

ALASKA LEGISLATURE COMMITTEE FILES 2007-2008 SJUD 12584

- 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 9<sup>th</sup> 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 9<sup>th</sup> 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 9<sup>th</sup> 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 9<sup>th</sup> 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 withdrawal 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.

**NPDES Primacy Workgroup Report  
February 2005**

**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.

# STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION  
DIVISION OF WATER  
DIRECTOR'S OFFICE**

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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.

**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 these 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](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:

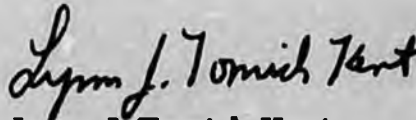
- Clean Water Act Section 401 certifications for 100% of EPA-issued NPDES individual permits (9 permits)
- Clean Water Act Section 401 certifications for 100% of EPA-issued NPDES general permits (5 permits)
- 15 authorizations under the TAPS linewide NPDES general permit
- 87 authorizations under the 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

# STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION  
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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.

**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?**

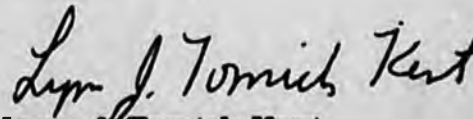
NPDES primacy will not increase the state's exposure to lawsuits under the Clean Water Act. In general, the Eleventh Amendment to the U.S. Constitution prohibits federal courts from hearing lawsuits brought by private citizens against states. Nothing in the citizen suit provision of the Clean Water Act 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

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

## **What NPDES Primacy Means to Alaska**

- **One water permitting agency instead of two.**
- **State, instead of federal management of surface water quality.**
- **A faster permitting process. Major permits issued in 8 months instead of 31 months.**
- **Millions of dollars in cost savings in permitting major new projects.**
- **Permits that truly reflect Alaska's priorities and unique conditions.**
- **Less emphasis on cumbersome process and more emphasis on results.**
- **Permits that produce a better environmental result.**
- **A vastly improved appeals process that is timelier, conducted by Alaskans, and less apt to stall projects needlessly and indefinitely.**
- **Judicial proceedings that are decided by Alaska courts instead of outside federal courts.**
- **Accountability in permitting – to Alaska's elected officials and the Alaskan public.**
- **Fewer errors or omissions in permitting.**
- **Broader permit coverage and fewer discharges operating without permits.**
- **Robust public notification and participation opportunity.**
- **State control over water quality priorities.**
- **A stable, risk-based, and predictable enforcement regime.**

**Department of Environmental Conservation  
NPDES Primacy  
Overview and Status - February 2007**

## **Background**

Section 402 of the Clean Water Act (CWA) requires that all discharges to surface waters be permitted under the National Pollutant Discharge Elimination System (NPDES) permit program.

The CWA intends for states to implement (to have "primacy" for) the NPDES program with the Environmental Protection Agency (EPA) acting in an oversight role.

Forty-five states have primacy for the NPDES program. The four other states, aside from Alaska, that do not have NPDES primacy are Idaho, New Mexico, New Hampshire and Massachusetts.

EPA is the NPDES authority in Alaska. DEC plays a secondary role "certifying" that EPA permits meet state water quality standards and issuing state permits for very small discharges that EPA cannot get to.

In 2005, the Alaska legislature (SB 110) directed DEC to take all actions necessary to assume the NPDES discharge permitting authority including responsibility for issuing and monitoring compliance with the permits.

## **NPDES Program Components**

There are six components to the NPDES permit program. The State intends to assume responsibility for the first five.

1. *NPDES Permitting* which amounts to developing, issuing, modifying and renewing the permits.
2. *Stormwater Program* which consists of permitting stormwater discharges from construction and industrial activities as well as permitting the stormwater collected and discharged by large municipal storm sewer systems.
3. *Compliance and Enforcement* which includes monitoring compliance with permit terms and conditions and taking enforcement action when necessary.
4. *Federal Facilities* which involves permitting of discharges from federally-owned facilities, such as Department of Defense installations.
5. *Pre-treatment Program* which consists of regulating highly toxic discharges into sewerage systems.
6. *Biosolids Management Program* which regulates the disposal of sewage treatment byproducts, or "sludge."

**Department of Environmental Conservation**  
**NPDES Primacy**  
**Overview and Status - February 2007**

The Biosolids component is a small component of the NPDES program in Alaska. States have the option whether to assume primacy for this part of the program.

### **NPDES Primacy Application**

The application to assume NPDES primacy includes:

1. A *letter from the Governor* requesting approval of the state's application;
2. 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;
3. An *Attorney General statement* of legal authority that confirms the state's laws and regulations are sufficient to implement the NPDES program;
4. A signed *Memorandum of Agreement (MOA)* between the state and EPA that establishes timeframes for the state to assume authority for the program components over a five-year period; and
5. A *compliance assurance agreement* developed between the State and EPA that describes the methods the State will employ to assure that permittees comply with the terms and conditions of their permits.

### **Application Status**

DEC submitted the NPDES primacy application to EPA by July 1, 2006, as directed by the legislature.

EPA provided an extensive list of comments on the application on October 31, 2006. It was not until EPA reviewed the Department's full application submission that they identified several statutory shortcomings that must be corrected in order to demonstrate that the Department has the necessary authority to implement the NPDES program. Legislative action on these statutory amendments is being pursued during the current legislative session (HB 149 and SB 91).

DEC is also making revisions to the program description, Attorney General's statement, MOA, and regulations in response to EPA comments.

DEC intends to submit a revised application to EPA this summer, and anticipates EPA program approval by the end of the calendar year.

