

Response to Comments
Alaska Pollutant Discharge Elimination System
Program Revision Approval
U.S. Environmental Protection Agency, Region 10
August 2011

On October 31, 2008, the Regional Administrator for the U.S. Environmental Protection Agency, Region 10 (EPA), approved the application by the State of Alaska to administer the Alaska version of the National Pollutant Discharge Elimination System (NPDES) program, pursuant to section 402 of the Clean Water Act. The approved state program, called the Alaska Pollutant Discharge Elimination System (APDES), includes an implementation plan that transfers the administration of specific NPDES program components from the EPA to the Alaska Department of Environmental Conservation (ADEC) in four phases. In accordance with the EPA's original 2008 approval, the transfer of the four phases was planned to occur over a three year period from the date of program approval. Phases I-III have been transferred from the EPA to ADEC. Transfer of the final phase, Phase IV, was originally scheduled for October 31, 2011.

By letter dated March 14, 2011, ADEC proposed an extension of the Phase IV transfer for one year, or until October 31, 2012. ADEC also submitted a modified APDES program description and a modified Memorandum of Agreement (MOA) related to the proposed APDES program revision. The program description and MOA were modified to incorporate the proposed one year extension of the Phase IV transfer.

The APDES program description provides a narrative description of the scope, structure, coverage, and processes of the APDES program including a description of the ADEC organization and staffing and administrative procedures for the issuance of permits and administrative or judicial procedures for their review. The only changes proposed by ADEC to the program description related to a one year extension for the transfer of the Phase IV program component and to update the Phase IV permit list.

The EPA determined that ADEC's request for a one year extension of the transfer date for Phase IV was a non-substantial program revision. The EPA proceeded with a discretionary public participation process as part of its review of the APDES program revision. This process included the publication of a Federal Register notice, two newspaper notices, and a large mailing to interested persons and entities, announcing a 45 day public comment period (May 13-June 27, 2011) to receive input. The EPA sought consultation with tribal governments regarding the proposed extension and held three telephone conference calls (April 26, 27 and 28, 2011) for interested tribes. The EPA staff provided verbal responses to tribal representatives' questions and comments during the conference calls. The EPA also held a discretionary public hearing in Anchorage on June 13, 2011.

The EPA received written and public hearing comments during this discretionary public participation process. The EPA is not obligated to prepare a formal response to comments for a program revision under 40 C.F.R. § 123.62. However, the EPA believes a summary of the significant comments and the EPA's responses to comments is an important final step in that public participation process. This document constitutes the EPA's responsiveness summary to significant comments.

Alaska Oil and Gas Association. The Alaska Oil and Gas Association (AOGA) presented testimony at the EPA's June 13 hearing and submitted written comments during the public comment period. AOGA's testimony and written comments were similar in content. Accordingly, the following responses address both AOGA's testimony and written comments.

Comment 1 – Phase Extension

AOGA supports a one year extension in the transfer of Phase IV to ADEC. AOGA indicated that the additional time would allow EPA and ADEC to complete work on several permits that would otherwise be delayed if Phase IV transferred to ADEC on October 31, 2011. AOGA also indicated that the additional time would allow ADEC to increase staffing levels and provide adequate training so that ADEC is better prepared for Phase IV and to process permits once the transfer occurs. However, AOGA does not support a time extension for any greater length of time because of concerns that further delays would cause confusion and potentially longer delays in permit issuances with possibility of severely delayed or abandoned oil and gas projects.

Response to Comment 1

EPA acknowledges AOGA's support for the one year extension. ADEC has prepared a capacity building plan for its oil and gas permit work and designated staff persons to a new oil and gas section within the ADEC Division of Water's Wastewater Discharge Authorization Program. ADEC is also recruiting a section manager position for this new oil and gas section. EPA and ADEC are working cooperatively on the Phase IV transition, including EPA's participation in and support for ADEC's capacity building plan. EPA and ADEC are not anticipating an extension of Phase IV program transfer beyond the one year requested by ADEC.

Comment 2 – Permit Issuance Request

AOGA requests that EPA and ADEC work on a schedule to complete and issue four specified NPDES permits prior to the new Phase IV transfer date. The four NPDES permits are the Facilities related to Oil and Gas General Permit (aka North Slope General Permit, AKG330000), the Alyeska Pipeline Marine Terminal individual permit (AK0023248), the Beaufort Sea Exploration General Permit (AKG282100) and the Chukchi Exploration General Permit (AKG288100). AOGA also requested that EPA and ADEC provide regular updates to stakeholders on the agencies' progress on these permits.

