12166 HOUSE JUDICIARY

NPDES Program Approval Criteria

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

Under the Clean Water Act (CWA), a state seeking approval of its NPDES program must have authority to do the following[1]:

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

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

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

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

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

STATE OF ALASKA

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DIVISION OF WATER
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March 19, 2007

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

Re: Questions related to HB 149

Dear Representative Seaton:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

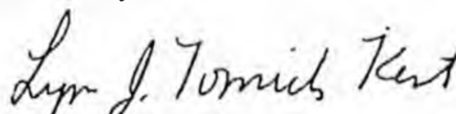
NPDES primacy will not increase the state's exposure to lawsuits under the Clean Water Act. In general, the Eleventh Amendment to the U.S. Constitution prohibits federal courts from hearing lawsuits brought by private citizens against states. Nothing in the citizen suit provision of the Clean Water Act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

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

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

Please let me know if you need any additional information.

Sincerely,



Lynn J. Tomich Kent
Director

G:\Water\DIR\LEGISLATIVE\Seaton re HB 149 NPDES primacy.doc

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

STATE OF ALASKA

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March 15, 2007

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

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

Dear Representatives Johnson and Gatto:

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

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

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

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

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

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

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

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

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

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

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

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

What will happen to permit fees with NPDES primacy?

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

DEC's NPDES Work Group and overall public process

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

SB 110, from 2005 directed DEC to continue to work with a Work Group of NPDES permittees while developing the primacy application. SB 110 underwent public review through the legislative process. The Work Group includes representatives of large and small community domestic wastewater dischargers (sewage treatment facilities); and the oil and gas, timber, mining, seafood, and construction industries. The Work Group's members are listed at the DEC website at:
http://www.dec.state.ak.us/water/npdes/work_group.htm, along with agendas, handouts, drafts of the primacy application, attendee lists, meeting summaries, and other documents germane to the Work Group process -- the public has access to everything the workgroup has access to. The February 2005 Work Group report is enclosed. Work Group meetings and teleconferences have been public noticed and meeting announcements are also emailed to a list serve group (350+ people). Public representatives have been present and participated during the meetings and during the specific allocation of time on the agenda for public comment. The initial regulations for the program underwent public review and pending revisions to the regulations will have a public review beginning this week. And, when all is done, EPA will conduct another public notice and review of the entire program. Upon program approval, all permits will also undergo public review.

NPDES resources commitment

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

Primacy application status and EPA review

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

DEC certifications of EPA NPDES permits

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

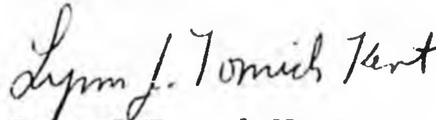
- Clean Water Act Section 401 certifications for 100% of EPA-issued NPDES individual permits (9 permits)
- Clean Water Act Section 401 certifications for 100% of EPA-issued NPDES general permits (5 permits)
- 15 authorizations under the TAPS linewide NPDES general permit
- 87 authorizations under the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

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

- 18 state individual permits
- 62 state general permit authorizations

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

Sincerely,



Lynn J. Tomich Kent
Director

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

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PRIMACY WORKGROUP REPORT

February 24, 2005

FINAL

WORKGROUP MEMBERS

Member	Alternates
Oil and Gas Industry Sector Marilyn Crockett Alaska Oil and Gas Association	Carl Rutz Alyeska Pipeline Service Company
Mining Industry Sector Steve Borell Alaska Miners Association	Charlotte MacCay Bristol Environmental Larry Hartig Hartig Rhodes Hoge & Lekisch
Seafood Industry Sector Stephanie Madsen Pacific Seafood Processors Association	
Timber Industry Sector Owen Graham Alaska Forest Association	Eric Fjelstad Perkins Coie Law Firm
Construction Industry Sector Dick Cattanach Associated General Contractors of Alaska	
Large Community Domestic Wastewater Facilities Kris Warren Alaska Water and Wastewater Management Association	
Small Community/Tribal Domestic Wastewater Facilities Art Ronimus Alaska Native Tribal Health Consortium	Dan Reitz Alaska Native Tribal Health Consortium

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EXECUTIVE SUMMARY

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

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

II. CHARACTERISTICS OF AN ALASKA NPDES PERMITTING PROGRAM

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

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

Permit Application Process

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

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

Permit Limits and Monitoring Requirements

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

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

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

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

Guidance Documents

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

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

Public Participation and Public Notice Process

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

Permittee Review of Draft and Proposed Final Permits

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

Compliance Assistance

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

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

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

Appeals Process

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

Management Involvement

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

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

Budget and Staffing

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

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

Transition

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

NEPA, ESA, and EFH

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

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

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

III. POTENTIAL BENEFITS OF PRIMACY

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

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

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

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

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

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

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

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

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

IV. COSTS AND CONCERNS

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

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

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

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

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

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

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

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

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

V. BENEFIT/CONCERNS ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. ISSUES RAISED BY THE PUBLIC

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

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

VII. TOPICS DISCUSSED IN GREATER DETAIL

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

Electronic Permit Applications, Data Submission, and Payment Procedures
Applicants can currently pay DEC invoices for wastewater, food service, and air permit fees using a centralized online payment center.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transition Process
There are six components to the NPDES permitting program.

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

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

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

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

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

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

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

Procedure for Returning NPDES Primacy to EPA

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

Current EPA Permit Coverage
According to EPA Region 10 statistics, there are 2,287 facilities covered by 168 wastewater permits (155 individual permits and 13 general permits) in Alaska. Seventy-one (71) facilities are considered "major" facilities. Forty-four (44) "major" facilities have an individual permit and 27 "major" facilities are covered by three general permits. As of July 7, 2004, 77% of all permits (individual and general) for "major" facilities are current, and 80% of the individual permits for "major" facilities are current.

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

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

VIII. RECOMMENDATIONS OF THE WORKGROUP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Department of Environmental Conservation
NPDES Primacy
Resource Comparison

Background

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

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

Comparison between Alaska and EPA Region 10 Primacy States Staffing

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

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

Alaska Forest Association, Inc.

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March 12, 2007

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

Via fax 907-465-2381

RE: House Bill 149

Dear Representative Johnson:

I am a member of the State's Primacy Working Group. The group met by teleconference on March 1, 2007 to discuss some proposed technical changes in the draft Primacy regulations that are needed to satisfy certain EPA requirements. My understanding is these minor changes include:

1. Changes in exemptions for minor sewer discharges, minor drilling and trenching activities and minor munitions discharges (e.g. rifle ranges, etc.);
2. Changes in the sampling and reporting requirements;
3. Changes in the DEC's authority to pursue criminal enforcement for negligent violations; and
4. Changes in the definition of pollutants.

These changes will simply bring the State regulations into conformance with the existing EPA regulations and thus speed the approval process for Primacy.

We support these changes because we are eager to get State Primacy for the NPDES program:

1. We want people who are more familiar with our State to process and manage NPDES permits; and

2. We believe the State will put a higher priority on our permitting needs than the EPA. For instance, the EPA general permit for log transfer and storage expired years ago and the EPA has refused to process individual new projects, thus our timber industry is caught in a regulatory Catch-22.

Thank you for the opportunity to comment.

Sincerely,

Owen J. Graham
Executive Director

T

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Division of Water

NPDES Primacy

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National Pollutant Discharge Elimination System (NPDES) Primacy

Contact:
Sharon Morgan
(907) 465-5530 or sharon_morgan@dec.state.ak.us

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

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

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

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

Of Interest...

- Primacy Applicat
- State applies for Governor's Press
- SB 110
- Governor Signs N Primacy Bill
- NPDES Primacy Background
- Work Group
- NPDES Report to Legislature 2007
- Sign up for prima email updates

Division of Water

NPDES Primacy

NPDES Primacy Work Group

Contact: Sharon Morgan (907) 465-5530

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

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

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

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

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

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

All work group meetings were open to the public.

Quick Links...

- NPDES Home Pa
- Work Group Men
- Meeting 13- December 13, 2C
- Meeting 12 - Jun
- Meeting 11 - Feb
- Meeting 10 - Nov
- Meeting 9 - Sept
- Meeting 8 - Aug.
- Meeting 7 - June
- Teleconference M

Of Interest...

- NPDES Primacy Report, Feb 05
- Primacy Applicat
- SB 110
- Sign up for prima email updates

Division of Water

NPDES Primacy

Meeting 7 June 6, 2005

Sharon Morgan
(907) 465-5530

Handouts

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

Attendance Sheet
Minutes

Sample of information available on each meeting

April 10, 2007

The Honorable Jay Ramras
Chairman, House Judiciary Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Re: Sealaska Support for CSHB 149

Dear Chairman Ramras:

Sealaska Corporation supports CSHB 149, which would make a number of technical changes in Alaska's water pollution laws in order to facilitate Alaska's assumption of the federal Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit program in Alaska.

Sealaska is directly and substantially ffected by the NPDES permit program. For example, all of the company's log transfer facilities (or "LTFs") require an NPDES permit. Sealaska has been a long-time supporter of Alaska's assumption of primacy, for reasons that include the following:

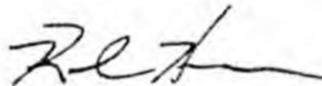
- Forty-five o... :r states have assumed primacy of this important regulatory program. It is, frankly, difficult to explain why Alaska, which has otherwise been very assertive with respect to states' rights, has lagged so far behind in this important expression of federalism;
- Assumption of primacy would mean that water pollution permit decisions in Alaska will be better informed, because they will be made by Alaskans who are far more familiar with the unique qualities of the state's environment and economy;
- Alaska water pollution permits would become a priority. Currently, Alaska permit applications are dumped in a Seattle-based EPA in-basket, where they can and have languished for years. This has been true, for example, of EPA's general permit for Alaska LTFs, which expired two years ago and for which Alaska's beleaguered logging industry is still awaiting renewal; and
- Primacy would "de-federalize" water pollution control issues in Alaska in many important respects, not the least of which is that water pollution permit appeals would be heard by our state judiciary, rather than the federal Court of Appeals for the Ninth Circuit—a court that has not been historically sensitive to Alaskan imperatives.