**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<br>- March 31, 2008 | EPA reviews and makes final NPDES Program application decision <ul style="list-style-type: none"> <li>- EPA makes application completeness determination</li> <li>- EPA consults with Tribes</li> <li>- EPA public notices application and provides for a comment period</li> <li>- EPA and DEC respond to public comments</li> <li>- DEC revises application if necessary</li> <li>- EPA makes final program approval determination</li> </ul> |
| March 31, 2008 –<br>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><b>(See Transfer Schedule)</b>  |
| March 31, 2011                       | DEC completes phase in of the NPDES Program.  |

**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.

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

**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 supporting 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  
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<br>Facilities <sup>^</sup> | Minor<br>Facilities | Total Number<br>of Facilities |
|--|----------------------------------|---------------------|-------------------------------|
| Authorizations<br>under 13 General<br>Permits* | 27                               | 2,105               | 2,132                         |
| Individual Permits                             | 44                               | 111                 | 155                           |
| Total  | 71                               | 2,216               | 2,287                         |
|  |                                  |                     |                               |
| Unpermitted<br>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.

<sup>^</sup>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.

**Department of Environmental Conservation  
NPDES Primacy  
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

# STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION  
OFFICE OF THE COMMISSIONER

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July 18, 2007

U.S. Environmental Protection Agency  
Environmental Appeals Board (1103B)  
Attn: Clerk of the Board Eurika Durr  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

Re: OCS Appeal No. 07-01  
In re: Shell Offshore, Inc. Kulluk Drilling Unit and Frontier Discoverer Drilling Unit,  
OCS Permit Nos. R10OCS-AK-07-01 and R10OCS-AK-07-02

Dear Ms. Durr:

This letter expresses our agency's support for the Environmental Appeals Board's (EAB) expedited consideration of the North Slope Borough's petition for review of the above-referenced permits.

The Alaska Department of Environmental Conservation has responsibility for protection of Alaska's environment. As the EAB schedules the appeal process, we ask that you consider the following.

From our perspective, the process employed by the U.S. Environmental Protection Agency (EPA) in developing the permits included good opportunity to identify and consider issues of concern. In fact, EPA considered and responded to a number of issues raised by our department and others. Because some of the issues raised in the appeal are now familiar as a result of their being raised earlier, the parties should be prepared to articulate their positions without the need for extensive additional preparations.

We confirm the significant constraints, costs and complexity of planning and undertaking an operation of this sort in an area as remote as the Beaufort Sea, and that small delays could well result in the loss of an entire field season. If the permit is upheld, expedited review of the appeal could preserve the potential that drilling can proceed this season.

July 18, 2007

We see no reason to dispute Shell Offshore, Inc.'s statements it will incur significant economic harm if this drilling season is lost and that an expedited review schedule could lessen the potential for needless impacts.

We would not be urging expedited review in this matter if we believed it would compromise the fairness or thoroughness of your review. We respect the EAB appeal process and the need for your careful consideration of every appeal. We are not attempting to argue the merits of the appeal. Thank you for considering our views.

Sincerely



Larry Hartig  
Commissioner

cc: Christopher Winter, Crag Law Center, Attorneys for the North Slope Borough  
Elin Miller, Regional Administrator, Region 10, EPA

**State environment official assists Shell with federal plea****Drilling: DEC commissioner's letter to EPA requests expedited permits for Dutch oil giant.**

By WESLEY LOY

wloy@adn.com

*(Published: July 26, 2007)*

When Dutch oil giant Shell ran into problems recently securing federal air pollution permits needed to launch its controversial offshore drilling campaign this summer, the company went to the state's top pollution regulator for help.

Larry Hartig, commissioner of the Alaska Department of Environmental Conservation, obliged with a letter last week to the U.S. Environmental Protection Agency asking for a hurry-up on Shell's permits, saying the company "will incur significant economic harm if this drilling season is lost."

The letter seems to indicate the state is aligned with industry on the drilling, which the North Slope Borough, environmental groups and Native whalers are opposing.

DEC spokeswoman Lynda Giguere confirmed that Shell requested the letter, but stressed it was written by the commissioner's office, not Shell.

And the DEC "did not intend to, nor did it, express any position on the merits of the case," Giguere wrote in an e-mail to the newspaper. The concern is the time pressure Shell faces, she said.

In early June, the EPA issued air pollution permits for two drilling ships Shell aims to use this summer to drill exploratory wells in the Beaufort Sea.

The borough challenged those permits, so they're on hold. The borough and other opponents also are fighting Shell on other fronts including federal court, where they recently won a ruling temporarily suspending the Beaufort Sea drilling program.

The challengers say Shell and the government haven't done enough to prevent noisy drilling rigs, icebreakers and other industry activity from driving away migratory bowhead whales, potentially ruining Native subsistence hunts. They're also concerned about oil spills in icy waters.

**URGING A DECISION**

Shell hasn't started drilling yet. The company is rallying an armada of assets including the two giant drilling platforms and at least a dozen support vessels.

But the company's work window is limited, as sea ice likely will move across the Beaufort come fall, ending the drilling season. If Shell can't overcome the court's stay and can't win the EPA permits, its drilling program might have to be scratched for this year — a costly delay.

The air pollution permit issue is now pending before the EPA's Environmental Appeals Board in Washington, D.C. In his July 18 letter, Hartig asks the board for "expedited consideration" of the borough's appeal, saying that "small delays could well result in the loss of an entire field season."

Shell spokesman Curtis Smith said the company had no comment on the letter.

North Slope Borough representatives also did not respond to requests for comment Wednesday.