Response to Comment 2

EPA and ADEC are working on schedules to issue these four NPDES permits prior to the new Phase IV transfer date. These schedules include public notices and public comment periods for the permits and Section 401 certifications. Stakeholders, including AOGA, are kept apprised of developments on a routine basis, including notices during the applicable public comment periods. Stakeholders may also contact either EPA or ADEC if they have questions about the status of permits or certifications.

Association of Village Council Presidents. The Association of Village Council Presidents (AVCP) submitted a comment letter during EPA's consultation outreach with the tribes. An AVCP representative also participated in one of EPA's tribal conference calls and reiterated the information and comments conveyed in the AVCP's written submittal. Accordingly, the following responses address both AVCP's conference call and written comments.

Comment 3 – Phase IV Extension

AVCP supports the extension of the Phase IV transfer date.

Response to Comment 3

EPA acknowledges receipt of this comment.

Comment 4 – Jurisdiction for Environmental Protection Programs

AVCP stated its belief that tribal governments have the right and responsibility to implement environmental protection laws and that the tribal authority to manage natural and cultural resources is vested with tribal governments regardless of land ownership. AVCP stated that the tribes must have the authority to protect the natural and human environment because the tribe is a government responsible for the health, welfare and economic development of its members. AVCP expressed concern about potential conflicts that could arise between tribes and the State of Alaska within areas of inherent tribal jurisdiction. As a result of this concern, AVCP suggested that EPA consider adopting three stipulations: (1) that until a time when an Alaskan tribal government asserts jurisdiction allowed under the NPDES, such authority will be retained by EPA; (2) that EPA will stipulate that in transferring NPDES program implementation authority to ADEC, EPA is not transferring any jurisdictional authority that could be retained by a federally-recognized tribe; and (3) that EPA's transfer of NPDES program implementation authority to ADEC is not diminishing or restricting any inherent authority of the federally-recognized tribal governments in Alaska.

Response to Comment 4

AVCP's comments are outside the scope of this program revision, which addresses the schedule for the transfer of Phase IV functions to ADEC, but does not otherwise modify the State's APDES authorities. EPA nonetheless notes that its 2008 action under the Clean Water Act approving the APDES program explicitly excluded discharges occurring in Indian country.¹ For discharges in Indian Country, EPA retained permitting authority.² Any tribal authority remains unaffected.

In addition, EPA notes that Section 402(b) of the Clean Water Act requires states to demonstrate adequate authority to meet the criteria of that section. Regarding discharges occurring outside of Indian country, EPA's approval of the APDES program neither expands the State's, nor diminishes any Indian tribe's existing authority. To the extent a state cannot make such a demonstration, EPA would be the appropriate permitting authority.

Comment 5 – Environmental Program Implementation

AVCP stated its belief that tribal governments have the responsibility to implement environmental protection laws including the potential for delegation of federal environmental programs to tribal governments and the authority to implement such programs. AVCP stated that it looked forward to working with EPA on a government-to-government basis to implement the necessary environmental programs necessary to protect its members and tribal communities.

Response to Comment 5

EPA acknowledges receipt of these comments and also refers to the prior EPA response to Comment 4. EPA also acknowledges the working relationship that currently exists with Alaska tribes in EPA's support of the development of elements of a core tribal environmental protection programs and development of tribal capacity to administer environmental programs. EPA Region 10's efforts in this working relationship include assistance to tribes in building the basic infrastructure of a tribal environmental program, such as administrative, technical, communication, education and outreach elements. Like AVCP, EPA is committed to this continuing government-to-government effort so that tribes are positioned to implement the necessary environmental programs necessary to protect their members, communities, and resources.

¹ *National Pollutant Discharge Elimination System, Memorandum of Agreement Between State of Alaska and United States Environmental Protection Agency, Region 10* (October 29, 2008).

http://www.dec.state.ak.us/water/npdes/Final_Application_2008/MOA/MOAOct08FINAL.pdf, pp. 3, 7.

² *Id.* at 10, 21; *EPA Approval Letter* (October 31, 2008),

<http://www.dec.state.ak.us/water/npdes/pdfs/APDES/EPAApprovalLetterAKNPDES10-31-08.pdf>.