As virtually all of our sister states have recognized, primacy is the right thing to do. Congress clearly intended that states assume primary responsibility for water pollution control issues, and enacted the Clean Water Act largely to create minimum standards for state water pollution programs. HB 149 would help Alaska meet those standards, and resultantly take its rightful place in our nation's water pollution hierarchy.

Thank you for the attention that I know you will give to our concerns.

Sincerely,

SEALASKA CORPORATION



Richard Harris
Executive Vice President

cc: Members, House Judiciary Committee
The Honorable Kim Elton
The Honorable Albert Kookesh
The Honorable Bert Stedman
The Honorable Peggy Wilson
The Honorable Bill Thomas, Jr.
The Honorable Kyle Johansen
The Honorable Beth Kerttula
The Honorable Andrea Doll
Mr. Owen Graham, Alaska Forest Association
Mr. Jason Brune, Resource Development Council
Ms. Linda Hay, ADEC
Mr. Jerry Mackie

ALASKA MINERS ASSOCIATION, INC.

3305 Arctic Blvd., #105, Anchorage, Alaska 99503 • (907) 563-9229 • FAX: (907) 563-9225 • www.alaska miners.org

April 10, 2007

Honorable Jay Ramras
Chairman
House Judiciary Committee
Capitol Building
Juneau, AK 99801

RE: House Bill 149, Changes to Conform Alaska Statute for Assumption of NPDES

Dear Representative Ramras,

The Alaska Miners Association supports House Bill 149. This bill modifies the existing State Statute that was passed previously to enable the State to take primacy over the EPA National Pollution Discharge Elimination System (NPDES) program. This bill contains a few additional changes that are needed for the State to assume the program. For a state to obtain primacy over the NPDES program, its authorities must be at least as strong as those of EPA and this bill makes a few changes that are needed to ensure Alaska statues meet that test.

Alaska is one of only five states that do not have primacy over NPDES. DEC has worked diligently for several years during past administrations to obtain primacy and these changes are some of the final items to ensure that effort can be completed. The DEC staff has done an excellent job with this extremely detailed and complex issue. The fact that this HB-149 contains so few changes is a testimony to the thoroughness of DEC's efforts.

We urge that HB-149 be passed and become law at the earliest possible date.

Sincerely,

Steven C. Borell, P.E.
Executive Director

Council of Alaska Producers

P.O. Box 22653 Juneau, Alaska 99802

April 11, 2007

Honorable Jay Ramras
Chairman
House Judiciary Committee
Capitol Building
Juneau, AK 99801

RE: House Bill 149, Changes to Conform Alaska Statute for Assumption of NPDES

Dear Representative Ramras:

The Council of Alaska Producers supports State of Alaska efforts to assume the National Pollution Discharge Elimination System (NPDES) permit program. Passage of Senate Bill 91 is required in order to modify existing State Statutes to conform to EPA requirements for assumption of the NPDES program. These proposed changes result from lengthy consultation between EPA and DEC. In order to continue to make progress on assumption of this program, we must be responsive to the input received from EPA and make the modifications required.

Alaska is one of only five states that do not have primacy over NPDES. Alaska would be well served by joining the ranks of those states that are willing to grasp the responsibilities and flexibilities provided for under the Clean Water Act.

The Council of Alaska Producers supports passage of SB-91.

Sincerely,

Karl Hanneman

Karl Hanneman
President, Council of Alaska Producers

AS 46.03.100

ALASKA STATUTES
Title 46. Water, Air, Energy, and Environmental Conservation.
Chapter 03. Environmental Conservation.
Article 3. Water Pollution Control and Waste Disposal.

Sec. 46.03.100 Waste management and disposal authorization.

(a) A person may not construct, modify, or operate a sewerage system or treatment works or dispose of or conduct an operation that results in the disposal of solid or liquid waste material or heated process or cooling water into the waters or onto the land of the state without prior authorization from the department. Department authorization shall be obtained for direct disposal and for disposal, other than of domestic sewage, into publicly owned or operated sewerage systems.

(b) Prior authorization by the department is provided through one or a combination of the following:

(1) an individual permit issued for a specific facility or disposal activity;

(2) a general permit issued on a statewide, regional, or other geographical basis for a category of disposal activities that the commissioner, using information available when the permit is developed, determines are similar in nature and will comply with applicable environmental quality standards established under this title;

(3) regulations adopted by the department authorizing a category of disposal without requiring a permit and establishing specific siting or operational requirements, discharge limits, or best management practices for the disposal category;

(4) designation and approval of a plan as described under (c) of this section;

(5) an integrated waste management and disposal authorization as described in (d) of this section.

(c) The department may require the submission of plans for review and written approval before construction, extension, installation, modification, or operation of a publicly or privately owned or operated sewerage system or treatment works. If the sewerage system or treatment works is designed to prevent disposal from the system or works outside of containment under normal operating conditions, the department may designate that the plan approval constitutes the authorization required under (a) of this section.

(d) The department may issue an integrated waste management and disposal authorization covering multiple related or unrelated waste management or disposal activities to be conducted at a facility, including generation, treatment, storage, and disposal of solid or liquid waste. An integrated waste management and disposal authorization may include the authorizations in (b) and (c) of this section and a water-quality-related certification required by 33 U.S.C. 1341 for the discharge of dredged or fill materials or of pollutants to surface waters from point sources.

(e) This section does not apply to

(1) a person discharging only domestic sewage into a sewerage system;

(2) disposals subject to regulation under AS 31.05.030(e)(2);

(3) injection projects permitted under AS 31.05.030(h);

(4) discharges of solid or liquid waste material or water discharges from the following activities if the discharge is incidental to the activity and the activity does not produce a discharge from a point source, as that term is defined in regulations adopted under this chapter, directly into any surface water of the state:

(A) mineral drilling, trenching, ditching, and similar activities;

(B) landscaping;

(C) water well drilling and geophysical drilling; or

(D) drilling, ditching, trenching, and similar activities associated with facility construction and maintenance or with road or other transportation facility construction and maintenance; however, the exemption provided by this subparagraph does not relieve a person from obtaining a prior authorization under this section if the drilling, ditching, trenching, or similar activity will involve the removal of the groundwater, stormwater, or wastewater runoff that has accumulated and is present at an excavation site for facility, road, or other transportation construction or maintenance and a prior authorization is otherwise required by this section;

(5) bilge pumping, unless the bilge product pumped may be expected to yield an oily sludge, emulsion, or sheen on the surface of any water of the state;

(6) cooling water discharges from a boat or vessel into any surface water of the state; or

(7) the firing or other use of munitions in training activities conducted on active ranges, including active ranges operated by the United States Department of Defense or a United States military agency.

(f) A person who applies for an authorization to operate a solid waste disposal facility that accepts hazardous waste or a mining waste disposal facility for an operation that chemically processes ores or has the potential to generate acid shall furnish to the department proof of financial responsibility to manage and close the facility in a manner that the department finds will control or minimize the risk of the release of unauthorized levels of pollutants from the facility to waters. The department may require that a municipal solid waste disposal facility furnish proof of financial responsibility. Proof of financial responsibility may be demonstrated by self-insurance, insurance, surety bond, corporate guarantee, letter of credit, certificate of deposit, or other proof of financial responsibility approved by the department, under regulations adopted by the department. Regulations adopted under this subsection must set financial tests for the acceptance of corporate guarantees and other forms of financial responsibility that the department determines would be required for an independent showing of financial capability. For a mining waste disposal facility, the department may accept as adequate to satisfy the requirement of this subsection financial assurance for reclamation provided to a state or federal land management agency if it otherwise meets the requirements of this subsection. The department's acceptance of proof of financial responsibility under this subsection expires

(1) one year after its issuance for self-insurance, unless the department accepts a renewal of the same self-insurance demonstration after a financial review under regulations adopted by the department;

(2) on the effective date of a change in the insurance agreement, surety bond, corporate guarantee, letter of credit, or certificate of deposit;

(3) on the expiration or cancellation of the insurance agreement, surety bond, corporate guarantee, letter of credit, or certificate of deposit.

(g) A person who applies for a solid waste disposal authorization under this section, except for an authorization under (b)(2) of this section or an authorization to dispose of municipal solid waste, shall demonstrate to the satisfaction of the department that the applicant has reasonably considered all solid waste management options and that the authorization would be consistent with the practices and priorities established under AS 46.06.021.

(h) The program developed to issue permits by the department to authorize discharge of pollutants into surface waters and submitted to the United States Environmental Protection Agency for approval under 33 U.S.C. 1342 (sec. 402, Clean Water Act) shall include the monitoring and reporting requirements included in the permits, limited to those requirements mandated by law, including any legal settlements, and those necessary to ascertain compliance with the effluent limitations contained in the permit and with state water quality standards.

(i) A person who applies for a permit under the program may review and provide comments and amendments to a draft permit and discuss the draft permit with the staff of the department before that draft permit undergoes public notice and comment under AS 46.03.110.

(j) A person who applies for a permit under the program has the opportunity to review a proposed final permit and discuss it with the staff of the department before the department issues the permit.

(k) A permit issued under the program is not automatically stayed by the filing of a request for an adjudicatory hearing on the permit; a request to stay a permit issued under the program shall be decided by the commissioner or the commissioner's designee.

(*l*) Permits issued under this section shall be issued as expeditiously as possible.