#### SHELL DRAFTED SAMPLE LETTER

Giguere provided documents showing how the DEC commissioner's letter came to be written.

On July 5, Kyle Parker, a partner in the law firm Patton Boggs, e-mailed Hartig a draft letter to the EPA appeals board. "Please consider whether you might be in a position to submit something along these lines," Parker wrote. "Based on our contacts at the agency, we think such an expression of support from the state would be helpful not only at the EAB, but also in moving the EPA forward with its own motion in support of expedited consideration." Parker is a former Alaska assistant attorney general in the oil, gas and mining section.

The letter Hartig ultimately sent is very different from the one Shell suggested.

His letter omits Parker's suggested language that the EPA "acted appropriately" in issuing Shell the permits and that the permits "are fully protective of air resources" off the Alaska coast.

Instead, Hartig's letter notes the EPA's process for awarding the air permits "included good opportunity to identify and consider issues of concern."

Hartig says "expedited review of the appeal could preserve the potential that drilling can proceed this season" if the permit is upheld.

His letter concludes: "We are not attempting to argue the merits of the appeal."

Tony Brown, a spokesman in EPA's Seattle office, which covers Alaska, said he didn't know Wednesday whether the Environmental Appeals Board had made a decision on speeding up the case.

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E-mail Wesley Loy at [wloy@adn.com](mailto:wloy@adn.com) or call 257-4590.

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#### Shell's Alaska oil play

- Shell hopes to start drilling exploratory wells in Beaufort Sea this summer using two drill ships plus a dozen support boats.
- Company plans more Alaska exploration in 2008 and 2009.
- Drilling campaign is on court-ordered hold until at least Aug. 14 because of challenges from North Slope Borough, environmental groups, Native whalers.



[Back](#)



## Red Dog state's top waste rock producer



The EPA's Toxic Release Inventory for 2006 shows Red Dog Mine released more than 390 million pounds of waste rock, about half of all the waste rock reported in the state. (KTUU-TV)

by Rebecca Palsha  
Monday, Feb. 25, 2008

ANCHORAGE, Alaska -- The largest zinc mine in the world tops the list of all toxic producers in Alaska, according to the Environmental Protection Agency.

While the state Department of Environmental Conservation may be expected to cry foul, the department says the federal pollution report is misleading and no cause for concern.



James Kulas, the environmental superintendent for the mine (Kyle Staider/KTUU-TV)

The EPA's Toxic Release Inventory for 2006 shows Red Dog Mine released more than 390 million pounds of waste rock, about half of all the waste rock reported in the state.

But a top company official says there is more to the story.

James Kulas, the environmental superintendent for the mine, flew into Anchorage from the Kotzebue mine to explain why Red Dog is the largest producer of waste rock in the state.

"The rock is moved from where we're mining to and then stockpiled on our site in regulated and permitted stockpiles," Kulas said.



Because the stockpiles have lead or zinc in them it must be reported. It's then listed as waste rock. (KTUU-TV)

Because the stockpiles have lead or zinc in them it must be reported. It's then listed as waste rock.

"My fears are that it is taken out of context and people are misconstruing the reality," Kulas said. "The reality is that mining, applied to TRI, makes us the largest reporter and this is not pollution."

The DEC backs the mine up.



DEC Prevention and Emergency Response Manager Leslie Pearson (Kyle Staider/KTUU-TV)

"There's no red flags that come up about this information itself," said DEC Prevention and Emergency Response Manager Leslie Pearson. "It's unfortunate that mining does not look good based on this."

The department says Alaska is ranked number one in the country for waste rock because the state is a major player for mining.

Officials say Red Dog accounts for about half of the 665 million pounds of waste rock released two years ago.

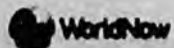
picture."

"This data is so easy to take out of context and that's the biggest concern," Pearson said. "It's just one little piece of a really big

Kulas says about .05 percent of the mine's bi-products could be considered waste.

He says the company uses methanol to keep its wells from freezing, as well as pollution from smoke stacks.

Contact Rebecca Palsha at [rpalsha@ktuu.com](mailto:rpalsha@ktuu.com)



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## COURT NARROWS REACH OF ENDANGERED SPECIES ACT

On June 25, 2007, the United States Supreme Court announced a decision, *National Association of Home Builders v. Defenders of Wildlife*, that clarified how the Endangered Species Act (ESA) applies to federal actions under other laws.

The *Defenders of Wildlife* case involved the actions of the Environmental Protection Agency (EPA) in approving Arizona's application for primacy of the federal wastewater permitting program (NPDES permits). Opponents of Arizona primacy attempted to use the ESA to stop EPA's approval of the Arizona program. Although the Ninth Circuit Court of Appeals sided with the challengers, the U.S. Supreme Court found that the Ninth Circuit misread the ESA and, consequently, reversed the appellate court.

The decision is a victory for Alaska, which had a significant stake in the case due to the fact that the state's NPDES primacy application is currently pending with EPA.

For advocates of ESA reform, the *Defenders of Wildlife* decision is welcome relief. In a 1978 decision, *TVA v. Hill*, construction of the Tellico Dam was embroiled in litigation concerning the impact of the dam impoundment on the snail darter. By the time the TVA case reached the Supreme Court, the dam was nearly complete. The Court, in one of the strongest environmental opinions in its history, set the stage for future interpretations of the ESA by stating that the ESA "admits of no exceptions" and requires a court to enjoin actions that would jeopardize the continued existence of a species, regardless of economic consequences.

