

**STATE OF ALASKA'S
ATTORNEY GENERAL'S STATEMENT OF LEGAL AUTHORITY for
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
(NPDES) PROGRAM
[PART I]**

April 25, 2008

(Corrected June 9, 2008)

I hereby certify, pursuant to Section 402(b) of the Federal Water Pollution Control Act, as amended, also referred to as the Clean Water Act (33 U.S.C. §1251 *et seq.*), that in my opinion the laws of the State of Alaska provide adequate authority to carry out the program set forth in the "Program Description" submitted by the Alaska Department of Environmental Conservation (ADEC). The specific authorities provided, which are contained in lawfully adopted State statutes or regulations on the date of this Statement, include the following:

1. Authority to Issue Permits.

a. Existing and new point sources.

State law provides authority to issue permits for the discharge of pollutants by existing and new point sources, including federal facilities, to waters of the United States to the same extent as required under the permit program administered by the U.S. Environmental Protection Agency (EPA) under section 402 of the Clean Water Act, as amended, 33 U.S.C. § 1251 et seq. (hereinafter "CWA" or "the Act").

Federal Authority: CWA §§ 301(a), 402(a)(1), 402(b)(1)(A); 40 CFR 122.21(a.)

State Statutory and Regulatory Authority: AS 44.46.020; AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.900; 18 AAC 83.015.

Remarks of the Attorney General:

The Alaska Legislature has given ADEC broad authority, duties, and powers to be exercised in furtherance of a sweeping statement of state policy. *See* AS 44.46.020 (duties), AS 46.03.020 (powers), and AS 46.03.010 (policy). ADEC is authorized to “adopt regulations...providing for control, prevention and abatement of ...water...pollution.” AS 46.03.020(10). An evaluation of ADEC’s authority to administer a state NPDES permit program must be undertaken in light of ADEC’s broad general authority. Alaskan courts have upheld such broad grants of authority from the legislature to an agency when faced with challenges alleging improper delegation of legislative authority.¹

Alaska statutes give ADEC broad authority to regulate, through permits or other disposal authorizations, the discharge of pollutants into the waters or onto the land of the state. AS 46.03.100(a) prohibits disposal of waste material, or heated water, into state waters or onto state land without prior authorization from ADEC. The term “waters” is defined broadly to include all bodies of surface and underground waters. AS 46.03.900(37).

It is important to recognize that the Alaska Pollutant Discharge Elimination System (APDES) program adopted by ADEC is a subset of the activities covered by AS 46.03.100. That statute not only covers discharges of both solid and liquid waste to land and waters, but also requires that ADEC authorize construction of sewerage systems and treatment works. Because of its breadth, the terminology used in AS 46.03.100 does not always correspond with the terminology used in the federal NPDES program. However, in order to ensure that the state program is equivalent to the federal program, ADEC has largely adopted EPA’s terminology in the regulations that it has adopted for its APDES program. In some instances, discussed below, ADEC has also changed and/or clarified its statutory terms to resolve any question about the scope of its authority.

For example, for purposes of its APDES program, ADEC has made the program applicable to all discharges of pollutants from point sources into waters

¹ *See Boehl v. Sabre Jet Room*, 349 P.2d 585, 588 (Alaska 1960).

of the U.S. *See* 18 AAC 83.005(b). ADEC has adopted a regulatory definition of “waters of the U.S.” that tracks the federal definition. *Compare* 18 AAC 83.990(77) with 40 CFR 122.2. This universe of activities (i.e. discharges into waters of the U.S.) is a subset of those over which ADEC has authority under AS 46.03.100. While the state’s statutory definition of “waters” is different from the federal regulatory definition of “Waters of the U.S.” (for example, the state’s statutory definition does not specifically include “wetlands”), ADEC’s statutory permitting authority extends to both state water and land. Because ADEC has statutory authority over discharges to both water and land, it has the authority to create a ‘blended’ regulatory universe of discharges subject to the APDES program, borrowing for that purpose the federal term “waters of the U.S.”

Another issue of terminology concerns the terms “pollutant” (the federal term), and “waste material” (the state term). Again, while the state’s APDES program uses the same definition of “pollutant” as does EPA (*compare* 18 AAC 83.990(49) with 40 CFR 122.2), the state’s statutes use different terminology, giving ADEC permitting authority over the disposal of “solid or liquid waste material or heated process or cooling water.” AS 46.03.100(a). The statute defines “solid waste” as “garbage, refuse, abandoned, or other discarded solid or semi-solid material, regardless of whether subject to decomposition, originating from any source.”