HB
151

HOUSE JUDICIARY COMMITTEE

STATE CAPITOL, ROOM 120
(907) 465-4990

COMMITTEE MEMBERS

Rep. Jay Ramras
Chairman
Room, 118
(907) 465-3004

Rep. Nancy Dahlstrom
Vice-Chairman
Room 409
(907) 465-3783

Rep. John Coghill
Room 214
(907) 465-3719

Rep. Bob Lynn
Room 104
(907) 465-4931

Rep. Ralph Samuels
Room 204
(907) 465-2095

Rep. Max Gruenberg
Room 110
(907) 465-4940

Rep. Lindsey Holmes
Room 405
(907) 465-4919

MEMORANDUM

Date: April 30, 2007

To: Representative John Coghill
Chairman House Rules Committee

From: Representative Jay Ramras
Chairman House Judiciary Committee

Re: House Judiciary Referral File for HB151

Attached are the following documents that make up the referral file for HB151:

- Sponsor Statement
- CSHB151(JUD) 25-LS0479\O
- House Judiciary Committee Report
- CSHB151(STA) 25-LS0479\K
- HB151
- ADM zero fiscal note
- Sectional
- Support

ALASKA STATE LEGISLATURE

Interim:
716 West 4th Avenue, Suite 640
Anchorage, Alaska 99501
Phone (907) 269-0200
Fax (907) 269-0204
Rep_Craig_Johnson@legis.state.ak.us

Session:
State Capitol Building, Room 126
Juneau, Alaska 99801-1182
Phone (907) 465-4993
Fax (907) 465-3872
Toll-free (866) 465-4993

REPRESENTATIVE CRAIG JOHNSON
HOUSE DISTRICT 28

Sponsor Statement

House Bill 151

An Act requiring an indemnification and hold harmless provision in construction-related professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions.

HB 151 will require uniform indemnification and hold harmless provisions in professional services contracts for all public agencies within the state of Alaska.

Over the last several years, there has been a significant increase in litigation related to public projects. One reaction to this trend has been for public agencies to include indemnification language in new construction projects contracts. This language insulates public agencies from liability by unfairly transferring responsibility for negligence to design consultant companies.

These indemnification clauses are typically either uninsurable or insurable only at very high cost. When a contract cannot be insured, design professionals must either accept an unduly high degree of liability or walk away from the contract. The results of this increased liability include:

- Increased costs to the design professionals (which translates into increased overall costs for public projects)
- Decreased participation from design professional companies on competitive bids for public projects (which again increases the costs of these projects)
- The elimination of many smaller local design firms due to their lack of the financial wherewithal to defend themselves from civil lawsuits, or worse, from loosing a civil lawsuit that stemmed from negligence on behalf of a public agency

HB 151 prescribes uniform contract indemnification language for all state agencies and makes each party in a professional services contract financially responsible for their own liabilities and distributes joint liability on a comparative fault basis.

The question of indemnification has been addressed by the Alaska Department of Transportation, whose language has been adopted by many boroughs and agencies throughout Alaska for decades. HB 151 means to standardize their approach, and in doing so, provide a fair and equitable business climate within the State of Alaska.

HB 151 has already passed through the State Affairs Committee, where changes were made that (1) brought it more in line with current DOT language and (2) narrowed its scope to only construction-related contracts.

HOUSE COMMITTEE REPO

(7)
Date Referred to Committee: March 26, 2007 **FURTHER REFERRALS:**

Date of Committee Action: April 30, 2007

The JUDICIARY Committee considered: **HB 151**

HOUSE BILL NO. 151 **INDEMNITY CLAUSE IN PUBLIC CONTRACTS**
"An Act requiring an indemnification and hold harmless provision in professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions."

Recommends it be replaced with [ ] HCS *or* [✓] CS for HB151 (JUD)
***For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR*_______ [ ] Same Title [✓] New Title**

[ ] attach amendments
[ ] add new referral to ___________Committee
[ ] Letter of Intent___________Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LWF
LAW
LEG
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES** (*Assigned by Chief Clerk's Office)

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero
ADM	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
[signature]	Gruenberg	✓			
[signature]	LYNN	X			
[signature]	Coghill			✓	
[signature]				X	
[signature]	Holmes			X	
[signature]	SAMUELS			X	
Chair: [signature]	RAMRAS	X			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2007 LEGISLATIVE SESSION

Fiscal Note Number: HB151-DOA-RM-3-15-07
Bill Version: HB 151
() Publish Date:

Revision Date/Time (Note if correction): 3/15/2007

Title	An act requiring an indemnification and hold harmless provision in state prof. serv. contracts
Sponsor	Representative Johnson
Requester	House State Affairs

Dept. Affected:	Administration
RDU	Risk Management
Component	Risk Management
Component No.	71

Expenditures/Revenues (Thousands of Dollars)

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

OPERATING EXPENDITURES	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2007) cost: 0.0

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

POSITIONS

Full-time						
Part-time						
Temporary						

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

This legislation requires use of standard indemnity clause in "professional service" (AS 36.30.990) agreements by all public agencies as broadly defined.

The stipulated language proposed is similar to standard terms already being used for many years by state agencies protected by state's self insurance program administered by the Division of Risk Management, thereby there is no ope ational or financial impact.

Prepared by:	J. Brad Thompson, Director	Phone	465-5723
Division	Risk Management	Date/Time	3/15/07 4:00 PM
Approved by:	Kevin Brooks, Deputy Commissioner	Date	3/15/07 5:00 PM
Agency	Department of Administration		

(Revised 9/18/2006 OMB)

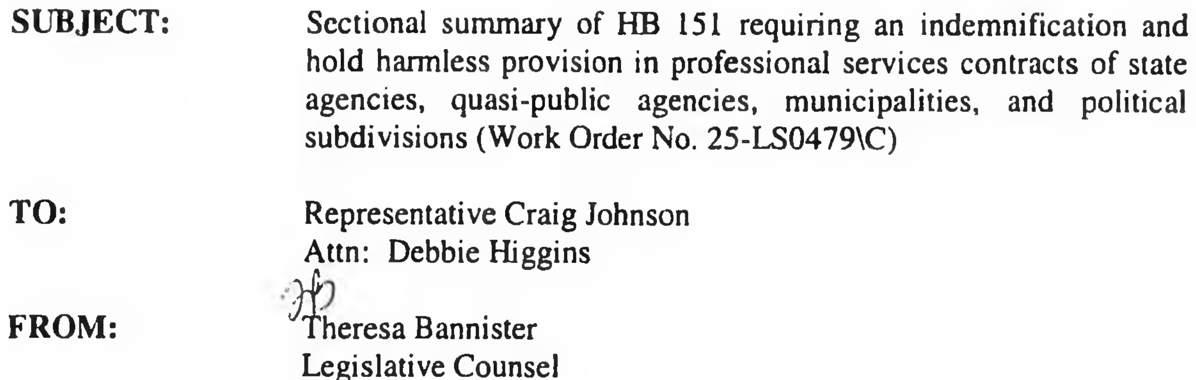
LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 16, 2007



SUBJECT: Sectional summary of HB 151 requiring an indemnification and hold harmless provision in professional services contracts of state agencies, quasi-public agencies, municipalities, and political subdivisions (Work Order No. 25-LS0479\C)

TO: Representative Craig Johnson
Attn: Debbie Higgins

FROM: Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1. Adds a new section to the chapter on public contracts.

Sec. 36.90.300(a). Requires public agencies to include an indemnification and hold harmless provision in their professional services contracts. The provision must indemnify and hold the public agency harmless for the negligent acts, errors, and omissions of the consultant. Requires the provision to apportion joint liability on a comparative fault basis.

Sec. 36.90.300(b). Provides model language for the provision required by (a). Allows a provision that reads substantially the same as the model language to satisfy the requirements of (a).

Sec. 36.90.300(c). Defines two terms for the section. Refers the definition of "professional services" to the definition in the state's procurement code. The definition of "public agency" identifies which public entities are covered by the section.

If I may be of further assistance, please advise.

TLB:med
07-175.med

Murray & Associates, P. C. **Consulting Engineers**
PO Box 21081, Juneau, Alaska 99802-1081 (907) 780-6151 Fax: (907) 780-6182

March 14, 2007

The Honorable Beth Kertulla
State Capitol, Room 404
Juneau, AK 99801-1182

The Honorable Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

Subject: House Bill HB No. 151

Dear Representatives:

As a private professional engineer and owner of a local engineering firm I would like to inform you that I strongly support HB 151. The University and the City and Borough of Juneau has required indemnification language in our past contracts which is very arbitrary, unfair, and likely not even enforceable.

Some professional will not even compete for thee projects solely because of the indemnification requirements. Time and effort are wasted reviewing these unfair requirements.

Please vote in support of this bill. If you have any questions, please contact me.

Cordially,

Douglas Murray, P.E.
President, Murray & Associates, P. C.
(907) 780-6151

March 14, 2007

The Honorable Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

RE: Support of HB151

Dear Representative Johnson:

We are writing to express our support of the indemnification provisions addressed in HB151.

Livingston Slone, Inc. is an architectural firm providing professional services for facility designs and I have been negotiating contracts with State, Federal and Local government agencies on my firm's behalf for more than 30 years. Indemnification provisions in contracts as a whole create one of the greatest difficulties in reaching agreement during contract negotiations. They can result in added costs, schedule increases and hard feelings at a time when owners and professional firms need to be cooperating for the good of a project.

Many public-agency contracts, such as that of the University of Alaska, require professional firms (A/Es) to indemnify the owner even if the A/E is not at fault. Livingston Slone and our colleagues in the design professions can, and do, carry insurance for professional liability, business liability, etc. We can accept liability our acts and performance, but not the acts or performance of others. State law requires the Architect or Engineer of Record to be liable and not their employer. So, indemnifying an owner even when the A/E is not at fault puts tremendous risk on individuals; risk that cannot be insured under normal policies. The indemnification provisions are almost always the contract points that require both the owner and the A/E to consult attorneys, driving up the costs of doing business for both. We invest literally tens thousands of dollars in getting proposing on and negotiating contracts. This puts us at a commercial disadvantage and we are often forced by circumstance to sign contracts that have indemnification provisions that we can't insure.