In *Defenders of Wildlife*, EPA initiated ESA consultation with the U.S. Fish & Wildlife Service (FWS) to determine whether the transfer of primacy to Arizona would result in any adverse impacts on ESA listed species. FWS expressed concerns over the potential direct and indirect impacts to certain upland species from future development

in areas that would ultimately be served by Arizona-issued NPDES permits. EPA concluded that it did not have authority to disapprove a transfer based on any considerations other than the nine criteria listed in the Clean Water Act (CWA) governing EPA's approval of primacy applications. EPA concluded that Arizona had met each of the nine CWA criteria, approved the transfer of the permitting program to the state, and concluded the ESA consultation.

The plaintiffs sought review in the Ninth Circuit, arguing that the ESA effectively imposed an additional criterion on the transfer of NPDES permitting program authority, and that the federal duty to avoid jeopardy through consultation must be satisfied before the transfer could be lawfully approved. The Ninth Circuit concluded that the obligation imposed on federal agencies under the ESA to avoid jeopardy and adverse modification of critical habitat "is an obligation in addition to those created by the agencies' own governing statute."

The U.S. Supreme Court was presented with two competing statutory mandates - the duty to avoid jeopardy to listed species and designated critical habitat under the ESA, and the duty of EPA to approve the transfer of the NPDES permitting program under the CWA to a state upon satisfaction of the nine specified criteria. In reconciling the two statutory schemes, the Court considered whether the ESA essentially acts as an independent source of authority irrespective of the non-discretionary mandate imposed on EPA under the CWA. In a 5-4 decision, the Court held that Section 7 of the ESA applies only to

discretionary federal actions, and thus does not impose an additional statutory criterion on EPA when it is carrying out mandatory obligations.

As a result of the Court's holding, it is now clear that Section 7 applies only to actions exhibiting the requisite discretionary federal involvement or control. Future litigation will focus on clarifying discretionary federal actions from those that are mandatory.

In terms of direct impacts from the decision, Alaska has already benefited insofar as the path to obtaining approval of NPDES permitting primacy has one less hurdle to cross. Moreover, federal agencies make decisions every day affecting resource development projects in Alaska. The *Defenders of Wildlife* decision should ultimately result in a narrower set of circumstances under which the ESA will impact federal actions.

Land access (e.g., rights provided by statute or easements), federal water rights, and other actions compelled by statute come to mind as situations where federal agencies may have nondiscretionary obligations that would not be impacted by the requirements of ESA consultation. On other fronts, the case will be cited for the proposition that the ESA does, in fact, have limits.

ESA critical habitat issues are looming for Alaska on a variety of fronts, and it remains to be seen whether the lower courts will find support in *Defenders of Wildlife* to narrow federal agencies' obligations on critical habitat and other ESA fronts.

*Eric Fjelstad is an attorney with Perkins Cole LLP. He is a member of the RDC Board of Directors.*

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**ALASKA POLLUTANT DISCHARGE ELIMINATION  
SYSTEM**

**Public Participation in the APDES Permitting  
Process**

**Send your comments on this document to:  
[Sharon.Morgan@Alaska.gov](mailto:Sharon.Morgan@Alaska.gov) or call 907- 465-5530**



**WORKING DRAFT  
February 12, 2008**

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## **1.0 Introduction**

The mission of the Alaska Department of Environmental Conservation (DEC) is to protect the environment and human health. Protecting the quality of Alaska's waters is a key part of that mission. At the core of DEC's efforts to protect water quality are the State water quality standard regulations (18 AAC 70). Those regulations establish standards of quality based on protecting the State's waters for designated beneficial uses, such as supporting aquatic life. They also include provisions for applying the standards. Any permit authorizing a discharge to Alaska waters must result in compliance with the State water quality standards regardless of whether the U.S. Environmental Protection Agency (EPA) or DEC is issuing the permit.

While the water quality standards establish the limits of allowable water quality change, permit actions require decisions about how the standards are applied. For example, the implementing provisions of the water quality standard regulations require decisions about the extent to which water quality can be degraded from high quality natural conditions under the State antidegradation policy, whether to provide for mixing of an effluent with receiving waters, and whether standards should be modified to reflect conditions specific to a site. An intended and expected result of the State of Alaska assuming primacy for the National Pollutant Discharge Elimination System (NPDES) permitting program is sound permitting decisions based on a complete understanding of local conditions.

***Enhance access.*** As the State's environmental permitting authority, DEC intends to rely on input from the local residents, Tribes, governments and other organizations to inform its permit decisions. It is a goal inherent in DEC's efforts that the Alaska Pollutant Discharge Elimination System (APDES) program enhance public access to permit information and process in order to produce better permits and better compliance with permit terms and conditions.

***Equal protection.*** An equally important objective of the State APDES permit development and administration process is to provide equal access and protections across the State despite geographic, cultural and socioeconomic characteristics of affected individuals or populations. The APDES program will strive to provide an equal voice despite differences in the ability of persons to engage agency staff and decision makers, and difficulties associated with communications over distances and across cultures. Translators and facilitators with expertise in cross-cultural communications may be used where needed to overcome communication challenges.

***Efficiency.*** At the same time, the APDES permit issuance process must be efficient in how it informs the public, and in how it collects, considers and responds to input. An efficient permit issuance system is one that is capable of clear and open communication with interested public members and organizations about a project and its permit(s) while maintaining a schedule for timely permit development and issuance. The process also should engage the interested public in a thoughtful and effective manner so as to be accessible and informative, but not a burden. An anticipated byproduct of these efforts is a high degree of public confidence in DEC and the permits it issues and enforces.

