IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

O'BRYAN BAUN COHEN KUEBLER,
Plaintiff,

vs.

PAUL F. LISANKIE, DIRECTOR OF DIVISION OF WORKERS' COMPENSATION, DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, STATE OF ALASKA, JOHN DOES 1-10, EMPLOYEES OF THE STATE OF ALASKA,
Defendants.

Case No. 1JU-05-557 CI

## ORDER ON MOTIONS FOR SUMMARY JUDGMENT

### Factual and Procedural History

This lawsuit is brought by the O'Bryan law firm to obtain information from the State of Alaska Department of Labor about Workers' Compensation claims. The dispute arose when the State refused to provide information it had previously been providing.

Between June and November 2004 the State responded to requests by O'Bryan for Report of Injury by providing lists of claimants and their addresses and phone numbers.



KAF

However, in March 2005 when O'Bryan made a request for similar information the State refused to supply it.

When O'Bryan first asked the State in June 2004 to provide all Reports of Injury (ROI) listing Icicle Seafoods as the employer. The State notified O'Bryan that providing copies of 400 ROIs would be "a real burden" and attached a summary list of claimants, addresses and phone numbers with the hope that the summary would suffice. O'Bryan accepted the summary list in lieu of the 400 ROIs.

In August, September and November 2004, O'Bryan made three more requests for similar information. Although each request identified a different employer and employment period, the format of each request was essentially the same:

> Please provide at our expense a list of all workers compensation claimants . . . including names, addresses, and phone numbers.

Each time, O'Bryan requested a list of all workers compensation claimants against an employer, including "names, addresses, and phone numbers." And, each time the State satisfied the request by providing the summary lists.

O'Bryan made another request in March 2005. Like the previous requests, the firm asked for a summary of the information in the same format:

> Please provide at our expense a list of all workers compensation claimants for Icicle Seafoods and Trident Seafoods from the date of your last email attached. I would like their names, addresses, and phone numbers.

The State, however, advised O'Bryan that it would no longer supply any further claims information. The basis for this decision is unclear. O'Bryan says that the State explained that it would no longer do so because Richard Nielsen, an attorney representing seafood processors, had filed a complaint with the governor's office against the State.[1] The State denies that the sole basis of the denial was the Nielsen complaint letter.[2] The State says that "[t]he Director of the Division determined it was not appropriate to continue to create and provide summaries of information, and the request was denied."[3]

O'Bryan filed a letter of appeal on March 16, 2005. To date, the State has not responded to the appeal.[4]

O'Bryan filed a suit in superior court on June 6, 2005 seeking declaratory and injunctive relief. The State answered on July 25, 2005.

During the 2005 special session of the legislature, a new Workers Compensation scheme was considered and eventually enacted. That new scheme had a provision at AS 23.30.107(c) that said:

> "The division may not assemble, or provide information respecting, individual records for commercial purposes that are outside the scope of this chapter."

That provision was effective on November 7, 2005.[5]

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[1] Plaintiff's Ex. 7, p.2 and Ex. 8, p.1.
[2] Answer at 2.
[3] Defendants' Reply to Opposition to Defendants' Cross Motion for Summary Judgment at 7.
[4] Memorandum in Support of Motion for Summary Judgment at 4.

On November 23, 2005, O'Bryan's counsel sent the State's counsel a letter regarding the "Request for ROIs."[6] The letter declared that it was O'Bryan who accommodated the State – rather than vice-versa – in accepting the summary information rather than the ROI forms. The letter also outlined plaintiff's arguments that another statute, AS 23.30.260[7], is inapplicable to claims under federal law. The letter also contained the following statement:

> My client is perfectly willing to accept actual copies of the ROI pursuant to AS 40.25 et seq. seq. in order to resolve this dispute. It was the State's desire to produce the compilation in lieu of copying the ROI's but if the State is unwilling to turn over the compilation, Plaintiff hereby requests that the State produce the ROI's for Icicle Seafoods and Trident Seafoods for the period from June of 2004 to the present. Please advise when we can expect to receive these documents.[8]

O'Bryan moved for summary judgment on December 7, 2005. The State opposed and cross moved for summary judgment. Both motions are now ripe for decision. The parties agree that there is no genuine issue of fact and this is a question of law to be decided by the court.

## Summary Judgment

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[5] Ch. 10, SLA 2005.
[6] Memorandum in Support of Motion for Summary Judgment, Exhibit 11 at 1 ("Letter").
[7] AS 23.30.260. Penalty For Receiving Unapproved Fees and Soliciting.
A person is guilty of a misdemeanor, and upon conviction is punishable for each offense by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both, if the person
(1) receives a fee, other consideration, or a gratuity on account of services rendered in respect to a claim, unless the consideration or gratuity is approved by the board or the court; or
(2) makes it a business to solicit employment for a lawyer or for oneself in respect to a claim or award for compensation.
[8] Letter, supra n. 9.

The court will grant summary judgment only if the record presents no genuine issues of material fact and "the moving party was entitled to judgment on the law applicable to the established facts."[9] Once the movant has established a prima facie case, the non-movant, in order to prevent entry of summary judgment, is required to set forth specific facts showing that it could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a material issue of fact exists.[10] The court construes facts offered in support of and in opposition to a motion for summary judgment in a light most favorable to the nonmoving party.[11]

Public Records

Alaska has two primary public records statutes, AS 40.25.110 and AS 40.25.120, which govern the release of records to the general public. AS 40.25.110 provides that public records are open to inspection and copying. It states in relevant part:

> "Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours." [12]

The Alaska Supreme Court has noted that "[t]here is a strong public interest in disclosure of the affairs of government," and "[sections] .110 and .120 articulate a broad

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[9] Newton v. Magill, 872 P.2d 1213, 1215 (Alaska 1994).
[10] McGlothlin v. Municipality of Anchorage, 991 P.2d 1273, 1277 (Alaska 1999).
[11] Beilgard v. State, 896 P.2d 230, 233 (Alaska 1995).
[12] AS 40.25.110 (a).

policy of open records."[13] Courts have characterized the right of citizen access to public records as a "fundamental right."[14]

Section 40.25.120 restates the general rule of availability, but also sets out the exceptions to the public's right to inspect a public record. It states these exceptions, including records made secret by law:

> Every person has a right to inspect a public record in the state, including public records in recorders' offices except:
> . . .
> (4) records required to be kept confidential by a federal law or regulation or by state law.[15]

To further the legislative policy of broad public access, courts narrowly construe any exceptions.[16] The term "state law" in AS 40.25.120 (4) refers to any statute protecting the confidentiality of records. It also covers any constitutional provision, including, most notably, the right to privacy,[17] as well as the executive privilege doctrine, and other privileges.[18] The Alaska Supreme Court also has indicated that the reference to state law includes common law. The common law on public inspection of government records, as developed in other jurisdictions and acknowledged in Alaska, provides that an

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[13] Gwich'in Steering Committee v. State, Office of the Governor, 10 P.3d 572, 578 (Alaska 2000).
[14] Id.
[15] AS 40.25.120 (4).
[16] See, e.g, Doe v. Alaska Superior Court, 721 P.2d 617, 622 (Alaska 1986).
[17] ALASKA CONST. art I, § 22.
[18] See, e.g. KNUTH, MARGO, INSPECTION AND DISCOVERY OF STATE RECORDS IN ALASKA, 4 ALASKA L. REV. 277, 280 (1987).

inspection should be denied when a demonstrable need for confidentiality outweighs the public interest in disclosure.[19]

Before November 7, 2005

The State has stated no credible reason for refusing to disclose the information requested prior to November 2005.