The language you have crafted in HB151 is much better than that which currently exists. Contractors take responsibility for problems when they are at fault, Owners do so when they are at fault and if the fault is shared, each party takes responsibility at the level or percentage they are at fault. It is a win-win proposition. Having specific indemnification language codified into law will make negotiations easier and more cost effective for both the public agency and businesses. These cost savings can result in more efficient use of public and business resources.

Thank you. HB151 is certainly a step in the right direction.

Sincerely,
LIVINGSTON SLONE, INC.

Donald E. Slone, P.E.
Civil Engineer

Thomas W. Livingston, FAIA
Architect

TOM LIVINGSTON, FAIA
DONALD E. SLONE, PE

LIVINGSTON SLONE, INC
3900 ARCTIC BOULEVARD SUITE 301
ANCHORAGE, ALASKA 99503-5762
907 562 2058 FAX 907 561 4528
www.LivingstonSlone.com

Kinney Engineering, LLC

750 West Dimond Boulevard
Suite 203
Anchorage, Alaska 99515
(907) 346-2373
Fax (907) 349-7498

March 12, 2007

The Honorable Craig Johnson,
State Capital, Room 126
Juneau, Alaska 99801-1182

Subject: HB No. 151

Dear Representative Johnson:

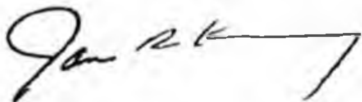
I am writing this letter to endorse and strongly support HB No. 151 for the following reasons.

1) Errors and Omissions insurance covers negligence, errors, and omissions of the professional. These policies do not cover liabilities arising due to the negligence, errors, or omissions of the Owner. As such, unfair indemnification clauses may not provide the Owner with the liability coverage that they expect.
2) Some professionals will not compete for projects containing unfair indemnification requirements. As a result, the most qualified professional may not be selected for some projects and this is detrimental to the public interests.
3) Substantial time and expense is incurred by professionals and insurance companies as they review and assess the unique indemnification language contained in each professional service agreement. This raises the cost for public projects.
4) When a public agency shifts the liability for their actions to consultants, the public agency is likely to be less diligent and increase the likelihood of negligence, errors, and omissions. This is not beneficial to the public since there is still a negative impact to the public, regardless of who is held responsible.
5) In many cases when a problem arises, both the public agency and the design professional have contributed to the problem. Arbitrarily assigning liability to the design professional is unfair and may prevent the public agency from taking the appropriate counter-measures to prevent similar problems in the future.

Reputable engineers, architects, surveyors, and scientists are agreeable to bear responsibility for our mistakes. We maintain comprehensive and expensive errors and omissions insurance policy to p .ect our clients should we were to be negligent in our professional services. However, it is unfair and not in the public interest for us to accept this risk for the performance of other parties whose actions are well beyond our control.

Please contact me at (907) 344-7575, or by e-mail at randykinney.kinneyeng@alaska.net if you require additional information.

Sincerely,
Kinney Engineering, LLC



James R. (Randy) Kinney, P.E, PTOE
Member

March 10, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, Alaska 99801-1182

Re: House Bill 151

Design Alaska strongly supports House Bill (HB) 151 requiring fairly apportioned indemnification and hold harmless provisions in the professional services contracts of public and quasi-public agencies.

Use of indemnification and hold harmless provisions that require design professionals to assume liability beyond their own negligence serve the purpose of reducing agency risk by insulating the agency from its own negligence. This unfairly and inappropriately creates a liability risk for professional service firms that is not uninsurable. Design Alaska's professional liability insurance covers only our own negligent acts, errors or omissions; our professional liability insurance cannot be extended to cover the negligence of others.

Design Alaska strongly supports the HB 151 legislation prescribing indemnification language that is uniform for all governmental agencies in Alaska; that requires each party to be financially responsible for their own negligent acts, errors, or omissions; and that apportions liabilities on a comparative fault basis. We believe HB 151 as currently written will clarify the contractual liabilities of the parties and allocate risk in a fair and balanced manner. Thank you for sponsoring HB 151.

Sincerely,

Design Alaska, Inc.

Jack B. Wilbur Jr.
President

cc: JBW, CHM

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Design Alaska Inc. Architects • Engineers • Surveyors
601 College Road Fairbanks Alaska 99701 907 452 1241
Fax 907 456 6883 E-Mail mail@designalaska.com

DOWL ENGINEERS®
A Division of DOWL LLC

March 9, 2007
W.O. D00001

The Honorable Craig Johnson
Representative of the State of Alaska
State Capitol, Room 126
Juneau, Alaska 99801-1182

Subject: State of Alaska Department of Transportation and Public Facilities Indemnification clause

The Honorable Craig Johnson:

DOWL Engineers (DOWL) has been in business in Alaska for 45 years, providing professional engineering services for clients throughout the state of Alaska in both the public and private sector. We employ more than 200 people and have thriving branch offices in Kodiak, Palmer, Seattle and Tucson. DOWL firmly supports HB 151.

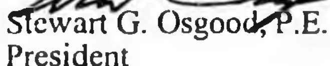
Currently, the State of Alaska Department of Transportation and Public Facilities (DOT&PF) contract language includes a "comparative fault" provision in its indemnification clause. This provision is consistent with industry standards and with what is widely considered "insurable" by Architect and Engineering (A/E) firms and their insurance companies.

While DOT&PF conforms to the latest standards, some state entities include contract language that puts the entire liability on the A/E firm regardless of the level of fault that is apportioned by the courts. This language takes all of the accountability off of the contracting agency and places it on the contractor—in effect, putting them in the role of an insurance company. Furthermore, the contract language is often non-negotiable and jeopardizes the award of the contract if the A/E firm refuses to accept the asymmetrical condition.

I have attached language extracted from the latest Engineers Joint Contract Documents Committee Standard Form of Agreement which discusses insurance guidelines and indemnification. Section 6.11.2 discusses the need to indemnify the Owner (State of Alaska) when there are costs, losses, or damages due to an engineering firm's negligent acts. Similarly, Section 6.11.3 indemnifies the engineering firm when the Owner's negligent acts cause costs, loss, or damage. It is clear HB 151 conforms to the latest national standards for contract indemnification.

Thank you for sponsoring HB 151. I think it will go a long way toward promoting accountability for those working on Alaska's important public projects. If I may be of additional assistance as this legislation goes through the committee process, please do not hesitate to call.

Sincerely,
DOWL Engineers



Stewart G. Osgood, P.E.
President

Attachment: As stated

D00001 Johnson HB51 SGO 030907.mas

"arranger," "operator," "generator," or "transporter" of hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA), which are or may be encountered at or near the Site in connection with ENGINEER's activities under this Agreement.

F. If ENGINEER's services under this Agreement cannot be performed because of a Hazardous Environmental Condition, the existence of the condition shall justify ENGINEER's terminating this Agreement for cause on 30 days notice.

6.11 Allocation of Risks

A. Indemnification

1. To the fullest extent permitted by law, ENGINEER shall indemnify and hold harmless OWNER, OWNER's officers, directors, partners, and employees from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of ENGINEER or ENGINEER's officers, directors, partners, employees, and ENGINEER's Consultants in the performance and furnishing of ENGINEER's services under this Agreement.

2. To the fullest extent permitted by law, OWNER shall indemnify and hold harmless ENGINEER, ENGINEER's officers, directors, partners, employees, and ENGINEER's Consultants from and against any and all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused solely by the negligent acts or omissions of OWNER or OWNER's officers, directors, partners, employees, and OWNER's consultants with respect to this Agreement or the Project.

3. To the fullest extent permitted by law, ENGINEER's total liability to OWNER and anyone claiming by, through, or under OWNER for any cost, loss, or damages caused in part by the negligence of ENGINEER and in part by the negligence of OWNER or any other negligent entity or individual, shall not exceed the percentage share that ENGINEER's negligence bears to the total negligence of OWNER, ENGINEER, and all other negligent entities and individuals.

4. In addition to the indemnity provided under paragraph 6.11.A.2 of this Agreement, and to the fullest extent permitted by law, OWNER shall indemnify and hold harmless ENGINEER and its officers, directors, partners, employees, and ENGINEER's Consultants from and against all costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals, and all court or arbitration or other dispute resolution costs) caused by, arising out of or resulting from a Hazardous Environmental Condition, provided that (i) any such cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than completed Work), including the loss of use resulting therefrom, and (ii) nothing in this paragraph 6.11.A.4. shall obligate OWNER to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence or willful misconduct.

5. The indemnification provision of paragraph 6.11.A.1 is subject to and limited by the provisions agreed to by OWNER and ENGINEER in Exhibit I, "Allocation of Risks," if any.

6.12 Notices

A. Any notice required under this Agreement will be in writing, addressed to the appropriate party at its address on the signature page and given personally, or by registered or certified mail postage prepaid, or by a commercial courier service. All notices shall be effective upon the date of receipt.

6.13 Survival

A. All express representations, indemnifications, or limitations of liability included in this Agreement will survive its completion or termination for any reason.

6.14 Severability

A. Any provision or part of the Agreement held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon OWNER and ENGINEER, who agree that the Agreement shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

6.15 Waiver

A. Non-enforcement of any provision by either party shall not constitute a waiver of that provision, nor shall it affect the enforceability of that provision or of the remainder of this Agreement.

6.16 Headings

A. The headings used in this Agreement are for general reference only and do not have special significance.

Architects Alaska®
An Alaskan Corporation
Architecture
Facility Planning
Interior Architecture

March 9, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

Subject: HB-151

Dear: Representative Johnson

I am writing to express my support for HB-151. Architects Alaska has been providing Architectural Design Services throughout Alaska since 1950. I personally have been practicing in Alaska for more than 26 years. We employ approximately 30 professional in 2 offices located in Anchorage and Wasilla, Alaska.

Recently, within the past 5 to 7 years, we have been experiencing more and more difficulty in negotiating fair contract language with clients, especially governmental agencies. These clients have been attempting to shift their risk unduly to the design community. Contact language requires the design team to hold the client harmless for all of the client's acts. This includes the client employees and agents. We take exception to this and consistently find ourselves in the position of negotiating this type of language out of contact(s), which is time consuming, expensive and needless to say frustrating.