The EPA, as the current NPDES permitting authority for Alaska, is obliged to coordinate and to consult with affected federally-recognized Tribes on its permitting actions in Alaska pursuant to

**Presidential Executive Order 13175 (November 6, 2000).** EPA views *coordination* as ensuring that Tribal governments are aware of EPA actions that might impact them, and affording Tribes the opportunity to alert EPA offices and officials that they wish to be consulted early in the permitting process. EPA considers the *consultation* process as one of meaningful and timely two-way exchange with Tribal officials, open sharing of information, full expression of Tribal and EPA views, and respect for Tribal self-government and sovereignty.

When the State implements the APDES program, Tribes retain the government-to-government relationship they have with EPA which assumes responsibility for overseeing the State's implementation of the program. As one aspect of its oversight role, EPA retains authority to approve or disapprove of State actions, including authority to object to any permits proposed for issuance by DEC that do not meet the requirements of the CWA. DEC may not issue a permit in the face of an EPA objection until the objection has been addressed and resolved. Through their government-to-government relationship with EPA, Alaska's Tribes can ask EPA for assistance to address their concerns.

At the same time, the State APDES public participation process extends State coordination efforts and consultation opportunities to Tribal governments. The State APDES program provides opportunities for Tribes to share traditional knowledge, information about subsistence use, and Tribal concerns about potential permits with DEC.

***Overarching programs.*** Many larger projects, especially those that involve new development and that invoke federal permitting or funding decisions, trigger broader environmental reviews that consider the range of potential project impacts on the environment, human health, and certain species and their habitats. In these cases, impacts on water quality, and the NPDES or APDES permits intended to address those impacts, often comprise a subset of considerations under the broader review. Rules that expand and integrate environmental reviews include federal laws, such as the National Environmental Policy Act (NEPA), the Endangered Species Act, and the Magnuson-Stevens Fishery Conservation and Management Act, along with State rules under the Alaska Coastal Management Program (ACMP) and the Alaska Department of Natural Resource's programs for coordinating large mine development projects under AS 27.05.010(b) and other types of large projects under State of Alaska Executive Order 106. These broader environmental reviews often include early public education and outreach and create opportunities to engage with the public on water quality matters. DEC will strive to integrate its APDES public communication efforts into the public participation processes undertaken as part of NEPA, ACMP and other overarching reviews, and to take full advantage of the early public communication and engagement opportunities they offer to consider water quality and wastewater discharge permitting issues.

***Feedback, assessment and continuing improvement process.*** A key aspect of DEC's public engagement efforts will be a continuing improvement process based on soliciting feedback from the public on the agency's efforts, using that feedback to assess the efficacy of measures used to inform and engage the public, and adapting agency approaches based on the public's view of what works best. The objective is a public engagement process that evolves in response to public need. DEC will develop and employ a formal process for soliciting and capturing feedback during and after key permitting efforts. Feedback will be compiled, analyzed and made available in report form. Reports will include lessons learned and recommendations for improving future efforts.

**Recordkeeping.** DEC will document public and agency communications and record, particularly, key public concerns and how those concerns were considered. Documentation of public interest will be included as part of the official permit record, along with agency responses, actions, decisions, and supporting information. DEC will maintain an official record of each permitting action and make those records readily available to the public via internet posting.

**Training.** Training for DEC staff, other agency staff, and the public in effective permit-centered communications will be another key element of the APDES public communications program. DEC will employ both in-house and external communications experts to train agency staff and interested others in effective communication techniques. A basic level of communications training will be mandatory for all DEC permitting staff. Supplemental training opportunities will be offered as well. In addition to training agency staff, DEC will sponsor training for other State and federal agencies and the public that participate or are interested in APDES permit communications. DEC also envisions creating training tools, such as recordings of training sessions, which can be used as a reference outside of live training sessions.

**Applicability of this plan.** In general, the Supplemental Communication Tools described in the document will apply to the permitting process for individual and general permits, but not to the approval of a notice of intent (NOI) for an individual facility to operate under a general permit. However, DEC reserves the flexibility to invoke a public process for approval of NOI's for facilities that generate significant public concern.

**Early notification of APDES actions.** It is often the case that the most effective time for public outreach is early in the permitting process -- before or during the process of drafting a permit. Engaging others early on improves the odds for identifying and addressing issues and formulating solutions that may or may not need to be accounted for in a permit and the agency's decision on the permit. In particular, early collection of traditional knowledge, subsistence information, and other information important to residents and local or Tribal governments will allow DEC to address them during permit drafting. In designing communication processes, DEC will be mindful of the advantages of communicating with the public and interested organizations early in the permit process.

DEC seeks to be proactive in the APDES permitting process. A Permit Issuance Plan (PIP) will be posted on the DEC website and updated biannually. The PIP is a list of all permits proposed to be issued or reissued during a calendar year. The PIP will be mailed to the local and Tribal government contacts and to any interested party upon request.

The Alaska statutes and the APDES regulations provide minimum standards for public participation opportunities. DEC has broad authorities, however, to supplement its communication efforts beyond the legal minimums. This guidance document summarizes the legal minimums for public notification and comment opportunity. It then goes on to describe additional discretionary tools available to the agency for supplementing the legal minimums in order to optimize opportunities for effective participation in the permit decision making process.

## 2.0 Basic Public Process

The basic process providing for public participation on an APDES permit (either individual or general permit) is primarily contained in 18 AAC 83.120 and begins once a draft permit has been prepared. Each step in the required process is described below.