Without some legitimate reason under the law, the State cannot deny a request to provide information that it has granted in the past. The Division Director's decision, after the complaint to the Governor's office, has not been shown to have a legitimate basis. Indeed it hasn't been shown to have any basis.

O'Bryan had been using the names and addresses of persons injured on the job to send letters to the injured persons telling them that they may have claims for other than Workers Compensation and that they could receive additional information if they wanted by contacting O'Bryan.

The State suggests that providing the information to O'Bryan would be unlawful because of prohibitions against lawyers engaging in solicitation. The U.S. Supreme Court disagrees.[20] Court Rules in Alaska and Michigan governing the practice of law do not prohibit this information being used in the manner that O'Bryan has used it. Rule 7 of the Alaska Rules of Professional Conduct for lawyers does not prohibit letters sent to persons

[19] Mun. of Anchorage v. Daily News, 794 P.2d 584, 590 (Alaska 1990).
[20] Shapero v. Kentucky Bar Ass'n, 486 US 466 (1988).

giving them information of possible legal remedies as provided by O'Bryan in this case. Rule 7.3(a) of the Michigan Rules of Professional Conduct expressly provides that the term "solicit" does not include the sending of "truthful and non-deceptive letters to potential clients known to face particular legal problems as elucidated in Shapero v Kentucky Bar Ass'n, 486 US 466."[21]

The State argues that the November 23, 2005 letter from O'Bryan's counsel to the State's counsel constituted a new request, prohibited under the new law AS 23.30.107(c). The court finds that the letter is not a new request but rather it is an offer to compromise the lawsuit. In the letter, O'Bryan articulated the consideration that it would be willing to back to the original request and accept the ROI's "in order to resolve the dispute."[22] O'Bryan offered to accept the ROI if the State was unwilling to provide the summary lists of names, addresses and phone numbers.

Evidence of offers to compromise a claim "which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount."[23] The letter from O'Bryan's counsel does not convert the March 2005 request into a new request that would fall under the prohibitions of AS 23.30.107(c), passed 8 months later.

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[21] MICHIGAN RULE OF PROFESSIONAL CONDUCT, Rule 7.3(a) (2002).
[22] See Letter, supra n. 9.
[23] Alaska R. Evid. 408.

The State also argues that AS 40.25.110 does not require it to create documents in response to a request if those documents are not in existence at the time of the request. [24] The court agrees. However, the past practice the State adopted of providing the summary lists rather than the actual ROI forms cannot be used to refuse the information requested. If the State chooses to no longer provide a summary list for its own convenience rather than the actual ROI forms, it must satisfy the March, 2005 request by releasing the underlying ROI forms. The State must provide the ROI requested in the March 2005 request or a summary as provided in the past.

After November 7, 2005

Much of the 2005 special session of the Alaska legislature was taken up with the consideration of a new Workers Compensation scheme. That scheme was originally submitted by the governor and introduced as Senate Bill 130. A conference substitute for SB 130 was eventually enacted as 10 SLA 2005. That law had a provision at AS 23.30.107(c) that said:

> "The division may not assemble, or provide information respecting, individual records for commercial purposes that are outside the scope of this chapter."[25]

Constitutional Challenge

[24] See Opposition to Plaintiff Motion for Summary Judgment and Cross Motion in Support of Summary Judgment at 4.
[25] Section 39 of the SLA

O'Bryan argues that the statute is unconstitutional if it is interpreted to prevent O'Bryan from having access for a commercial purpose. The State argues that the statute is not unconstitutional. It would be an interesting proposition if the State's interpretation would not allow a newspaper access to this information to support a story on safety in the workplace because it was a "commercial purpose". The State's interpretation would not allow an insurance company to obtain this information to find out how potential customers were dealing with their employees. Yet a citizen with a casual interest, just being nosy, could find out all things requested here by O'Bryan. Fortunately the court feels that it does not have to decide the constitutional question. The court is to decide cases on constitutional grounds only when the cases cannot be decided fairly on statutory or other grounds.[26] Whether the constitutional challenge is equal protection or free speech, the issues need not be decided here. The court believes that the correct analysis is statutory construction.

Statutory Interpretation

A statute is to be interpreted according to its plain meaning and if it is ambiguous the court is to look at the intent of the legislature.[27] The court is to interpret laws

[26] State Department of Health and Social Services v. Valley Hospital Association Inc., 116 P.3d 580 (Alaska 2005)
[27] North Slope Borough v. Sohio Petroleum Corp. 585 P.2d 534 (Alaska 1978)

restricting the public's access to state records strictly. "Doubtful cases should be resolved by permitting public inspection."[28]

The court finds the statute ambiguous in several ways. Nearly anything today can be characterized as a "commercial purpose" including government itself sometimes. There has been much discussion in a variety of forums through the years on whether the practice of law is a profession or a commercial venture.[29] The statute does not define "commercial purpose" as meant in the framework of this scheme. The decision to release information or not, depending on how the recipient is going to use the information would be a continuing conundrum for the State and recipients.

The prohibition in the statute on providing information is only applicable for "purposes that are outside the scope of this chapter."

Neither party provided the court with any legislative history of AS 23.30.107(c).

The court's review of the legislative history of the statute shows nothing in the legislative history to make the phrase "commercial purpose" more definite. This sub-section was Section 28 of the original bill that was introduced at the request of the governor. The transmittal letter from the governor included the stated purpose of the legislation to "enhance the efficiency of the current system by expanding workers access

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[28] City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1216 (Alaska 1982) at 540.
[29] See e.g. ABA v. FTC, 430 F.3d 457 (C.A.D.C. 2005); Bailey v. State, 424 S.E. 2d 503 (S. C. 1992 at 504 reh'g denied (1993); Samuel J. Levine, Professionalism with Parochialism, 71 Fordham L. Rev. 1339 (2002-2003)

to legal counsel". There was testimony before the legislature that there was a dearth of lawyers for those injured on the job.