First of all the design team has no control over the client's action and should not be held accountable for such acts. Secondly, this is uninsurable language. Most clients do not understand this. As requested by most government contacts, we provided professional liability insurance, which helps reduce the client's risk. However this risk is not reduced if the contact language is uninsurable.

We support HB-151. The bill language provides a more equitable share of risk to each party with regards to who has control over the firm(s), agency(s), employee(s), agent(s) or individual(s) actions.

Thank you for addressing this matter.

Sincerely;

Mark A. Kneedler, AIA
President

900 W. 5th Avenue, Suite 403
Anchorage, Alaska 99501-2029
(907) 272-3567
FAX (907) 277-1732

191 E. Swanson Avenue
Wasilla, Alaska 99654-7025
(907) 373-7503
FAX (907) 376-3166

Alaska Society of Professional Engineers

Professional Engineers in Private Practice

750 W. Dimond Boulevard, Suite 203 Anchorage, AK 99515

March 9, 2007

The Honorable Craig Johnson,
State Capital, Room 126
Juneau, Alaska 99801-1182

Subject: HB No. 151

Dear Mr. Johnson:

The Professional Engineers in Private Practice is a professional society for individuals providing consulting services to private and public clients. Our members have observed a steady increase in the number of public agency professional service agreements that require design professionals to assume liability which is uninsurable. We believe that this type of professional service contract language is unfair and is not in the best interest of the public. We endorse and strongly support HB No. 151 for the following reasons.

1) Errors and Omissions insurance covers negligence, errors, and omissions of the professional. These policies do not cover liabilities arising due to the negligence, errors, or omissions of the Owner. As such, unfair indemnification clauses may not provide the Owner with the liability coverage that they expect.
2) Some professionals will not compete for projects containing unfair indemnification requirements. As a result, the most qualified professional may not be selected for some projects and this is not beneficial to the public.
3) Substantial time and expense is incurred by professionals and insurance companies as they review and assess the unique indemnification language contained in each professional service agreement. This raises the cost for public projects.
4) When a public agency shifts the liability for their actions to consultants, the public agency is likely to be less diligent and increase the likelihood of negligence, errors, and omissions. This is not beneficial to the public since there is still a negative impact to the public, regardless of who is held responsible.
5) In many cases when a problem arises, both the public agency and the design professional have contributed to the problem. Arbitrarily assigning liability to the design professional is unfair and may prevent the public agency from taking the appropriate counter-measures to prevent similar problems in the future.

The Professional Engineers in Private Practice believe that it is in the best interest of the public that each party in a professional service agreement be financially responsible for their own liabilities and to apportion joint liabilities on a comparative fault basis. As such, we strongly support House Bill 151.

Sincerely,

Arnold N. Harder

Arnold N. Harder, P.E.
Chairperson, Alaska Chapter

ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Alaska

March 8, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, Alaska 99801-1182

Regarding: House Bill 151

Dear Representative Johnson:

The American Consulting Engineering Companies (ACEC) of Alaska strongly supports House Bill (HB) 151 requiring fairly apportioned indemnification and hold harmless provisions in the professional services contracts of public and quasi-public agencies. Gross imbalances in indemnification and hold harmless contract clauses create what is unquestionably the most contentious issue in contract negotiations between professional service providers and governmental and quasi-governmental agencies in the State of Alaska.

In recent years, several Alaskan government and quasi-government agencies have required design professionals to assume additional liability beyond the consultant's own negligence. The purpose of this action is to reduce agency risk by insulating the agency from its own negligence. This inappropriately increases liability risk to professional service firms and creates a contract that is not fully insurable, and in many cases uninsurable. Professional Liability Insurance is limited to negligent acts, errors or omissions. Consultants that agree to overly broad indemnification and hold harmless contract clauses do so without the possibility of insurance and place their livelihood and the fate of the agencies' project at great risk.

ACEC of Alaska strongly supports the HB 151 legislation prescribing indemnification language that is uniform for all governmental agencies in Alaska; that requires each party to be financially responsible for their own negligent acts, errors, or omissions; and that apportions liabilities on a comparative fault basis. We believe HB 151 as currently written will clarify the contractual liabilities of the parties and allocate risk in a fair and balanced manner. Thank you for sponsoring HB 151.

Yours truly,
American Council of Engineering Companies of Alaska

Paul C. Ramert, P.E.
President

P.O. Box 200345 Anchorage, AK 99520-0345

Shawn Florio, P.E.
2020 Shore Drive
Anchorage, Alaska 99515

March 8, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

RE: HB151 – Contractual Indemnification

Representative Johnson:

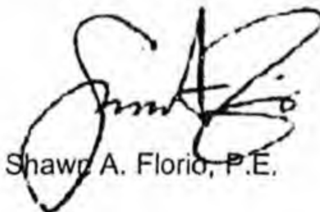
Thank you for sponsoring HB151. Although I am writing on my own behalf as a licensed engineer in the State of Alaska, I am familiar with the subject as the immediate past president of the Alaska Professional Design Council (APDC). For your reference, APDC is a consortium of professional societies that represents approximately 5,000 licensed architects, engineers, land surveyors, landscape architects and other design professionals.

Over the past few years, my involvement with APDC has exposed me to requests by owners of some projects – many times government agencies – to contractually indemnify uninsurable risks to design professionals. Many times these risks are uninsurable by the designer or his/her firm since the risk is beyond their own limit of negligence. This places the design professional in the precarious position of having to confront their client during contract negotiations with the issue, or alternatively assuming the uninsurable liability.

I support HB151 in its current form. HB151 provides uniform language for all state agencies and requires each party to be financially responsible for their own liabilities and fairly apportions joint liabilities on a comparative fault basis.

Thank you for your efforts.

Respectfully,



Shawn A. Florio, P.E.

R&M CONSULTANTS, INC. (907) 522-1707, FAX (907) 522-3403, www.rmconsult.com
9101 Vanguard Drive, Anchorage, Alaska 99507

March 8, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, Alaska 99801-1182

RE: HB 151, Indemnification and Hold Harmless Provisions in Professional Services Contracts

Dear Representative Johnson:

R&M Consultants, Inc. strongly supports HB 151 which will provide standard indemnification and hold harmless provisions for professional services contracts with state agencies, quasi-public agencies, municipalities, and political subdivisions. HB 151, as written, utilizes standard language found in State of Alaska Department of Transportation & Public Facilities (DOT&PF) contracts that have been used for many years.

The DOT&PF indemnification and hold harmless language provides liability and obligation on a comparative fault basis, and does not require obligation to the professional services firm for independent negligence by the owner, or a third party. The DOT&PF language does protect the owner from negligence by the professional services firm.

Many agencies have utilized the DOT&PF indemnification and hold harmless language as it is fair, has stood the test of time, and is supported by the State of Alaska.

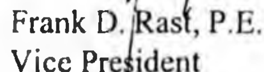
Recently, a significant number of public agencies have been utilizing indemnification and hold harmless language that assigns liability and obligation to professional services firms for independent actions, or negligence by the owner or third parties. These clauses are uninsurable and require the professional services firm to either accept the contract with undue risk, expend time and effort to renegotiate the indemnification and hold harmless language, or walk away from the work.

As in all contracting, standard language that has stood the test of time results in less risk for all parties, and provides for a more competitive marketplace.

Thank you for sponsoring HB 151. This important legislation will be beneficial to all Alaskans.

Very truly yours,

R&M CONSULTANTS, INC.



Frank D. Rast, P.E.
Vice President

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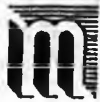


McCOOL CARLSON GREEN
ARCHITECTURE • INTERIOR DESIGN • SPACE PLANNING

March 8, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

Re: HB 151

Dear Representative Johnson,

I am writing in support of streamlining and standardizing indemnification clauses as proposed in HB 151. I have practiced chitecture in Alaska for more than 30 years and am a principal in the firm McCool C ason Green in Anchorage. Most of work has been for public clients with some of our more prominent buildings being the C Terminal at Ted Stevens International Airport, the Nesbett Courthouse in downtown Anchorage and UAA's Aviation Technology Center at Merrill Field.

Through the years I have spent countless hours discussing insurance and indemnification issues with our clients and up until recently most of the public agencies we work for have been willing to include reasonable indemnification clauses in their professional services contracts. That changed recently when two of our long term clients, the Mat Su Borough and the University of Alaska issued new contract forms that included clauses that were unfair, unreasonable, inconsistent with available insurance coverage and out of step with design industry practices. These indemnification clauses attempt to shift as much risk as possible to the design professionals, making them liable for events that are out of their control and potentially unrelated to the services they provided. Some even attempt to make the design professional responsible for the negligence of the owner. The use of such one sided contract clauses does not foster the spirit of teamwork and cooperation necessary to design public projects and is bad public policy.

HB 151 suggests the state mandate standardization of these clauses in all professional services contracts with public agencies based on language currently used by ADOT/PF. While this language does not include all the provisions the insurance industry might like it strikes a fair balance between reasonable protections for the owner and the current state of design practice and insurance coverage. I encourage you to support HB151 and move it quickly through the committee process.

Sincerely,
McCool Carlson Green Architects

Michael Carlson, AIA/CCS/NCARB
Principal Architect

John E. McCool
Michael P. Carlson
Douglas G. Green

901 Photo Avenue
Anchorage, Alaska 99503
(907) 563-8474
FAX (907) 563-4572
mcg@mcgalaska.com

March 7, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

Subject: HB 151 – Contractual Indemnification

Dear Mr. Johnson:

The purpose of this correspondence is to share my support with respect to proposed HB 151 with respect to Contractual Indemnification Language.

As a practicing Engineer and business owner, I feel that it is important for contracts between the State and Professional Service providers to be fair to both parties. In addition, contract provisions need to be reasonably insurable by our insurance providers without excessive costs that will eventually trickle down and be paid for by the public.