***Preliminary draft permit.*** Prior to formal public notice of a draft APDES permit, DEC regulations require that DEC post a preliminary draft permit on its website in conjunction with the permit applicant's 10 day review of such permit, unless the review period is waived in part or in whole by the applicant. 18 AAC 83.115(f). While this review is primarily intended for the permittee to review and discuss the preliminary draft permit with DEC, it also gives the public an early opportunity for review of the developing draft permit.

***Draft permit.*** Notice that a draft permit is available for public review and comment is provided by a combination of mailings to agencies, local governments and mail lists, newspaper advertisements, online public notice web posting, and other manners constituting legal notice. The public notice initiates a minimum 30-day public review and comment period. 18 AAC 83.120(b). The public notice and draft permit must be mailed to, among others, certain listed State and federal agencies, as well as to any affected Indian Tribe. 18 AAC 83.120(c)(1)(C) and 18 AAC 83.120(g). Individuals who specifically request to be kept on a list of persons to receive information on the permit must also be mailed a copy of the notice. 18 AAC 83.120(c)(1)(F). Any unit of local government having jurisdiction over the area within which the facility or proposed facility is to be located must also be mailed a copy of the public notice. 18 AAC 83.120(c)(1)(G). The permit application and a fact sheet describing the terms of the permit are also made available during the public comment period. DEC may schedule one or more public hearings on the draft permit if there is significant public interest, to describe the permitting decision, or for other good reason. 18 AAC 83.120(l).

***Proposed final permit.*** After the close of the minimum 30-day public comment period, DEC considers information provided by the public, prepares a document summarizing the public comments received on the draft permit, and may make changes to the draft permit. The resulting proposed final permit is made available to the applicant for a five-day review, unless the review period is waived in part or in whole by the applicant. 18 AAC 83.120(m). At the same time, DEC posts the proposed final permit and supporting documentation on the DEC web page where it is available to the public.

***Final permit.*** Following the close of the five-day review of the proposed final permit, DEC will prepare a final permit for issuance. The final permit, response to comments, revised fact sheet, and associated permit documents will be posted on the DEC web page.

***Accommodations for persons with disabilities.*** Under state Administrative Order 129, the State complies with the Americans with Disability Act (42 U.S.C. 12101 - 12213). All public notices associated with permits include a notice that a person with a disability can request and receive special accommodation to participate in the permit process.

### **3.0 Supplemental Public Processes**

DEC has broad authority to communicate with others in the course of conducting agency business.<sup>1</sup> As part of its APDES efforts, the agency is committed to exercising this authority to accomplish its objectives of better permits and parity in water quality protection across the State. This section describes the situations where the agency will supplement its public participation efforts and the tools available for that purpose.

Additional public outreach is typically most appropriate for proposed projects that raise significant local concerns or which are complex or controversial. Some circumstances that may warrant additional public outreach on permitting matters include:

- large, complex projects with multiple permitted discharges;
- projects that are locally or regionally important or controversial;
- projects that raise recreational or subsistence resource and use concerns;
- projects that are proximal to sensitive or protected resources or areas; and
- projects that may involve the use of new or complex technologies.

In deciding whether to supplement permit communications, the primary consideration will be the degree of interest expressed by the public, Tribal organizations, non-governmental organizations, and local and regional governments. DEC will also consider the views of the applicant and other state and federal agencies. In all its communications, DEC will strive to communicate factually and clearly. By planning ahead, the agency will also strive to schedule communication processes so that they do not adversely affect permit development schedules. At the same time, it will attempt to schedule proposed actions and opportunities for public involvement to reasonably accommodate seasonal patterns in Alaska's lifestyles and livelihoods.

### **4.0 Supplemental Communication Tools**

This guidance describes additional discretionary outreach the agency may wish to undertake with interested persons, including Tribes and municipalities, with respect to proposed APDES applications and permits that may raise significant local concerns or are complex or controversial.

DEC has at its disposal several tools that the agency may use individually or in combination to supplement required permit communications. In some cases, supplemental communications may rely on invoking a single supplemental activity such as holding workshops during the draft permit comment period. In other cases, DEC may combine a number of supplemental efforts and regulatory

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<sup>1</sup> For example, Alaska Statute 46.03.020 provides that DEC may, in its discretion, "(3) consult with and cooperate with (A) officials and representatives of any nonprofit corporation or organization in the state; (B) persons, organizations, and groups, public and private, using, served by, interested in, or concerned with the environment of the state . . ." Further, DEC may "undertake studies, inquiries, surveys, or analyses it may consider essential to the accomplishment of the purposes of the department; these activities may be carried out by the personnel of the department or in cooperation with public or private agencies, including educational, civic, and research organizations, colleges, universities, institutes, and foundations." AS 46.03.020(5).

requirements into a project *Permit Communication Plan*. Supplemental communication tools available to the agency are described below.

***Project Liaisons.*** DEC may appoint "project liaisons" or "navigators" to help in achieving agency goals of early communication with local residents and organizations, to provide for continuity in communications with the agency, and, ultimately, to gather meaningful information. These positions are assigned personal professional responsibility for anticipating public communication needs, and designing and implementing effective participatory processes. Responsibilities of these positions include efforts such as maintaining lists of persons and organizations interested in being apprised of developments, maintaining contact with interested persons and organizations through face-to-face meetings, informing persons and organizations of status and progress, fostering the flow of information to and from agency permitting staff and the applicant, serving as an accessible agency point of contact, and arranging for meetings, conference calls and other forums to enhance communications.

***Pre-application public workshops.*** Pre-application public workshops are held before a permit application is submitted. The workshops typically involve the voluntary participation of the permit applicant and serve three broad purposes: 1) to orient the public and interested organizations to the project, its potential impacts, and efforts to address or mitigate impacts; 2) to introduce the applicant and agency permitting staff to specific local resource uses, sensitivities, and concerns (including subsistence and recreational activities and resources); and 3) to provide information about the permitting process and timeline. Pre-application public workshops may include discussion of plans for, or results of baseline monitoring efforts.