ADEC has resolved this issue, among others, in its 2008 legislation. ADEC has added AS 46.03.100(m), which provides that for purposes of the APDES program, the term “waste material” includes “pollutants” as defined in the CWA. A third issue of terminology arose from state law’s reference to “disposal” of waste material, while federal law uses the term “discharge.” This issue was also resolved in the 2008 APDES bill, which amended AS 46.03.100(a) by adding the term “discharge.”

In summary, the APDES program covers the same universe of discharges as does the NPDES program, and uses the same terminology. ADEC will use permits, rather than the other forms of authorization listed in AS 46.03.100(b) –

(d), to authorize discharges under the APDES regulations. *See* AS 46.03.100(b) (as amended). ADEC has clarified this in its APDES regulations. *See* 18 AAC 83.015(a).

While state law does not specifically address ADEC’s regulation of federal facilities, the term “person,” for purposes of the requirement to obtain ADEC authorization for any discharge to state land or water, includes “any...government agency.” AS 46.03.900(18). ADEC and the Department of Law have long interpreted this to include agencies of the federal government, and have applied state law accordingly.²

State law does exclude certain kinds of activities from the requirement to obtain prior ADEC authorization. Those exclusions are for: discharge of domestic sewage into a publicly owned treatment works (POTW); discharges into the annular space of oil and gas wells (which are regulated by another state agency, the Alaska Oil and Gas Conservation Commission, or AOGCC); underground injection related to oil and gas production (also regulated by AOGCC); vessel bilge pumping under some circumstances; cooling water discharges from a boat or vessel; and firing of munitions in training activities on active ranges. AS 46.03.100(e).³

The first exclusion covers discharge of domestic sewage into a POTW. AS 46.03.100(e)(1). Federal law includes a parallel exclusion at 40 CFR 122.3(c). The next two exclusions do not involve a discharge to surface water, but rather disposal or injection into wells, regulated by AOGCC. Both exclusions are discussed further below, under the “Disposal Into Wells” section of this statement.

The state’s statutory exclusions for vessel bilge pumping (AS 46.03.100(e)(5)), and for cooling water discharges from a boat or vessel (AS 46.03.100(e)(6)) also have a federal counterpart, at 40 CFR 122.3(a). The

² *See, e.g.*, 1993 Inf. Op. Att’y Gen. (July 8; 663-93-0425). *See also Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 764 (Alaska 1999).

³ State law also includes an “incidental discharge” exclusion, at AS 46.03.100(e)(4), but that exclusion only applies if the activity does not produce a discharge from a point source into a water of the U.S.

discharge of bilge water is “incidental to the normal operation of a vessel,” and so would fall within the scope of the federal exclusion. *See* 33 U.S.C. § 1322(a)(12)(A)(i). The state’s exclusion for the discharge of cooling water appears to fall within the scope of the federal exclusion for “effluent from properly functioning marine engines.” 40 CFR 122.3(a). Discharge of cooling water, like bilge water, is also “incidental to the normal operation of a vessel.” *See* 33 U.S.C. § 1322(a)(12)(A)(i).

The final state exclusion is for the firing of munitions in training activities conducted on active ranges. AS 46.03.100(e)(7). In its 2008 legislation, ADEC has limited the scope of this exclusion so that it does not apply if the discharge of munitions is into waters of the U.S.

Finally, ADEC is not asserting permitting authority over Indian country in Alaska or in Denali National Park and Preserve.

b. Disposal into wells.

State law provides the authority to issue permits to control the disposal of pollutants into wells.

Federal Authority: CWA § 402(b)(1)(D); 40 CFR 123.28).

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.50, AS 46.03.100, AS 46.03.800.

Remarks of the Attorney General:

ADEC has broad authority over the disposal of pollutants into state waters and onto state land. In fact, ADEC’s statutory authority to regulate such disposal through permits or other authorizations does not distinguish between discharges to surface waters and discharges to groundwater. Under AS 46.03.100(a), a person may not dispose of wastes into state waters or onto state land without a permit or authorization from ADEC. The term “waters” is defined to include all “bodies of surface or underground water.” AS 46.03.900(37). Thus, ADEC’s authority over

discharges to the land and to groundwater is just as broad as its authority over discharges to surface water.