Thank you for your work on the proposed bill.

Sincerely,

Calvin C. Hay, P.E.
5520 E. 112th Avenue
Anchorage, AK 99516

cc: Senator Con Bunde
cc: Representative Bob Lynn
cc: Representative Ralph Samuels

engineering and constructing a better tomorrow

March 6, 2007

Representative Craig Johnson
Alaska Legislature
State Capitol, Room 126
Juneau, Alaska 99801-1182

RE: Support for House Bill 151, Indemnification Standardization for Alaskan Public Agencies

Dear Representative Johnson:

MACTEC Engineering and Consulting, Inc., is pleased to register its support in favor of House Bill 151 requiring standardized indemnification and hold harmless provisions in professional services contracts for public agencies in Alaska. Passing of this bill will benefit not only the architect-engineer (A-E) industry, but also the State, the public agencies, and the people of Alaska.

Apportionment of joint liability on a comparative fault basis provides for indemnification to the extent that the professional A-E service provider is negligent. Any non-comparative fault apportionment is simply not fair and will ultimately result in higher project costs.

Responsible professional A-E service providers carry professional liability insurance for negligent acts, errors, or omissions, so it behooves public agencies to require indemnification for those items to take advantage of the provider's insurance coverage in the event that indemnification by the provider becomes necessary. Currently several public agencies' standard contracts include indemnification terms that are not covered by professional liability insurance, and the inclusion of those terms in a signed contract can negate all professional liability coverage. Standardizing indemnification terms protects the agency and the A-E service provider.

Sincerely,

MACTEC Engineering and Consulting

Jason Ditsworth, P.E.
Alaska Office Manager

cwc
QC/TE/cc/A0253G

MACTEC Engineering and Consulting, Inc.
601 E. 57th Place • Anchorage, Alaska 99518 • Phone: 907.563.8102 • Fax: 907.561.4574
www.mactec.com

PDC INC. ENGINEERS

March 6, 2007

The Honorable Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

Dear Mr. Johnson:

I would like to express to you my strong support for House Bill No. 151. This important legislation addresses a critical issue associated with professional services agreements between public agencies and professional design firms in Alaska, specifically, indemnification and hold harmless agreements.

There currently exists a wide disparity between the professional services agreements used by various public agencies to contract for professional design services in Alaska. Many of the agreements contain indemnification and hold harmless clauses that attempt to shift risk from the public agency to the design professional unfairly. Such clauses are typically either uninsurable or insurable only at very high cost.

Use of unfair indemnification clauses has resulted in a number of undesirable effects:

1) Inappropriate shift of risk to the design professional
2) Unfair shift of fault from the responsible party to the design professional
3) False sense of risk management (frequently the indemnification clauses are uninsurable, hence, no real risk protection is made available to the public agency)
4) Increased costs experienced by the design professional community, which ultimately translates into increased costs for the delivery of projects for the public agencies.
5) Fewer qualified design professionals available to provide competent services to public agencies. Responsible design professional firms cannot reasonably accept the risk and costs associated with unfair indemnification clauses.

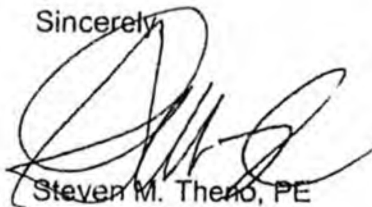
As a design professional, I am quite willing to accept reasonable risk in the performance of our professional services, to provide protection to our clients for services rendered through responsible risk management and insurance, and to accept the responsibility for our negligent acts, errors, and omissions, should they occur. However, it is extremely difficult for us to accept the risk and liability of negligent acts, errors, and omissions that are the responsibility of other parties.

The proposed legislation would correct the current deficiencies, fairly allocate risk and responsibility in professional services agreement, and improve the delivery of professional services for public agencies in the State of Alaska.

2700 Gambell Street, Suite 500
Anchorage, AK 99503
T: 907.743.3200
F: 907.743.3295

Ultimately, our mandate as design professionals is to protect the health, safety, and welfare of the public. We do so in part through the services we deliver to public agencies. This legislation helps provide an appropriate and fair framework under which we deliver those services.

Sincerely,



Steven M. Theno, PE
President
PDC, Inc. Engineers

UNWIN SCHEBEN KORYNTA HUETTL INC. ARCHITECTURE • ENGINEERING • LAND SURVEYING • PLANNING

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Gregory A. Ingham
Timothy J. Vig
D. Lance Mearig
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Jeffrey N. Logan
Bruce E. Hopper
Gregory A. Liebl
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OFFICE LOCATIONS
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Juneau, Alaska
Wasilla, Alaska
Lewiston, Idaho
Ferndale, Washington
Spokane, Washington
Walla Walla, Washington

March 6, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182
Via email to Rep_Craig_Johnson@legis.state.ak.us

RE: HB-151 Indemnification Provisions in Professional Contracts
SUBJ: Please Pass HB-151; Indemnification Reform is essential

Dear Representative Johnson:

Standardization of fair and balanced indemnification requirements in public contracts is long overdue and urgently needed. The public has much to gain by the indemnification standardization offered by HB-151, and much to lose if the status quo is maintained.

No single term in a professional services contract has more impact than indemnification. A fair and balanced indemnification requirement sets a positive tone for the project that follows, and the opposite is also true. One sided indemnification provisions that add large uninsurable risks for a consultant create an awkward environment that is adverse, defensive, more expensive and less creative. Ultimately, uninsurable indemnification requirements drive good professionals from the marketplace.

Good project development and design requires very collaborative effort between owner and designer, and a great deal of effort by both parties. A professional services contract that nurtures qualities of mutual respect, fairness, open communications and the free and open exchange of ideas is the first and perhaps the most important step in establishing a cooperative relationship and a successful outcome. A contract that chills this relationship between designer and owner leads to mediocrity at best, and sets a stage for disappointment and confrontation.

Public agencies hold enormous coercive and situational power, simply by the very nature of their control of rather large design and construction budgets. Consequently, contracting public agencies are in a position to impose unfair conditions in their agreements that violate what most would consider ethical business practices and fundamental fairness. In Alaska today, some agencies demand absolution from all liability and loss, except for loss resulting from the "Owner's gross negligence or willful misconduct." This exception is virtually impossible to prove, so the consultant is effectively responsible for everything, even acts of the public agency and others completely out of the consultant's control.

Professional Liability Insurance only covers damages caused by the negligence of the insured consultant relative to the accepted professional standard of care. Nationally, the accepted professional standard of care is "the ordinary and reasonable care required and established by expert testimony of what a reasonable and prudent professional would have done under the same or similar circumstances at the same time in the same locality."

Any firm, either through ignorance or otherwise, may assume a greater responsibility or higher standard of care, but professional liability insurance (PLI) will not cover the additional liability.

Without PLI insurance, consultants who accept onerous indemnifications and uninsurable standards are seldom capable of honoring them, and those who accede to broad, uninsurable contractual liability requirements do so at great peril to their livelihoods. For this reason, most consultants pay close attention to indemnification clauses in contracts, and spend considerable time attempting to negotiate fair and insurable terms.

At USKH Inc., we spend at least 100 hours per year of Principal time battling draconian indemnification language. There are currently 426 licensed architect/engineer corporations in Alaska. If only one quarter (25%) of them spend as much time as we do, the cumulative impact exceeds 10,000 hours of professional time per Year! Adding in the time spent by insurance companies and their legal departments, the total cost to the pubic is dramatic. At the current average billing rate for Principal level architects and engineers of about $150/hour, the wasted potential of A/E firms struggling with unfair indemnification language may exceed $1,500,000 per year. These costs are eventually passed on to the public. There is no free lunch.

Paradoxically, consultants who truly understand risk are in the best position to help the Owner's project proceed smoothly, yet typically these professionals refuse to sign onerous indemnification clauses. This leaves the Owner with consultants who are motivated to be overly conservative and employ costly "defensive design" techniques to limit their risk or somehow make themselves "judgment proof". With one-sided indemnification clauses, not only does the cost of A/E services increase but the quality of service may be reduced. It is a double whammy.

The party with the most to gain from a project is the Owner and the equitable distribution of risk should acknowledge these factors. Design professionals do not have deep pockets and should not be expected to assume all risks.

Fair practice requires that the Consultant should be responsible for their negligence, the Public Agency should be responsible for their negligence, and if there is joint negligence then the liability should be shared. Either way, the indemnification should be limited to exclude unrelated third party events.

This question of indemnification has been addressed by the State of Alaska Department of Transportation (ADOT) whose language has been adopted by many boroughs and agencies throughout Alaska for decades. HB-151 standardizes the ADOT approach. Even though the precise ADOT language is less than perfect, it is an excellent model to emulate. The language of HB -151 retains the true essence and spirit of the current ADOT language.

Thank you for your efforts on behalf of the professional architects, engineers, and land surveyors, and the general public in Alaska. HB-151 is important legislation that will benefit all Alaskans.

Sincerely,
USKH, Inc.

James A. Huettl, AIA
Chairman of the Board
Chief Executive Officer

MARSH

LeAnne Boldenow
Vice President

Marsh USA Inc.
1031 West 4th Avenue, Suite 400
PO Box 107502
Anchorage, AK 99510
907 276 5617 Fax 907 276 6292
leanne.boldenow@marsh.com
www.marsh.com

March 05, 2007

Representative Craig Johnson
State Capital, Room 126
Juneau, AK 99801-1182

Subject: House Bill 151
Design Professional Contractual Language

Dear Representative Johnson

I am writing to support the efforts of the HB 151 in direct alignment with Alaska Design Professional Council (APDC). I am a member of the APDC Contract Task Force Committee. As an insurance broker representing more than thirty (30) Design Professional Firms over the past ten (10) years, I have continually reviewed poorly written uninsurable contracts released by public agencies.