> "We need access to legal counsel. There are only eight attorneys assisting claimants and some are choosing not to represent injured workers in favorable profitable types of litigation. "[30]

A provision was put into the bill allowing the State to contract to pay lawyers to help injured workers. The Director of the Division of Workers Compensation in explaining a section that was meant to encourage lawyers to be involved said the statute was allowing attorneys to charge for an initial consultation with injured workers because ...there are a limited number of private attorney who are willing to provide the service. [to workers][31] The only references found in the legislative history relating directly to sub-section 107(c) were statements made by the Director of the Division. He said

> ... We would maintain, in section 27, the confidentiality of medical and rehabilitation records that are held by the division or the new appeals commission. And, in Section 28, it would ban the division from assembling or providing individual records for commercial purposes. We've got a number of folks that ask us to give them information. We are getting more and more information into our system that we request because we are trying to get electronically filed and now we getting this intercession where people recognize that there is more and more information about employers, employees, anybody you can think of. They asked us to stratify this data and give them some kind of report that they can use

[30] Testimony of Barbara Williams, of the Alaska Injured Workers Alliance, on March 8 before Labor & Commerce Committee.
[31] Paul Lisankie at 8:56:51 AM before Senate Judiciary on April 5, 2005.

> for a commercial purpose. We want to be able to give information to people that need it so they can get good health care, so that they can get paid for providing that health care, so that an insurance company or an employer or an employee can get information they need to settle, or resolve, or if necessary, have a hearing on a disputed claim. We're trying to restrict the scope of information that we give out for purely commercial purposes.[32]

On April 5, 2005 he testified:

> Section 28 is a new provision, which would ban the Division of Workers Compensation from assembling or providing individual records for commercial purposes. The Division of Workers Compensation is asking people to file online so as to speed up the process. However, they are getting requests from other people to provide information that may be used for other purposes. People have legitimate privacy concerns.[33]

The court has to recognize that providing those injured on the job with accurate information about their legal rights is an important public interest recognized by the legislature. It is also clear that attorneys are more willing to represent persons in Workers Compensation cases if there are related, more profitable tort claims that can be pursued for the client. Clearly other legal remedies may help workers "settle or resolve" Workers Compensation claims as the Director wanted. The court finds that making it possible for lawyers to tell injured workers of their rights is not "outside the purposes of this chapter".

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[32] Paul Lisankie at 2:16:54 PM on March 10, 2005 before the Senate Labor and Commerce Committee
[33] Senate Judciary Committee Minutes at 9:26:25 AM

In weighing the privacy interests of access to names, addresses and phone numbers against the benefit of providing workers with legal information about their rights, the court believes the legislation provides for access to legal rights information. It is not clear whether the privacy concerns the Director referred to are the concerns of the employer or the employee nor is it clear what those concerns are. The new law specifically controls medical and rehabilitation information and release of that information is clearly prohibited. The privacy interest in that information is strong. Any privacy rights must be legitimate to be protected. The State has articulated no privacy interest of either the employee or employer about name, address and phone number that would justify keeping that information secret.

The stated goals of the legislation to provide counsel, and the ambiguity of the statute, and the requirement that laws limiting access to state records be strictly construed results in the court finding no need to address the constitutionality of the statute. The court believes that a reading of the statute that allows access to only names, addresses and phone numbers of claimants injured at particular employers is not "outside the scope of the chapter". The legislation is aimed at protecting workers injured on the job and O'Bryan's efforts to give workers information about their possible legal rights accomplishes that aim.

The court grants O'Bryan's motion for summary judgment.

The court denies the State's motion for summary judgment.

Dated this 7th day of April, 2006, at Juneau, Alaska.

Larry R. Weeks
Superior Court Judge

CERTIFICATION OF SERVICE
I certify that I served the following parties on the 10 day of April, 2006:

Daniel Bruce
By Courtbox.

Judith Crowell
Assistant Attorney General
Department of Law
Office of the Attorney General
Anchorage Branch
1031 W. Fourth Avenue, Suite 200
Anchorage, AK 99501

Tracy Ver Velde
Professional Assistant to Judge Weeks

**Cliff Stone**

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**From:** Paula D Scavera [paula_scavera@labor.state.ak.us]
**Sent:** Friday, February 23, 2007 10:20 AM
**To:** Cliff Stone
**Subject:** FW: Workers Compensation Claimants

Cliff- Here is the email that was sent to the Division of Workers' Compensation. The request for information is public information but we have edited out the name of the staff person. Thank you. Paula

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**From:** Rick Tripp [mailto:rtripp@obryanlaw.net]
**Sent:** Friday, February 23, 2007 6:45 AM
**To:**
**Subject:** Workers Compensation Claimants

Dear Mr.

Please provide us with a list of all Workers' Compensation claimants for injuries reported from 11/30/04 to the present , including names , addresses and phone numbers, against the following companies: American Seafoods, Icicle Seafoods, Deep Sea Fisheries, Norquest Seafoods, Ocean Beauty Seafoods Inc.,Pacific Star Seafoods, Peter Pan Seafood, Inc., Petersburg Fisheries, Saltwater, Inc., Seafood Producers Co-op, Sitka Sound Seafoods, Snopac Products, Trident Seafoods, Unisea, Inc., Alaska Ocean Seafood, Inc., Artic Storm, Inc., Glacier Fish Co., LLC, Highland Light and Starbpond LLC.
Call me when you receive this email. Time is of the essence.

Rick Tripp
O'Bryan Baun Cohen Kuebler
401 S. Old Woodward, Ste. 320
Birmingham, MI 48009
248.258.6262
248.258.6047 (f)

Please note the date of Feb. 23, 2007 on the request from this law firm.

This is the day after the original HB 121 was heard and passed out of the House Labor and Commerce Committee on Feb. 22, 2007.

- Empire Front Page
- Local News
- Opinion
- Letters To The Editor
- ClubHooligan.com
- Neighbors
- State & Regional News
- Obituaries
- Weather
- Business News
- Archives
- Alaska AP Wire
- National AP Wire
- RSS Feed
- Health
- SE Alaska Real Estate & Rental
- Juneau-Skagway Road Series
- Looking Forward

- Local Sports
- Empire Outdoors
- Juneau Softball
- JDHS Sports
- Gold Medal 2006
- Golf News & Scores

Yellow
Juneau's new online yellow pages!
What:
Where:

- Summer Monthly
- UAS Connections
- Job Fair
- Capital City Weekly
- ClubHooligan.com
- Food Challenge!
- Submit "Around Town" Event
- Books
- Slideshows
- Spotted
- Select TV
- Movie Listings
- Juneau History
- Poll Results

- Classifieds
- Email Newsletter
- Stop N' Shop
- Subscribe
- 2007 Employment Guide
- Jobs At The Empire
- Open Carrier Routes
- Local Maps
- Advertising
- Contact Us

# Census Bureau inadvertently posts personal data on Web site

STEPHEN OHLEMACHER
Associated Press Writer

WASHINGTON — The Census Bureau inadvertently posted personal information from 302 households in Alaska and other states on a public Internet site multiple times over a five-month period, the bureau said Wednesday.

The information included names, addresses, phone numbers, birth dates and family income ranges, said Ruth Cymber, the agency's director of communications. No Social Security numbers were posted, and there is no evidence that the data was misused, Cymber said.

But, she added, posting the information violated bureau policies and federal law.

The bureau is in the process of contacting the households, located in nine states and the District of Columbia, to offer free credit-monitoring services.

"A breach of this kind is unacceptable," Census Director Charles Louis Kincannon said in a statement. "We are strengthening our internal procedures to further safeguard our data to prevent a recurrence."