ADEC also has the authority to order the abatement of water nuisances, under AS 46.03.800. The term “water nuisance” is defined to include putting an offensive substance into, or otherwise polluting, a well. *Id.* It is a misdemeanor to neglect or refuse to abate the nuisance when ordered to do so by ADEC. AS 46.03.800(b).

As mentioned above, certain kinds of injection activities are excluded from ADEC’s permitting program, and are instead regulated by AOGCC. Specifically, AOGCC regulates the disposal of drilling muds, cuttings, and non-hazardous drilling operation wastes into the annular space of an oil or gas well. AS 31.05.030(e)(2). In permitting annular disposal, AOGCC ensures that “the waste will be confined and will not come to the surface or [with one exception discussed below] contaminate freshwater.” 20 AAC 25.080(b)(3). The only circumstance where AOGCC will allow annular injection into freshwater is where it makes a finding that that water has total dissolved solids content of more than 3,000 mg/l, and is not reasonably expected to supply a public water system. 20 AAC 25.080(e)(1).

AOGCC also regulates the underground disposal of oil-field wastes, having received approval from EPA to implement the Underground Injection Control Program for Class II wells. 20 AAC 25.252, citing 40 CFR 144.6(b). The state’s Class II program was approved by EPA under § 1422 of the Safe Drinking Water Act, 42 U.S.C. § 300h-1. Accordingly, AOGCC’s regulation of these disposal activities satisfies EPA’s requirement under the applicable NPDES regulation. *See* 40 CFR 123.28. AOGCC also ensures that Class II well disposal will not allow movement of such wastes into sources of freshwater. 20 AAC 25.252(b).

2. Authority to Deny Permits in Certain Cases.

State law provides authority to ensure that no permit will be issued in any case where:

- a. The permit would authorize the discharge of a radiological, chemical or biological warfare agent or high-level radioactive waste;
- b. The permit would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation of any waters of the state;
- c. The permit is objected to in writing by the Administrator of EPA, or his designee, pursuant to any right to object provided to the Administrator under Section 402(d) of the CWA;
- d. The permit would authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the CWA;
or
- e. The issuance of the permit would otherwise be inconsistent with the CWA or regulations promulgated thereunder.

(Federal Authority: CWA §§ 301(f), 402(b)(6), 402(d)(2), and 208(e); 40 CFR 122.4, 123.29 and 123.44.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12); AS 46.03.050, AS 46.03.100, AS 46.03.110; 18 AAC 83.015(c).

Remarks of the Attorney General:

ADEC has the authority to deny a permit under the circumstances listed above. While the governing statutes don't explicitly vest ADEC with the authority to deny permits, that authority is implicit in the requirement that someone obtain

ADEC's authorization before disposing of waste materials into state waters. AS 46.03.100(a). If ADEC could not deny a permit, that would frustrate the policies that its statutes are intended to achieve. AS 46.03.010. Under such circumstances, recognizing ADEC's implied power to deny permits is appropriate.⁴

Pursuant to the broad statutory grant of authority discussed in Part I, Sec. 1, and to its implied power to deny permits, ADEC has promulgated regulations, modeled after federal law, that will prohibit issuance of APDES permits under the listed circumstances. *Compare* 18 AAC 83.015(c) *with* 40 CFR 122.4.

3. Authority to Apply Federal Standards and Requirements to Direct Discharges.

a. Effluent standards and limitations and water quality standards.

State law provides authority to apply, in the terms and conditions of issued permits, the applicable federal effluent standards and limitations and water quality standards promulgated or effective under the CWA, including:

- (1) Effluent limitations pursuant to CWA §301;
- (2) Water quality related effluent limitations pursuant to CWA § 302;
- (3) National standards of performance pursuant to CWA § 306;
- (4) Toxic and pretreatment effluent standards pursuant to CWA § 307; and
- (5) Ocean discharge criteria pursuant to CWA § 403.

(Federal Authority: CWA §§ 301(b), 301(e), 302, 303, 304(d), 304(f), 306, 307, 402(b)(1)(A), 403, 208(e), and 510; 40 CFR 122.44.)

⁴ See, e.g., *City of Columbia v. Board of Health*, 355 S.E.2d 536, 538 (So. Car. 1987); *Waste Mgt. of Central Jersey v. State of New Jersey*, 650 A.2d 379, 383 (N.J.App. 1984).