Pre-application public workshops may be held by DEC or may be held as part of broader, coordinated interagency efforts, such as those conducted as part of a National Environmental Policy Act (NEPA) process or an Alaska Department of Natural Resources (DNR) Large Project Team process. The number of workshops can range from a single workshop to a series of workshops in one or more locations depending on the situation.

The means the agency uses to notify the public of workshops is driven by a judgment as to what will be the most effective way to reach interested individuals and parties. Notification typically consists of some combination of: individual notification via mailings, e-mail or telephone calls, advertisements in local or regional publications, and public service announcements. In more rural settings, DEC staff should consider working with local government and residents to spread the word by whatever means is typical for the community, such as bulletin board postings or local government announcements.

***Post-application public workshops.*** DEC may also hold public workshops after a permit application has been received. Post-application public workshops serve the same purposes as the pre-application public workshops. They may be held before the official public comment period on a draft permit, or, more typically, during the official public comment period. When held during the comment period, workshops may be held in conjunction with public hearings where the workshops often immediately precede the hearings. While the primary purpose of a public hearing is to allow the public an opportunity to respond to a draft permit, workshops provide for a two-way flow of information from DEC to the public about the project and permit(s), as well as from the public to DEC.

Notice of post-application public workshops held in conjunction with public hearings is typically provided along with the official hearing notice. The means the agency uses to notify the public of workshops that are not held in conjunction with hearings will be the same as outlined for pre-application public workshops.

**Public hearings.** Permit development regulations provide DEC with discretion to hold public hearings during the public comment period on draft permits. Hearings can provide a more convenient means for the public to comment to the agency on a permit. They also afford an opportunity for members of the public to hear from other members and organizations.

In accordance with regulations governing public hearings on APDES permits, DEC will hold one or more public hearings whenever the Department finds, based on requests, a significant degree of public interest in a draft permit; a hearing might serve to clarify issues; or there is other good reason. As a general rule, formal public hearings alone may not be the most effective means of informing the public or providing for clear exchange of information. Hearings are often most effective when they follow other efforts to inform the public.

**Supplemental notice and information.** The APDES regulations include both prescribed and optional methods for notifying the public of the availability of draft APDES permits. Prescribed methods include a combination of mailings, publishing notices in newspapers, and methods constituting legal notice. Under the same regulations, however, DEC has authority to provide notice "by any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or use of any other form or media to elicit public participation." 18 AAC 83.120(c)(4).

As mentioned earlier, DEC staff will strive to identify and employ the most effective ways to notify interested individuals and parties of permit actions and other matters. Notification will typically consist of some combination of: individual notification via mailings, e-mail or telephone calls; advertisements in local or regional publications; and public service announcements. In more rural settings, DEC staff should consider working with local government and residents to spread the word by whatever means is typical for the community, such as bulletin board postings or local government announcements.

For larger or more controversial projects, DEC will compile lists of interested individuals and parties. The agency's experience suggests that maintaining lists of e-mail addresses for interested parties and organizations and communicating via e-mail is an effective and efficient means of keeping the public informed. DEC will also use the internet to make information available to the public. Major permits under development may warrant their own web page with links from other DEC or agency web pages.

As part of notifying interested persons and organizations, DEC will seek to distribute or make available pertinent information about permits and projects. Documents, data, and developments thought to be of interest may be forwarded directly to interested parties, or their availability may be announced to interested parties with instructions for obtaining the information, such as downloading them from a DEC web page. Supplemental information distributed or made available to interested parties may include materials such as special analyses and reports on particular issues or topics; plans, data, analyses, and reports generated by baseline monitoring programs; and project and permitting schedules.

For large projects where permit development occurs under a DNR Large Project Team format, DEC will strive to integrate effective notification and information efforts into an overall coordinated effort.

***Local and Tribal government coordination.*** DEC will make reasonable efforts to inform and seek participation from local and federally-recognized Tribal governments that may be affected by a proposed activity under the APDES Program. This will be accomplished by providing early in the permit process notice of a forthcoming permit proceeding. That advance notice will be provided by mail, e-mail, telephone, or a combination thereof depending on what is deemed most effective and efficient, as early as reasonably practicable following an applicant's notice to DEC. As part of the advance notice coordination step, DEC will seek to learn the extent to which municipal and Tribal government officials are interested in being apprised of the permit process, and preferences for how best to work with them, including whether consultation is desired (see below). In addition to procedural matters, initial coordination efforts will focus on early identification of local interests and general concerns.

***Local and Tribal government consultation.*** Consultation with local State-chartered and federally-recognized Tribal governments is typically organized and led by a project liaison and can be organized as a single discussion with representatives of the local or Tribal government or a series of discussions prior to providing formal public notice of a draft permit. Consultation may be either face-to-face or by telephone depending on cost, staff availability, and other practical considerations. The consultation process is intended to provide for a meaningful and timely dialog with local and Tribal officials with open sharing of information, the full expression of local and state views, a commitment to consider local views in decision-making, and respect for local authority and knowledge. Summaries of consultations will be entered into the permit record including DEC responses to substantive concerns.

***Extended public comment periods.*** While regulations require a minimum 30-day public comment period on draft permits, DEC has the discretion to provide for longer public comment periods, to extend comment periods before the comment deadline passes, and to provide for supplemental comment periods after an original comment deadline passes. In most instances when the public participation process includes one or more public hearings, DEC will specify a minimum 45-day comment period. The minimum 45 days provide for public notice to be issued 30 days before the public hearing as required by regulation, but also give the public some time after the hearing to formulate comments in light of testimony presented at the hearing.