The information was on and off the public Web site from October to Feb. 15 as Census employees working from home tested new software, Cymber said. The workers were supposed to use fictitious information to test the site, but they inadvertently mingled data from the bureau's Current Population Survey, a monthly survey best known for generating the nation's employment statistics.

Cymber said the real and fictitious data were indistinguishable. The information could have been accessed through a search engine on the Census Bureau's Web site used to disseminate large data files. She said she didn't know whether the data actually was accessed by anyone.

Cymber declined to say how many employees were involved, though a release from the bureau said "appropriate administrative action" has been taken, pending the outcome of an ongoing investigation.

The bureau also referred the matter to the Commerce Department's inspector general. The Census Bureau is part of the Commerce Department.

The affected households were located in Alabama, Alaska, Arkansas, Arizona, California, Colorado, Delaware, Florida, Connecticut and Washington, D.C.

The incident comes six months after the Census Bureau acknowledged losing 672 laptop computers since 2001, including 246 that contained personal data. Most of the computers were used by workers gathering survey information in communities.

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On The Net: Census Bureau:

http://www.census.gov/

# ICICLE.

February 19, 2007

Representative Kurt Olson, Chair
House Labor & Commerce Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Chairman Olson and Committee Members,

On behalf of Icicle Seafoods, Inc., I want to express our strong support for HB 121, "An Act relating to release of information in individual workers' compensation records".

It has come to our attention, thanks in large part to one of our employees, that a private party outside of Alaska has been soliciting Alaska worker compensation claimants by obtaining personal information about them from the Alaska Dept. of Labor. After obtaining the names and addresses of injured workers, they use this private information for direct marketing purposes.

We find this practice incredibly disturbing and believe this information should not be made available without the consent of the person the information is about.

House Bill 121 would stop this objectionable practice and we fully support its adoption. Thank you for your consideration.

Sincerely,

Kris Norosz
Government Affairs
Icicle Seafoods, Inc.

PETERSBURG FISHERIES
A DIVISION OF ICICLE SEAFOODS, INC.
P.O. Box 1147 • Petersburg, AK 99833 • Tel: 907-772-4294 • Fax: 907-772-4472

TRIDENT SEAFOODS CORPORATION
5303 Shilshole Ave NW, Seattle, WA 98107-4000 • (206) 783-3818 • Fax (206) 782-7195
Domestic Sales (206) 783-3474 • Fax (206) 782-7246
Export Sales (206) 783-3810 • Fax (206) 782-7195

February 21, 2006 7

The Honorable Kurt Olson, Chairman
Labor and Commerce Committee
Alaska State Legislature
State Capital
Juneau, Alaska 99801

Dear Representative Olson

I am writing on behalf of Trident Seafoods Corporation to express our strong support for HB 121. Our employees have been surprised to learn that the Alaska Department of Labor's Division of Workers' Compensation is disclosing the names and addresses of all individuals who are injured in the seafood processing industry. We believe the law should be changed so that this information is released only with the employee's consent.

This issue has come to our attention because a law firm from Michigan has been requesting information from the State about all the individuals in the seafood industry who have filed workers' compensation claims. This firm then solicits business from these individuals, seeking to bring claims under maritime law instead of under the State's workers' compensation system. This has resulted in some unusual maritime claims, including one lawsuit filed against the "vessel" Sand Point. Sand Point, of course, is not a vessel. It is a community in the Aleutians East Borough where Trident has a shorebased processing plant.

More importantly, many of the people at Trident who file workers' compensation claims do not want their personal information released to the public. They are upset about lawyers contacting them about their injury. Those employees who do not object to having personal information disclosed should be free to consent to having such information released. Without such authorization, however, we believe this type of information should remain private.

Thank you for considering our views on this legislation.

Sincerely,

Joseph T. Plesha
General Counsel

February 15, 2007

Representative Peggy Wilson
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Dear Representative Wilson,

Thank you for sponsoring House Bill 121. I am in full support of this bill that will put an end to the release of personal information of worker compensation claimants by the State of Alaska, Dept. of Labor, and the Workers Compensation Board without the consent of the claimants.

I have attached a letter that I wrote last year in support of a similar measure. As a worker compensation claimant, I had my personal information released to a third party commercial operator (a Michigan law firm) who then used the information to solicit business from me. I did not appreciate this type of contact and do not feel personal information should be released in this situation without my personal consent.

Thank you for working to end this unpleasant practice. Please feel free to provide my letter to other legislators as the bill moves through the legislative process.

Sincerely,

Hyo R. Kim
P.O. Box 705
Petersburg, Alaska 99833

April 15, 2005

Senator Con Bunde, Chair,
Senate Labor & Commerce Committee
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Dear Senator Bunde and Committee Members,

My name is Hyo R. Kim and I have been an Alaska resident for over 27 years Approximately 5 months ago, I received a letter from an out of state attorney that somehow learned of an injury I had at work. He indicated in his letter that if I contacted his firm, they could possibly get me more money for my injury.

I called the attorney to find out what this was about and how he had access to my personal information. During our conversation, the attorney asked me many questions about how I was injured, what the injury was, etc. After talking, the attorney indicated that he could not do anything for me since the injury was not substantial. I got the feeling he thought there was not enough money for him to get involved.

I asked him how he was able to get my personal information and he basically said he had his sources in the State of Alaska. This really bothered me since I really don't want people other than those that I approve of having access to my personal and private information. This especially concerns me the most now that there are so many cases in the news of identity theft and fraud.

After discussing with my friends the conversation I had with this attorney, I learned that he most likely got my personal information from the Workers Compensation Board and the Alaska Dept. of Labor. If this is the case, it irritates me a lot as I do not want people to have access to my private information and I assumed that what I filled out on the Alaska Workers Compensation forms was confidential.

I am very surprised the State of Alaska would allow this information to be released about its residents. My injury is my private concern and should only involve me, my employer, my doctor, my family and not an out of state attorney. I ask you to please take the appropriate steps to make sure this does not happen again in the future.

Sincerely,

Hyo R. Kim

Hyo R. Kim
P.O. Box 705
Petersburg, Alaska 99833

February 19, 2007

The Honorable Kurt Olson
Chairman, Labor & Commerce Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Chairman Olsen:

I have been told that you are chairing a hearing on a bill that would keep confidential the personal information of people who file worker's compensation claims. I am writing in strong support of this legislation. I do not want any of my personal information made available to the public merely because I have filed a worker's compensation claim and respectfully ask that you enact the bill during this session of the legislature.

My husband, Gene, and I have both had minor injuries while we were working at Trident Seafoods Corporation shoreplant in Sand Pont, Alaska. We each received unwelcomed solicitations from some lawyers back East asking if we were injured on a floating processing vessel! I do not want my personal information made available to the public and wondered how these lawyers got my name in the first place. I do not believe it is appropriate for the State of Alaska to release this information without my consent.