It is common for onerous indemnification clauses within contracts to require the design consultant to take on liabilities that are not their typical responsibility in the design aspect of the project. Insurance can generally cover liabilities that are TORT Law and would be the firm's responsibility even if a contract was not in place. Examples of a poorly written contract language that I identify for a design professional firm are:

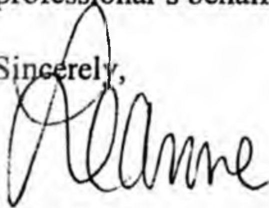
- "Defend the public agency for any and all claims." Design professionals insurance will provide defense when the negligent act, error or omission of the consultant's work is identified as culpable. It is typical to see a contract that does not tie the liability to negligent acts, errors or omissions.
- Reference to the design professional consultant as a "contractor", which could hold the firm to a higher standard of care to include guarantee, warranty or certification of work. Design professional standard of care is not guaranteed, warranted or certified. A design consultant's work is intellectual property vs. an actual structure that is the final work product of a contractor construction firm.
- Giving the public agency ownership of the design teams drawings and documents. As design firm provides a professional service to their clients, not a product. A design professional intent is to protect against unauthorized reuse of their drawings and specifications by others.

I believe many public agencies attempt to write one contract that fits all aspects of a building project. As referenced above, when a contract is written for a general contracting construction firm it requires broader liability that is outside the standard of care of a design professional consultant. It is unfortunate these incorrectly written indemnification clauses in contracts are

forced on the design professional consultants' all around the State. The release of such a poorly written contract requires a design professional consultant firm's to make a risk management decision to determine if they want to take on the liabilities outside their insurance program. There are also firms out there that do not have a full understanding of the risk they are taking undertaking with such poorly written onerous contract.

I support this bill and commend you for your support and action. Please feel free to contact me with any additional questions or concerns. Thank you for your efforts on the design professional's behalf around the State.

Sincerely,



LeAnne Boldenow, CIC
Vice President

Cc: Boyd Moganthaler, APDC Contract Task Force

Alaska Professional Design Council • PO Box 100515 • Anchorage AK 99510-0515

HB 151 Comment Letter

MEMBER SOCIETIES

Alaska Society of Professional Engineers

Alaska Society of Professional Land Surveyors

American Congress on Surveying & Mapping Alaska Section

American Institute of Architects Alaska Chapter

American Society of Civil Engineers Alaska Section

American Society of Landscape Architects Alaska Chapter

Architecture/Engineering Marketing Association of Alaska

American Council of Engineering Companies of Alaska

Professional Engineers in Private Practice Alaska Chapter

American Society of Interior Designers

March 5, 2007

Representative Craig Johnson
Chair, House Resources Committee
Alaska State Legislature
State Capitol, Room 126
Juneau, AK 99801-1182

Re: House Bill 151 — Indemnification

Dear Representative Johnson:

On behalf of the Alaska Professional Design Council (APDC), I am writing to express our support of House Bill 151 and to the need for this legislation.

The Alaska Professional Design Council (APDC) is a consortium of professional societies representing architects, engineers, land surveyors, landscape architects and other design professionals. Our ten member organizations have a combined membership of over 1,500 and represent approximately 5,000 licensed professionals. APDC addresses issues of concern to the various design professions through workshops, seminars, ad-hoc committees, standing committees, and governmental task forces. APDC also receives sustaining member support from 30 Architectural and Engineering firms throughout Alaska.

Presently, public agencies in Alaska have a wide variety of indemnification requirements. This bill will standardize indemnification requirements for all Public Agencies in Alaska, make the Architects/Engineers and other professionals responsible for their "negligent acts, errors or emissions", make each financially responsible for their own liabilities, fairly apportion joint liabilities on a comparative fault basis, and defines Public Agency for purposes of this bill.

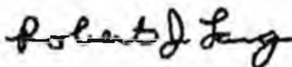
The Alaska Department of Transportation & Public Facilities (DOT/PF) has language that is generally appropriate for contract indemnification purposes. HB 151 through legislation is requiring the use of indemnification contract clauses that are in place with DOT/PF and to be consistent with all Public Agencies.

Professional Services Contracts establish the basic framework between a project owner and a design company for design services associated with a particular project. In recent years, owners of some projects, generally government and quasi-government agencies, have required designers to assume additional liability, beyond the consultant's own negligence. The net effect of this action is to reduce agency risk by insulating the agency from its own negligence. This increases the liability insurance costs to the designers , creates a contract which is not fully insurable, or in some cases asks the designers to assume liability for which no insurance is available. APDC supports legislation that would prescribe indemnification language that is uniform for all state government agencies and assigns, and that requires each party to be financially responsible for their own liabilities and to fairly apportion joint liabilities on a comparative fault basis.

APDC encourages the House of Representatives to move HB 151 forward and enact this important legislation.

Thank you for considering APDC's position on this important issue.

Sincerely,
Alaska Professional Design Council



Rob Lang, P.E.
President

March 5, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182 Via email to Rep_Craig_Johnson@legis.state.ak.us

RE: HB-151 Indemnification Provisions in Professional Contracts

SUBJ: Please Pass HB-151; Indemnification Reform is essential

Dear Representative Johnson:

Standardization of fair and balanced indemnification requirements in public contracts is long overdue and urgently needed. The public has much to gain by the indemnification standardization offered by HB-151, and much to lose if the status quo is maintained.

No single term in a professional services contract has more impact than indemnification. A fair and balanced indemnification requirement sets a positive tone for the project that follows, and the opposite is also true. One sided indemnification provisions that add large uninsurable risks for a consultant create an awkward environment that is adverse, defensive, more expensive and less creative. Ultimately, uninsurable indemnification requirements drive good professionals from the marketplace.

Good project development and design requires very collaborative effort between owner and designer, and a great deal of effort by both parties. A professional services contract that nurtures qualities of mutual respect, fairness, open communications and the free and open exchange of ideas is the first and perhaps the most important step in establishing a cooperative relationship and a successful outcome. A contract that chills this relationship between designer and owner leads to mediocrity at best, and sets a stage for disappointment and confrontation.

Public agencies hold enormous coercive and situational power, simply by the very nature of their control of rather large design and construction budgets. Consequently, contracting public agencies are in a position to impose unfair conditions in their agreements that violate what most would concider ethical business practices and fundamental fairness. In Alaska today, some agencies demand absolution from all liability and loss, except for loss resulting from the "Owner's gross negligence or willful misconduct." This exception is virtually impossible to prove, so the consultant is effectively responsible for everything, even acts of the public agency and others completely out of the consultant's control.

Professional Liability Insurance only covers damages caused by the negligence of the insured consultant relative to the accepted professional standard of care. Nationally, the accepted professional standard of care is "the ordinary and reasonable care required and established by expert testimony of what a reasonable and prudent professional would have done under the same or similar circumstances at the same time in the same locality."

Any firm, either through ignorance or otherwise, may assume a greater responsibility or higher standard of care, but professional liability insurance (PLI) will not cover the additional liability.

Adams, Morgenthaler and Company, Inc.
701 East Tudor Road • Suite 250 • Anchorage, AK 99503
fax 907-257-9191 • info@amc-engineers.com • phone 907-257-9100

Without PLI insurance, consultants who accept onerous indemnifications and uninsurable standards are seldom capable of honoring them, and those who accede to broad, uninsurable contractual liability requirements do so at great peril to their livelihoods. For this reason, most consultants pay close attention to indemnification clauses in contracts, and spend considerable time attempting to negotiate fair and insurable terms.

At AMC Engineers, we spend at least 100 hours per year of Principal time battling draconian indemnification language. There are currently 426 licensed architect/engineer corporations in Alaska. If only one quarter (25%) of them spend as much time as we do, the cumulative impact exceeds 10,000 hours of professional time per year! Adding in the time spent by insurance companies and their legal departments, the total cost to the public is dramatic. At the current average billing rate for Principal level architects and engineers of about $150/hour, the wasted potential of A/E firms struggling with unfair indemnification language may exceed $1,500,000 per year. These costs are eventually passed on to the public. There is no free lunch.

Paradoxically, consultants who truly understand risk are in the best position to help the Owner's project proceed smoothly, yet typically these professionals refuse to sign onerous indemnification clauses. This leaves the Owner with consultants who are motivated to be overly conservative and employ costly "defensive design" techniques to limit their risk or somehow make themselves "judgment proof". With one-sided indemnification clauses, not only does the cost of A/E services increase but the quality of service may be reduced. It's a double whammy.

The party with the most to gain from a project is the Owner and the equitable distribution of risk should acknowledge these factors. Design professionals do not have deep pockets and should not be expected to assume all risks.

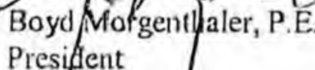
Fair practice requires that the Consultant should be responsible for their negligence, the Public Agency should be responsible for their negligence, and if there is joint negligence then the liability should be shared. Either way, the indemnification should be limited to exclude unrelated third party events.

This question of indemnification has been addressed by the State of Alaska Department of Transportation (ADOT), whose language has been adopted by many boroughs and agencies throughout Alaska for decades. HB-151 standardizes the ADOT approach. Even though the precise ADOT language is less than perfect, it is an excellent model to emulate. The language of HB151 retains the true essence and spirit of the current ADOT language.

Thank you for your efforts on behalf of the professional architects, engineers, and land surveyors, and the general public in Alaska. HB-151 is important legislation that will benefit all Alaskans.

Sincerely,

AMC ENGINEERS



Boyd Morgenthaler, P.E.
President

ENVIRONMENTAL ENGINEERING, HEALTH & SAFETY
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Juneau: 119 Seward Street #10, 99801, 907.586.6813 Fax: 586-681?
Fairbanks: 2400 College Rd, 99709 907.452.5688 Fax: 452.56??
info@nortechengr.com www.nortechengr.com

March 2, 2007

Representative Craig Johnson
Chair, House Resources Committee
Alaska State Legislature
State Capitol, Room 126
Juneau, AK 99801-1182

Re: House Bill 151 — Indemnification

Dear Representative Johnson:

On behalf of myself and ***NORTECH***, I am writing to express our support of House Bill 151 and to the need for this legislation.

