. Available at www.eli.org

Stakeholder Forum on Federal Wetlands Mitigation. 2001-2006. Environmental Law Institute, Washington, D.C. Available at www.eli.org

National Academy of Sciences. *Compensating for Wetland Losses Under the Clean Water Act.* 2001. National Academy Press, Washington, D.C. Available at www.nap.edu

Wetlands Protection: Assessments Needed to Determine Effectiveness of In-Lieu-Fee Mitigation. 2001. U.S. General Accounting Office Report GAO-01-325. Washington, D.C. Available at www.gao.gov

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.



Kachemak Bay Conservation Society
3734 Ben Walters Ln, Homer, AK 99603
907 235.8214
kbayconservation@gmail.com

February 4, 2013

Dear State Legislators,

RE: HB78 & SB27-Regulation of Dredge and Fill Activities

Kachemak Bay Conservation Society (KBCS) opposes HB78 & SB27 for the following reasons:

1. Gov. Parnell proposes to allow the Departments of Natural Resources and the Department of Environmental Conservation to take control of permitting dredge and fill activities. By removing the authority of the U.S. Army Corps of Engineers, our wetlands would no longer have the protection of the federal National Environmental Policy Act process. KBCS feels that this is yet another attempt of the governor to permit irresponsible resource development of Alaskan wetlands.
2. Historically this program has proven to be extremely expensive to administer.
3. Wetlands are such an imperative resource for the ecosystem and all the wildlife that depends on that ecosystem. They also are essential for flood control and filtering waters before they enter streams, lakes, & oceans; thus protecting wetlands is essential.
4. Wetlands are recognized as important features in the landscape that provide numerous beneficial services for people and for fish and wildlife. Some of these services, or functions, include protecting and improving water quality, providing fish and wildlife habitats, storing floodwaters, and maintaining surface water flow during dry periods. These beneficial services, considered valuable to societies worldwide, are the result of the inherent and unique natural characteristics of wetlands.

KBCS feels that protecting wetlands is becoming more important as climate change and global warming cause's sea level rising and super storms. It is in the state's best interest to protect and save wetlands for future generations.

Sincerely,

Roberta Highland, President
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www.kbayconservation.org