To be blunt, the fact I have suffered an injury in the workplace and filed a claim under worker's compensation should not entitle the public to my home address and other personal information. I certainly do not want some ambulance-chasing lawyer soliciting me because of my claim. If I had wanted to hire a lawyer to represent me, there are plenty of local attorney's available. They advertise in the Alaska Airlines magazine and every fishing magazine published.

I urge you to pass this legislation and appreciate you listening to my concerns.

Sincerely,

Gloria J. Copenspire

HB

149



teckcominco

March 28, 2008

Senator Hollis French
State Capitol, Room 417
Juneau, AK 99801-1182

**Re: Support for Advancement of SB 91/CSHB 149**

Dear Senator French:

The NANA Regional Corporation, Inc. and Teck Cominco Alaska Incorporated, owners and operators of the Red Dog Mine, are completely and wholeheartedly in support of advancing Senate Bill 91 to the floor of the legislature in this session. Senate Bill 91 follows up on law passed by the previous legislature authorizing the State of Alaska to assume primacy of the National Pollutant Discharge Elimination System program from the U.S. EPA where it currently resides. This action is beneficial for Alaska: both for Alaska's present and future economic development and for the concurrent protection of our water resources upon which so much of our subsistence and environmental heritage depends.

NANA and Teck Cominco have full confidence in the ability of the State of Alaska and the Alaska Department of Environmental Conservation to administer this program, as they already effectively do with the air quality program. The new State program would, by law, be as stringent, or more so, than the Federal program. Also, EPA will retain general oversight. The fact that SB 91 is before your committee demonstrates the synergy between the State and EPA in developing the program. ADEC has already accomplished the majority of work involved in taking primacy, including developing State of Alaska water quality standards that are as protective, and in some cases more protective, than the Federal standards.

We believe that advancement and passage of SB 91 affords an Alaskan solution for the mutual goals of resource development and environmental protection. EPA Region X has many NPDES permits and actions pending for the four States in their region. Pending permits for Alaska have no more priority than any other State. Red Dog has experienced numerous delays, stays, and permit withdrawals in attempting to comply fully with the NPDES process and the "speed" of the Federal bureaucracy. We believe that administration of this program by ADEC will result in a much more responsive process along with a higher degree of water quality protection. By no

means do we expect a "rubber stamp" on permits by ADEC that affect development projects. We do fully expect a rigorous, scientific, and regulatory review of every permit that comes before the State, and we believe that is what we will get from ADEC. We have been "blindsided" enough by the Federal process. Having a transparent State process with clear regulatory standards is highly desirable.

In conclusion, we again express our support for SB 91. Alaska has another opportunity before us for self-determination in this matter. We should not continue as a "regulatory outpost" for EPA, but take the responsibility of regulating our State of Alaska in the most clear, protective, and efficient manner possible.

**Please contact Paul Glavinovich (NANA) at 907-265-4183 or Jim Kulas (Teck Cominco) at 907-426-9129 for additional information.**

Sincerely,

Marie Greene
President, NANA Regional Corporation, Inc.

James Kulas
Environmental Superintendent, Teck Cominco Alaska Incorporated

Cc: Senator Donald Olson
Representative Reggie Joule
Senator Charlie Huggins
Senator Lesil McGuire
Senator William Wielechowski
Senator Gene Therriault
Senator Lyda Green

**Cindy Smith**

---

**From:** Sen. Hollis French
**Sent:** Monday, March 10, 2008 6:24 PM
**To:** Cindy Smith
**Subject:** FW: Follow up to our meeting last week on HB-149
**Attachments:** Public Participation APDES Permit Process 2.12.08 working draft.doc

Please print this and put it in the file. thanks

---

**From:** Hartig, Lawrence L (DEC) [mailto:larry.hartig@alaska.gov]
**Sent:** Monday, March 10, 2008 4:28 PM
**To:** Sen. Hollis French
**Cc:** Easton, Dan (DEC); Kent, Lynn J T (DEC); Carlson-Vandort, Marit K (DEC); Leonard, Cameron M (LAW)
**Subject:** Follow up to our meeting last week on HB-149

Senator French,

I appreciate our meeting last week and want to follow up on the question you raised regarding whether EPA's approval of the State of Alaska's petition for NPDES primacy would change how NPDES permits are issued for facilities located on federal lands, including the OCS. In preparing this response, I conferred with the state Department of Law. We are still waiting for more information from EPA on Clean Water Act permitting requirements beyond the 3-mile limit of the territorial sea, but I didn't want to delay any longer before responding to your question.

Upon grant of primacy, the state DEC would be authorized to issue NPDES permits under the terms of the federal Clean Water Act for facilities on federal lands within the territory of the state, with two exceptions. EPA would continue to issue NDPES permits for facilities located within Denali National Park or the Metlakatla Indian Reservation. DEC's jurisdiction would only extend offshore to the 3-mile limit of the state's territorial sea.

The federal territorial sea extends another 9 miles out, and the federal contiguous zone another 12 miles past that, out to a maximum distance of 24 miles allowed under international treaty. Beyond the contiguous zone are the high seas. The state will not assume NPDES authority in areas within the federal territorial sea, the contiguous zone or the high seas. But what the Department of Law and I haven't yet determined is whether EPA issues NPDES permits in the federal territorial sea and/or the contiguous zone, or rather addresses activities under other federal statutes, such as the Submerged Lands Act and the Coastal Zone Management Act. I will supplement this response once we learn more from EPA on this.

I am also providing you with a copy of the latest draft of DEC's guidance document "Public Participation in APDES Permitting Process." This guidance explains how DEC intends to supplement the permitting process currently in state law to enhance communications with the public, particularly on proposed projects that might be of heightened concern or impact tribal interests. Among other things, the guidance provides for consultation with tribal and local rural governments. DEC held work shops at the Alaska Forum on the Environment seeking to engage tribal leaders and rural Alaskans on their concerns their voices might be weakened if Alaska is granted primacy. This certainly isn't our intent. We welcome any suggestions you or any of your constituents have on this draft. This guidance will become part of DEC's primacy application package to EPA, and thus would be part of the approved NPDES program for Alaska. We want to do the best job we can on it and appreciate any input.

If there is any other information DEC can provide in advance of the upcoming Senate Judiciary hearing on HB-149, or that you would like for us to have prepared for the hearing, please let me know. Thank you again for scheduling the hearing.

Sincerely,
Larry Hartig

# STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION**
**OFFICE OF THE COMMISSIONER**

**SARAH PALIN, GOVERNOR**
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Juneau, AK 99811-1800
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FAX: (907) 465-5070
http://www.dec.state.ak.us

Bill file

February 15, 2008

The Honorable Hollis French
Alaska State Senate
State Capitol, Room 417
Juneau, AK 99801

Dear Chairman French:

I appreciated the opportunity on January 25 to testify before your committee on HB 149. As I mentioned in my testimony, HB 149 makes what are largely technical adjustments to the Department of Environmental Conservation's (DEC's) statutory authorities. The adjustments are needed to qualify the State of Alaska to assume wastewater permitting authority from the U.S. Environmental Protection Agency (EPA). I write to respectfully request you hold additional hearings with opportunity for public testimony and that you allow the committee to vote to move the bill from the Senate Judiciary Committee.