Presently, public agencies in Alaska have a wide variety of indemnification requirements. This bill will standardize indemnification requirements for all Public Agencies in Alaska, make the Architects/Engineers and other professionals responsible for their "negligent acts, errors or emissions", make each financially responsible for their own liabilities, fairly apportion joint liabilities on a comparative fault basis, and defines Public Agency for purposes of this bill.

The Alaska Department of Transportation & Public Facilities (DOT/PF) has language that is generally appropriate for contract indemnification purposes. HB 151 through legislation is requiring the use of indemnification contract clauses that are in place with DOT/PF and to be consistent with all Public Agencies.

Professional Services Contracts establish the basic framework between a project owner and a design company for design services associated with a particular project. In recent years, owners of some projects, generally government and quasi-government agencies, have required designers to assume additional liability, beyond the consultant's own negligence. The net effect of this action is to reduce agency risk by insulating the agency from its own negligence. This increases the liability insurance costs to the designers and creates a contract which is not fully insurable, or in some cases asks the designers to assume liability for which no insurance is available. ***NORTECH*** supports legislation that would prescribe indemnification language that is uniform for all state government agencies and assigns, and that requires each party to be financially responsible for their own liabilities and to fairly apportion joint liabilities on a comparative fault basis.

We encourage the House of Representatives to move HB 151 forward and enact this important legislation. Thank you for considering our position on this important issue.

Sincerely,

John Hargesheimer, PE, CIH.
President

Document3

March 2, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, Alaska 99801-1182

RE: HB151

Dear Representative Johnson:

Thank you for your time and efforts for introducing HB151 to the Legislature. A base line of understanding of indemnification is crucial to the community of Alaskan Architects and Engineers and all the various public agencies that utilize those professional services. Currently I believe there is a great deal of misunderstanding among public agencies and an increasing trend to attempt to contractually transfer undue and uninsurable responsibilities to the private sector.

There are industry standard contracts available in the marketplace that have achieved significant scrutiny and mutual acceptance by representatives of Owners, Project Managers, Architects, Engineers and Contractors, all involved in the Construction Industry and these have been time tested in courts of law. Never-the-less we are finding more and more public agencies developing their own contract form and we are seeing an increasing effort to escape their own liability and pass it on to the design professionals. Often times the language is so onerous that it extends our liability far beyond that which we can obtain professional liability insurance. This ultimately defeats their end goal because most design professionals are small businesses with limited resources. If the professional is not covered by insurance then the agency is left with no security or means of resource to cover an unfortunate liability. At best, they will capture what limited resources the firm may have and likely drive them out of business whereas with an equitable contract there may have been insurance available (which is required in all public contracts I have seen). So, the irony is that the agencies mandate the professional purchase liability insurance at great cost and then force them to sign a contract with an indemnification clause that may be specifically excluded in the insurance coverage.

ARCHITECTURE
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INTERIORS
DEVELOPMENT

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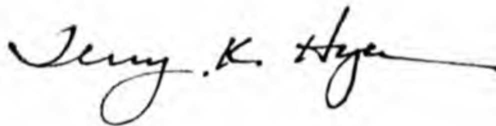
(907) 562-3213-FAX

Fundamentally the State should support fairness and equity in public contracts such that the parties to the contract are responsible for their actions. HB151 will help ensure that equitable treatment will prevail.

I welcome any questions or support I may offer in this pursuit.

Sincerely,
ECI/Hyer, Inc.



Terry K. Hyer, AIA

TH/snf

March 2, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, AK 99801-1182

RE: HB151

Dear Representative Johnson;

I am writing in support of House Bill 151 whose purpose is to bring equity to the question of Indemnification and Hold Harmless clauses that state agencies, quasi public agencies, municipalities and other political subdivisions use.

What this bill seeks to remedy is the situation where the consultant will be held to defend an owner unless the alleged liability is based upon the sole negligence of that owner. This is uninsurable by the Consultant, and few if any of Alaska's design professionals have the financial resources to self insure this risk.

Fair practice should be implemented here. The consultant should be responsible for his negligence, the owner responsible for their negligence, and if there is joint negligence then the liability should be shared. Either way, the indemnification should be limited to exclude unrelated third party events.

As a small, employee owned Alaskan business I can tell you that we are not in a financial position to take on full liability and hold harmless the state agencies that we wish to work for. Nor will our insurance company permit it.

This bill, modeled on the language use by the State of Alaska DOT, seeks to do just that.

I urge your support for this bill.

Sincerely,
EHS-Alaska, Inc.

Robert A. French, P.E.
Principal-in-Charge

ENGINEERING, HEALTH & SAFETY CONSULTANTS

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WEBSITE www.ehs-alaska.com • E-MAIL ehsak@ehs-alaska.com

TRYCK NYMAN HAYES, INC.

911 West Eighth Avenue
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907.279.0543 • 800.770.0543
Fax: 907.276.7679
Email: tedt@tnh-inc.com

March 2, 2007

Representative Craig Johnson
State Capitol, Room 126
Juneau, Alaska 99801-1182

Re: House Bill No. 151

Dear Representative Johnson:

I wanted to express my thanks to you for sponsoring HB 151, a very important piece of legislation which, if enacted, will be instrumental in ensuring the future viability of our firm. As you know, Tryck Nyman Hayes, Inc. is one of the oldest (54 years) and largest of the locally owned engineering firms in Alaska. In the past few years, we have seen a dramatic increase in litigation related to public projects, which is often unrelated to the soundness of our work but we seem to be frequently drawn in and have to spend scarce resources to defend ourselves.

One of the most disconcerting recent developments is that public agencies are increasingly attempting to transfer their liability in such situations to their design consultants through new indemnification language. In the past year we have seen new and often unfair language proposed in contracts from several State entities which do not use the contract model generated by ADOT&PF. In addition, we are now seeing such language in proposed contracts from local government entities which also are not using the ADOT model. We are not able to obtain insurance for much of this transferred liability, thus requiring us to either walk away from the contract or risk the future of our firm by assuming risk for which we are not covered by insurance and could not financially defend if called upon to do so.

It is my opinion that this situation, if left unchecked, will effectively eliminate many local A/E firms in Alaska, thus reducing competition and increasing costs in the State. Your legislation is extremely important to the future of our industry in Alaska.

Sincerely,

Ted B. Trueblood, P.E.

President

Engineering Surveying Landscape Architecture

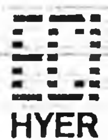
March 1, 2007

Representative Craig Johnson
Alaska State legislature
House of Representatives
Juneau, Alaska

RE: HB 151, Indemnification for Professional Services Contracts

Dear Craig:

We would like to express our support of prescribing uniform contract indemnification language for all state agencies within the state of Alaska. We have experienced first hand difficulties in conducting negotiations of contracts which contain uninsurable contract clauses.



HYER

Several state agencies have recently issued contracts which have been found to be uninsurable. When a contract cannot be insured, should a claim arise the state ends up without restitution and a local business will very likely end up liquidated.

A uniform state-wide professional services contract will save the state and the industry time and resources and is just plain good business practice. There are industry standard contracts available that have been tested nationally and locally and have withstood scrutiny from both sides of the table.

We urge the legislature to hear and ultimately to pass HB 151, to provide a fair and equitable business climate within the State of Alaska.

Sincerely,
ECI/Hyer, Inc.

Terry Hyer
Brian Meissner
Mary G. Knopf

ARCHITECTURE
PLANNING
INTERIORS
DEVELOPMENT

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(907) 562-3213 FAX

From: John Crittenden [jcrittenden@architectsalaska.com]
Sent: Friday, March 02, 2007 4:44 PM
To: Rep. Craig Johnson
Subject: HB 151

Representative Johnson

I support this contract language. It will help to clarify responsibilities, and to clarify how indemnification clauses are supposed to work. Many contracting agencies attempt to put in clauses that try to avoid any responsibility for errors on the part of the contracting agency. This is a goose and gander issue. Please try to get this passed.

John Crittenden

John Crittenden AIA, Principal

Architects Alaska®
An Alaskan Corporation

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Anchorage, Alaska 99501-2029
Ph. # (907) 272-3567
Fax # (907) 277-1732

jcrittenden@architectsalaska.com

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AIA Alaska

A Chapter of the American Institute of Architects

February 26, 2007

Craig Johnson
Representative
State Capitol, Room 126
Juneau, AK 99801-1182

RE: HB151 - INDEMNITY CLAUSE IN PUBLIC CONTRACTS

Dear Representative Johnson,

AIA Alaska, A Chapter of The American Institute of Architects met on February 21, 2007 in Juneau, Alaska and agreed to support the proposed legislation (HB151) that you introduced that next day. Many architects that are members of the AIA are affected by the lack of standardized requirements of indemnification in A/E Contracts.

AIA members participated with others belonging to APDC (Alaska Professional Design Council) last Wednesday and Thursday in speaking with our representatives and other influential members of the legislature about this issue and our support of your introduced bill. There are too many government agencies that have one sided provisions that are hostile to A/E firms, and cost of business is driven up by the unnecessary and wasted hours of fighting a one sided indemnification contract clause. This bill will standardize indemnification requirements for all Public Agencies in Alaska, and save thousands of dollars as well as make each party financially responsible for their own liabilities.

We hope that our support of this legislation helps to ensure its passage into law and make the lives of our member firms more equitable in sharing risk with its public clients. Our architectural and engineering professionals are willing to be responsible for their "negligent acts, errors and omissions", however to take on the entire burden of liability in contracting limits the willingness to contract with public agencies that write unfair indemnification requirements.

Your insight and support of this issue is appreciated by our profession as well as those of others in the professional design community of Alaska.

Sincerely,

Garrett H. Maupin, AIA/CCS
AIA Alaska Chapter President

P.O. Box 103563
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www.aiaak.org