DEC will also typically specify a minimum 45-day comment period when permits are for large, complex and controversial facilities. The agency will extend comment deadlines or provide supplemental public comment opportunities when there is significant public sentiment that the initial time allotted was insufficient for reasons unknown to, or unforeseen by, DEC when it initially established the schedule. At the same time, DEC will weigh the benefits of longer public comment periods against impacts of project and permit schedules.

***Permit communication plans.*** As mentioned previously, DEC may develop Permit Communication Plans that integrate those communications required as a matter of law with any single supplemental communication tool or combination of tools into a single overall plan for engaging the public on a permit matter. Permit Communication Plans are typically used for large, complex, and controversial

projects, but may be developed for any permit project where it would help interested persons and organizations understand ahead of time the breadth and sequence of all opportunities to learn about, discuss, and comment on a permitting project.

## **5.0 Other Permit Actions: Modify, Revoke and Reissue, or Terminate**

In addition to issuing APDES permits, the Department may take other permit actions to modify, revoke and reissue, or terminate permits. These actions may also include a public participation process.

**Modify.** The Department may modify an active permit for specific reasons. The Department will follow the same public involvement procedures used for new permits when it modifies an existing permit, with the exception of a minor modification defined at 18 AAC 83.145. The minor modification provision is tightly restricted to a very narrow range of truly minor changes and does not include a process for public notification or comment. When the Department modifies a permit under the provisions of 18 AAC 83.135, Tribes and other interested parties will have the opportunity to review the preliminary draft, draft, and proposed final permit modifications and request a meeting, workshop, or public hearing with the Department. 18 AAC 83.115 and 18 AAC 83.120. The proposed modifications will be available for a minimum 30-day public review and comment period. All other provisions of the existing permit remain in effect for the term of the permit and are not subject to the public review process. 18 AAC 83.130(f).

**Revoke and Reissue.** Under certain circumstances, the Department may revoke and reissue a permit. When re-issuing a permit, the Department will follow the same public participation procedures as for a new permit, including invoking any of the supplemental communication tools described previously.

**Terminate.** The Department may also terminate a permit before the end of its term at its own instance or at the request of a permittee. 18 AAC 83.140. If the permittee objects to permit termination, the Department will prepare a notice of intent to terminate that is subject to the same public review procedures as permit issuance. 18 AAC 83.130(i). Tribes and other interested parties will have the opportunity to review the preliminary draft, draft, and proposed final notice of intent to terminate and request a meeting, workshop, or public hearing with the Department. The notice of intent will be available for a minimum 30-day public review and comment period. 18 AAC 83.115 and 18 AAC 83.120.

## **6.0 Appeals**

The public also has access to permit appeals processes. Final agency permitting decisions can be appealed by the permittee or members of the public, including local and Tribal governments. Members of the public may request informal review by the Director as set out at 18 AAC 15.185 or file a request for a formal adjudicatory hearing under 18 AAC 15.200. A person requesting either informal review or a formal hearing must show that he is "directly and adversely affected" by the Department's decision in order to have standing to challenge the decision. Ultimately, a party who

remains dissatisfied with the Department's decision after informal and/or formal agency review may seek judicial review of final agency permitting decisions through the court system.

## **7.0 Additional Ways to Stay Informed**

***Permit Issuance Plan.*** The Department will prepare an annual Permit Issuance Plan that identifies the permits the Department proposes to issue during the upcoming year. The Permit Issuance Plan will be posted on the Department's web page and notification sent via the electronic mailing list that the Plan is available for review. This process will allow Tribes and the public advance notice of a permit that is proposed to be issued or reissued in an area of their concern and the opportunity to contact the Department to discuss the project or schedule a meeting.

**Cindy Smith**

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**From:** Sen. Hollis French  
**Sent:** Monday, February 11, 2008 8:56 AM  
**To:** Jon Bolling  
**Subject:** RE: HB 149

Dear Mr Bolling,  
Thanks for writing. I'll make certain that your letter of support gets into the bill file.  
Yours truly,  
Hollis French

-----Original Message-----

**From:** Jon Bolling [mailto:jbolling@aptalaska.net]  
**Sent:** Friday, February 08, 2008 3:22 PM  
**To:** Sen. Hollis French  
**Cc:** Shelly Wright; Rep. Beth Kerttula; Rep. Andrea Doll; Sen. Kim Elton  
**Subject:** HB 149

Dear Senator French:

I write to you on behalf of Southeast Conference in support of HB 149.

As you know, the bill completes some technical changes to Alaska Statutes that will assist the State of Alaska in meeting federal program requirements for primacy in permitting certain discharges of water. The bill follows legislation adopted in recent years intended to accomplish the same goal.

The Southeast Conference supported the state's initial efforts to secure permitting primacy several years ago. The Conference continues to support efforts to achieve this goal. Doing so will allow communities and businesses to interact with directly with State regulators on water discharge issues around Alaska. We believe this permitting format will likely prove more responsive than the alternative. This issue is one that affects nearly every municipality in Alaska, as most municipalities must obtain a permit as part of the operation of municipal wastewater treatment plants.

The Conference encourages the Judiciary Committee to pass HB 149 out of committee. If you have any questions, feel free to contact me anytime. Thank you for considering my comments.

Sincerely,

Jon Bolling  
Southeast Conference President  
jbolling@aptalaska.net  
907-401-0393