As you know, the 2005 legislature passed SB 110 directing DEC to seek primacy for the National Pollutant Discharge Elimination System (NPDES) wastewater discharge permitting program in Alaska. Since 2005, we have been faithfully executing the SB 110 charge: We have invested countless hours and millions of state dollars -- hiring and training staff; promulgating regulations; conducting detailed legal reviews and opinions; developing databases, forms and guidance documents; preparing a detailed description of all aspects of the program; and negotiating a detailed Memorandum of Agreement defining how DEC and EPA will execute their respective roles. All of this effort has been coordinated with the public working group established by SB 110.

We have come a tremendous way to accomplish what SB 110 asked of us. And, we are poised to submit a final application to EPA in May with the potential for approval later in 2008. One thing stands in the way – the statutory changes included in HB 149.

As you can see, HB 149 is only a small part of the much larger NPDES primacy effort, but it is essential. Without it, we will not be able to comply with SB 110, progress will stop, and we risk losing the enormous investment in the effort.

I appreciate your careful and deliberate consideration. If you or committee members have questions or concerns about the bill, please let me know. I would be happy to address them. Thank you for considering this most important matter.

Sincerely,

Larry Hartig,
Commissioner

cc: The Honorable Charlie Huggins, Alaska State Senate
The Honorable Lesil McGuire, Alaska State Senate
The Honorable Gene Therriault, Alaska State Senate
The Honorable Bill Wielechowski, Alaska State Senate
The Honorable Lyda Green, Alaska State Senate
Mike Tibbles, Chief of Staff, Office of the Governor
Joe Balash, Special Staff Assistant, Office of the Governor
Russ Kelly, Director of Legislative Affairs, Office of the Governor

# STATE OF ALASKA

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February 7, 2008

The Honorable Bill Wielechowski
Senate Judiciary Committee
Alaska State Capitol, Room 115
Juneau, Alaska 99801-1182

Dear Senator Wielechowski,

This letter supplements ADEC's response to your question posed at the Committee's January 25, 2008 hearing on HB 149. You inquired regarding monetary penalties that ADEC may seek for violations of APDES permits.

Violations of APDES permits issued by ADEC will be subject to the same statutory penalties as most other violations of ADEC's laws and permits. Those penalties are spelled out in AS 46.03.760(e). That statute gives the court broad discretion in what penalty to assess, but does establish both minimum and maximum boundaries. The statute makes the violator liable "for a sum to be assessed by the court of not less than $500 nor more than $100,000 for the initial violation, nor more than $10,000 for each day after that on which the violation continues." The statute then goes on to list the factors that guide the court's penalty assessment. *See* AS 46.03.760(e)(1)-(5).

These statutory penalty amounts exceed what is required under federal law for a state to assume the permit program. Under the governing regulation, a state need only have the authority to recover penalties of $5,000 per day for each violation. *See* 40 CRF § 123.27(a)(3)(i).

If we can answer any other questions regarding this important bill, we would be happy to do so. We look forward to another opportunity to appear before the Committee in support of HB 149. Thank you for your attention to this bill.

Sincerely,

Larry Hartig
Commissioner

cc: The Honorable Hollis French
The Honorable Charlie Huggins
The Honorable Lesil McGuire
The Honorable Gene Therriault
Kirsten Waid, Senate Secretary

# STATE OF ALASKA

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**DEPT. OF ENVIRONMENTAL CONSERVATION**
**OFFICE OF THE COMMISSIONER**

January 15, 2008

The Honorable Hollis French
Chairman, Senate Judiciary Committee
State Capitol, Room 211
Juneau, AK 99811

Dear Senator French:

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

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

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

I have enclosed several documents for your information as you consider this important piece of legislation, including Governor Palin's transmittal letter and a copy of the Department's Annual Report to the Legislature on the status of the primacy effort. If you require further information, please contact me or Linda Hay, DEC's Legislative Liaison, at 465-5290.

Sincerely,

Larry Hartig
Commissioner

Enclosures

# STATE OF ALASKA

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**DEPT. OF ENVIRONMENTAL CONSERVATION**
OFFICE OF THE COMMISSIONER

April 13, 2007

The Honorable Hollis French
Chairman, Senate Judiciary Committee
State Capitol, Room 211
Juneau, AK 99811

Dear Senator French:

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

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

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

I have enclosed several documents for your information as you consider this important piece of legislation, including Governor Palin's transmittal letter and a copy of the Department's Annual Report to the Legislature on the status of the primacy effort. If you require further information, please contact me or Linda Hay, DEC's Legislative Liaison, at 465-5290.

Sincerely,

Larry Hartig
Commissioner

Enclosures

# STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION**
**OFFICE OF THE COMMISSIONER**

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January 15, 2008

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

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

Dear President Green and Speaker Harris:

This letter serves as the Department of Environmental Conservation's (DEC) third annual report to the legislature on efforts to obtain state primacy for the National Pollutant Discharge Elimination System (NPDES) wastewater discharge program and to inform you of a state statutory impediment to program approval by the Environmental Protection Agency (EPA).

**Background**

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

> REPORT TO THE LEGISLATURE. Until full authority for administering the National Pollutant Discharge Elimination System has been transferred to the Department of Environmental Conservation, the Department of Environmental Conservation shall submit, within 10 days after the date the Legislature convenes in regular session, a report to both houses of the Legislature and the governor that includes the following information:
>
> (1) the department's progress in preparing and submitting its application to the United States Environmental Protection Agency by June 30, 2006;
>
> (2) a description of the progress by the United States Environmental Protection Agency in reviewing the state's application and the expected or actual date and contents of the agency's approval; and
>
> (3) the progress made by the Department of Environmental Conservation and the United States Environmental Protection Agency during the five-year National

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

**Primacy Application Status**

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

The Work Group's members are listed at the DEC website at: http://www.dec.state.ak.us/water/npdes/work_group.htm, along with agendas, meeting summaries, and other documents germane to the Work Group process. All Work Group meetings have been publicly noticed and open to the public with a specific allocation of time on the agenda for public comment.

Section 5 of SB 110 provided legislative direction to the Department to submit the NPDES primacy application to EPA before July 1, 2006. In meeting that deadline, the Department adopted program regulations on June 28, 2006 and submitted a primacy application to EPA on June 29, 2006. EPA reviewed the application and provided extensive comments in October 2006. Despite EPA's previous reviews of both the statutory and regulatory language, EPA's review of the final June 2006 application included several comments that required changes to the statutes, regulations, and program application documents.

The Department revised the NPDES program regulations at 18 AAC 83 based on comments received from EPA. The Department public noticed the revisions to the regulations in April 2007 and adopted the revised regulations in October 2007.

EPA and Department staff met several times to discuss and clarify EPA's October 2006 comments. The Department addressed all EPA comments and made necessary revisions to the NPDES application components. The Department submitted a draft NPDES application to EPA on October 15, 2007.

**Impediments to Primacy**

To address a small number of statutory shortcomings identified by EPA, HB 149 and SB 91 were introduced during the 1st session of the 25th Legislature. HB 149 passed out of the House and was transmitted to the Senate where it currently awaits a hearing in the Senate Judiciary Committee. The technical adjustments to the statutes made by HB 149 and SB 91 are a prerequisite to completing a final application and program approval.

There are currently no financial or other impediments to obtaining NPDES primacy.

**Next Steps**
EPA is scheduled to provide comments on the draft application by January 15, 2008. With passage of the essential legislation described previously, the Department plans to resubmit a final NPDES application to EPA in May 2008.

Once EPA determines that the application is complete and meets all federal requirements for a state-run NPDES program, they will initiate a public review and consultation process. The Department expects that EPA can complete this process and issue program approval by the end of 2008.

**Program Capacity Development**
Concurrent with developing the NPDES primacy application, the Department has successfully implemented several components of its capacity building plan to ensure the Department has the staffing and training to implement the NPDES program when authority is transferred from EPA. Staffing for the program is intact. Staff have received classroom training and are assuming increasing responsibility for program functions such as drafting permits for EPA and conducting joint inspections with EPA of NPDES-permitted facilities.

**Status of Related Court Action**
As noted in the 2006 and 2007 Reports to the Legislature, the Department has been tracking the outcome of the case proceedings in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005) in which the United States Ninth Circuit Court of Appeals reversed EPA's decision to grant NPDES primacy to the State of Arizona. In this case, the plaintiffs alleged that EPA had failed to consider, pursuant to the Endangered Species Act (ESA), the possible harm that could be caused to habitat and wildlife by Arizona's assumption of primacy. The Ninth Circuit Court reversed and remanded the primacy-granting decision to EPA with instructions to weigh Arizona's application under the ESA. EPA petitioned the United States Supreme Court to review the case, and in June 2007 the Supreme Court reversed the Ninth Circuit's ruling stating that EPA does not have to conduct an ESA consultation when considering approval of a state's NPDES program. 127 S. Ct. 2518.

The Department looks forward to continuing to work with you on legislation that will ensure the State has full authority to implement the NPDES program as required for primacy. We are prepared to answer any questions you may have about our progress.

Sincerely,

Larry Hartig
Commissioner

cc: Russ Kelley, Legislative Director, Senate Liaison, Office of the Governor
Heather Brakes, Legislative Director, House Liaison, Office of the Governor
Kirsten Waid, Senate Secretary
Suzi Lowell, House Chief Clerk

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**STATE OF ALASKA**
**OFFICE OF THE GOVERNOR**
**JUNEAU**

February 20, 2007

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

Dear Speaker Harris:

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

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

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

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

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

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

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

Sincerely,

Sarah Palin
Governor

## Sectional Analysis of CSHB 149(RES)

Sec. 1.

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

Sec. 2.

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

Sec. 3.

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

Sec. 4.

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

Sec. 5.

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

Secs. 6 & 7.

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

Sec. 8.

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

Sec. 9.

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

# Department of Environmental Conservation
## NPDES Primacy
## Who is regulated by the NPDES program?

### Background

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

A point source is defined as any confined and discrete conveyance including but not limited to a pipe, ditch, channel, tunnel, or conduit that discharges pollutants.

### Number of NPDES Permits

NPDES Permit Statistics for Alaska

| | Major Facilities^ | Minor Facilities | Total Number of Facilities |
|---|---|---|---|
| Authorizations under 13 General Permits* | 27 | 2,105 | 2,132 |
| Individual Permits | 44 | 111 | 155 |
| Total | 71 | 2,216 | 2,287 |
| | | | |
| Unpermitted Facilities** | 0 | 64 | 64 |

*A general permit covers a category of similar discharges within a geographical area. Applicants are granted authorization to discharge under the general permit.

**Mostly rural small domestic sewage discharges.

^A municipal system that discharges more than 1 million gallons per day, a discharge from an industry on the EPA Industry Ranking Sheet, or a facility that has a pretreatment program

### Examples of Major Facilities with NPDES Wastewater Permits

- Pogo Mine
- Trident Seafoods Corp.
- Healy Power Plant
- Conoco Philips Kuparuk Seawater Treatment Plant
- Alyeska Pipeline Valdez Marine Terminal ballast water treatment plant
- Anchorage Asplund Wastewater Treatment Facility (Pt. Woronzof)
- Unisea Inc.

## Who is regulated by the NPDES program?

### Examples of Minor Facilities with NPDES Wastewater Permits

- small suction dredge miners
- stormwater runoff from general construction activities
- Ketchikan Pulp Company landfill leachate
- East Port Frederick log transfer facility
- North Pole Wastewater Treatment Plant
- BP North Slope Oil & Gas Exploration (Liberty 1, Deadhorse)
- Snettisham Salmon Hatchery
- Port of Anchorage Marine Terminal Facility

## NPDES Permits

**Under federal regulations, any state permit program must be as stringent as EPA's program in order for EPA to approve it. That means that the state must require permits for the same operations as does EPA. Stated another way, Alaska cannot exempt from permit coverage anyone who needs a federal permit now.**

**Federal law does provide some exclusions from the NPDES permit requirement. Most of these are found in 40 CFR 122.3. For example, discharges of fill material don't need an NPDES permit because they are permitted by the Corps of Engineers under a separate section of the Clean Water Act. Another exclusion is for discharges of sewage into publicly owned treatment works (POTWs).**

**There is no exclusion from the NPDES permit requirement for discharges of sewage into surface waters, whether fresh or marine. Subsurface septic systems don't trigger the permit requirement because they don't discharge to surface waters. Any Alaskan home-owner with a surface water outfall is required to get permit coverage from EPA, either under a General Permit or an Individual Permit. The Clean Water Act simply does not recognize a *de minimus* doctrine that might excuse such residential discharges from the permit requirement.**

**Should ADEC's permit program be approved by EPA, the only change will be that ADEC, rather than EPA, will be the agency issuing the permits. No-one will have to get a permit from ADEC who doesn't already have to get one from EPA. Hopefully, ADEC will be able to issue such permits more expeditiously, and with greater understanding of local conditions, than has EPA.**

## NPDES Program Approval Criteria

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

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

**Department of Environmental Conservation**
**Division of Water**
**Wastewater Program Capacity**
**April 2007**

## I. CURRENT CAPACITY

### TRAINING

- 39 DEC staff attended EPA's Basic Inspector Training Course (April 2006)
- 35 DEC staff attended EPA's NPDES Permit Writers' Course (May 2006)
- 41 DEC staff attended EPA's Water Quality Standards Academy (February 2007)
- 2 DEC staff attended EPA's annual Advanced Inspector Training Course (February 2007 Denver, CO)

### RECRUITMENT

DEC has filled 10 of the 14 new NPDES positions - 7 permit and compliance staff and 3 program development staff.

### INTERPERSONAL AGREEMENTS AND JOB SHADOWING

- EPA Region 8 – IPA located in Anchorage for one year (November 2006 – November 2007)
  - Developed Reasonable Potential Analysis guidance for staff
  - Review and comment on portions of NPDES application
  - Review and interpret federal regulations
  - Inspection Report writing training for staff (pending)

- WA Department of Ecology – loaner staff located in Anchorage for 2.5 months (summer 2006)
  - Accompanied staff on inspections of construction sites for compliance with stormwater construction general permit
  - Guidance on inspection report writing

- WI Department of Natural Resources – loaner staff located in Fairbanks for 6 months (winter/spring 2006 / 2007)
  - Drafting Inspection Guidance for staff
  - NPDES permit writing training

- MN Pollution Control Agency – loaner staff located in Anchorage for 11.5 months (February 2007 – February 2008)
  - Advice/direction to develop compliance and enforcement standard operating procedures

- Job shadow opportunities (November 2006)
  - WA Department of Ecology – One DEC staff job shadowed at the WA DOE for 2 weeks in the stormwater program conducting and documenting inspections

and technologies in use. Presented "training/results" to Water Division staff upon return.
- Future job shadow opportunities in compliance and enforcement at WA DOE are being planned.

**PERMITTING DURING FY 06**

For EPA-issued NPDES Permits -- DEC issued:

- 401 certifications for 100% of EPA-issued NPDES individual permits (9)
- 401 certifications for 100% of EPA-issued NPDES general permits (5)
- 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

Where EPA has not issued NPDES permits - DEC issued State permits:

- 18 state individual permits
- 62 state general permit authorizations

**COMPLIANCE ACTIVITIES DURING FY 06**

DEC reviews DMR's for major dischargers and dischargers that only have a state permit; and reviews quarterly and annual reports from dischargers (i.e. seafood processors, log transfer facilities and mines).

DEC inspected:

- 40 NPDES-permitted facilities and 3 log transfer facilities
- 22 state-permitted facilities
- 7 non-permitted wastewater facilities
- 3 citizens' complaints
- 2 non-permitted stormwater construction sites
- 3 NPDES-permitted stormwater sites

## II. CAPACITY BUILDING

ADEC provided a second draft of a Capacity Building Plan to EPA for review and comment in October 2006. EPA provided comments on the Plan in January 2007. DEC is currently revising the document based on comments received. Although the Capacity Building Plan is not final, ADEC has accomplished many initiatives detailed in the Plan.

**WORK SHARE AGREEMENT and PARTNERSHIPS**

DEC is actively involved in drafting NPDES permits for EPA's review and input via two work share agreements negotiated with EPA:

- Log Transfer Facility General Permits (2)
  - DEC drafted permits and suppc ting documents for EPA review
  - Issuance pending early fall 2007

- Seafood Processors General Permit
  - DEC partnered with EPA to co-draft the permit documents for EPA review
  - Issuance pending summer 2007

In addition, DEC identified several NPDES permits in the Capacity Plan that DEC could take the lead on to draft the permit documents. EPA commented on DEC's permit candidates and has offered a few additions, along with an invitation for DEC permit writers to work directly with Region 10 permit writers on assigned permits.

**INSPECTOR CREDENTIALS**

DEC has agreed that identified staff will complete the required training necessary to receive the EPA Inspector Credentials and will continue to conduct NPDES inspections on behalf of EPA until full primacy is obtained.

- 7 staff will complete required training and receive EPA Inspector Credentials by June 30, 2007.
- On December 28, 2006, DEC transmitted a spreadsheet for tracking the required training to EPA for review and comment. EPA has not provided comments or feedback.

**DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC)**
**National Pollutant Discharge Elimination System (NPDES) Program**

Senate Bill 110 authorized the state, in August 2005, to submit an application to the U.S. Environmental Protection Agency (EPA) for primacy of the NPDES wastewater discharge permitting and compliance programs under the federal Clean Water Act. In accordance with the bill, DEC submitted an NPDES Program application to EPA on June 29, 2006. EPA provided comments on the application, and DEC is currently working with EPA to address the comments and revise the application accordingly.

DEC and EPA negotiated a schedule for the EPA decision on the state's NPDES Program application. The projected dates are subject to change and may fluctuate to allow DEC and EPA time to resolve outstanding issues or address public comments received on the NPDES application.

| | |
|---|---|
| July 2, 2007 | DEC submits revised draft NPDES Program application to EPA for review. |
| September 4, 2007 | EPA provides comments on revised draft NPDES Program application. |
| November 1, 2007 | DEC submits final NPDES Program application to EPA. |
| November 1, 2007 - March 31, 2008 | EPA reviews and makes final NPDES Program application decision<br>- EPA makes application completeness determination<br>- EPA consults with Tribes<br>- EPA public notices application and provides for a comment period<br>- EPA and DEC respond to public comments<br>- DEC revises application if necessary<br>- EPA makes final program approval determination |
| March 31, 2008 – March 31, 2011 | NPDES authority transfers to DEC over 3 years. Alaska will implement the program as the Alaska Pollutant Discharge Elimination System (APDES) Program.<br>**(See Transfer Schedule)** |
| March 31, 2011 | DEC completes phase in of the NPDES Program. |

*For more information contact Sharon Morgan at 907-465-5530 or http://www.dec.state.ak.us/water/npdes/npdes.htm*
*April 2007*

**DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

**Alaska Pollutant Discharge Elimination System (APDES) Program**

**Transfer Schedule**
**NPDES Permitting and**
**Compliance / Enforcement Programs**

DEC's NPDES application establishes a schedule for EPA to transfer permit/compliance responsibility for the NPDES Program to DEC over three years once EPA approves the application. The state's approved program will be called the Alaska Pollutant Discharge Elimination System (APDES) Program.

The projected dates to transfer responsibility to DEC assume that EPA will approve DEC's application by March 2008.

| | |
|---|---|
| **Phase I:**<br>At program approval<br>Projected: March 31, 2008 | Domestic discharges<br>Timber harvesting, log storage and transfer facilities<br>Seafood processing facilities<br>Hatcheries |
| **Phase II:**<br>1 year from program approval<br>Projected: March 31, 2009 | Federal facilities – Domestic plants at DOD and USCG facilities / cooling water<br>Stormwater<br>Pretreatment program<br>Miscellaneous non domestic discharges |
| **Phase III:**<br>2 years from program approval<br>Projected: March 31, 2010 | Mining |
| **Phase IV:**<br>3 years from program approval<br>Projected: March 31, 2011 | Oil and gas industry<br>Cooling water intakes<br>Munitions |

*For more information contact Sharon Morgan at 907-465-5530 or http://www.dec.state.ak.us/water/npdes/npdes.htm*
*April 2007*

# NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PRIMACY WORKGROUP REPORT

February 24, 2005

FINAL

## WORKGROUP MEMBERS

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## EXECUTIVE SUMMARY

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

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

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

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

## I. INTRODUCTION

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

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

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

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

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

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

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

## II. CHARACTERISTICS OF AN ALASKA NPDES PERMITTING PROGRAM

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

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

## Permit Application Process

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

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

## Permit Limits and Monitoring Requirements

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

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

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