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12); AS 46.03.050, AS 46.03.100, AS 46.03.110; 18 AAC 83.010, 18 AAC 83.430 -.435

Remarks of the Attorney General:

The primary sources of ADEC’s authority are AS 46.03.020(10), giving ADEC authority to adopt regulations to control water pollution, and AS 46.03.020(12), the umbrella authorization to take necessary actions to secure EPA approval of a state NPDES program. AS 46.03.110(d) also authorizes ADEC to “specify in a permit or other authorization the terms and conditions under which waste material or water may be disposed of.” Pursuant to these broad grants of authority, ADEC has promulgated regulations that will ensure that it applies effluent limitations, national standards of performance, toxic and pretreatment standards, and ocean discharge criteria. ADEC has accomplished this through adoption by reference of the applicable federal regulations. *See* 18 AAC 83.010(b) – (h); 18 AAC 83.430. APDES permits will also include water quality based effluent limitations. *See* 18 AAC 83.435.

b. Effluent limitations requirements of Sections 301 and 307 of the CWA.

In the absence of formally promulgated effluent standards and limitations under CWA §§ 301(b) and 307, State law provides authority to apply in the terms and conditions of issued permits effluent limitations to achieve the purposes of these sections of the CWA using the permitting authority’s best professional judgment (BPJ). Such limitations may be based upon an assessment of technology and processes as required under the CWA with respect to individual point sources, and include authority to apply:

- (1) To existing point sources, other than publicly owned treatment works, effluent limitations based on application of the best practicable control technology currently available or the best available technology economically achievable;
- (2) To publicly owned treatment works, effluent limitations based upon the application of secondary treatment; and
- (3) To any point source, as appropriate, effluent standards or prohibitions designed to prohibit the discharge of toxic pollutants in toxic amounts or to require pretreatment of pollutants which interfere with, pass through, or otherwise are incompatible with the operation of publicly owned treatment works.

(Federal Authority: CWA §§ 301, 304(d), 307, 402(a)(1), 402(b)(1)(A); 40 CFR 122.44.)

(State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100; 18 AAC 83.010(c).

Remarks of the Attorney General:

ADEC has incorporated by reference the federal regulations that provide for application of promulgated effluent limitation guidelines and for case-by-case determination of effluent limitations when such guidelines are not available. *See* 18 AAC 83.010(c)(1), adopting by reference 40 CFR 125.1 – 125.3.

ADEC has also incorporated by reference the federal Toxic Pollutant Effluent Standards and Prohibitions. *See* 18 AAC 83.010(d), adopting by reference 40 CFR Part 129, Subpart A. Dischargers must comply with standards and prohibitions for toxic pollutants even if those requirements are not in the APDES permit for that discharger. *See* 18 AAC 83.405(b) (implementing 40 CFR 122.41(a)(1)).⁵ If a new, more stringent toxic pollutant standard or prohibition is

⁵Conversely, compliance with an APDES permit does not constitute compliance with toxic pollutant standards and prohibitions. *Compare* 18 AAC 83.155(a) with 40 CFR 122.5(a).

promulgated after a source is permitted, ADEC will initiate proceedings to modify or to revoke and reissue the permit to include the new requirement. *See* 18 AAC 83.430(a)(2) (implementing 40 CFR 122.44(b)(1)). State regulations, like their federal counterpart, recognize that the need to incorporate a toxic effluent standard or prohibition in an existing permit is a basis for permit modification. *See* 18 AAC 83.135(b)(7) (implementing 40 CFR 122.62(a)(6)).

c. Schedules of compliance.

State law provides authority to set and revise schedules of compliance in issued permits which require the achievement of applicable effluent standards and limitations within the shortest reasonable time consistent with the requirements of the CWA. This includes authority to set interim compliance dates in permits which are enforceable without otherwise showing a violation of an effluent limitation or harm to water quality.

Federal Authority: CWA §§ 301(b), 303(e), 304(b), 306, 307, 402(b)(1)(A), 502(11) and 502(17); 40 CFR 122.47 and 122.62.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100; 18 AAC 70.910, 18 AAC 83.560.

Remarks of the Attorney General:

ADEC is authorized to include compliance schedules in the permits that it issues. Such authority derives from at least two statutes: AS 46.03.020(12), authorizing ADEC to take actions needed to gain EPA's approval of a state NPDES program, and AS 46.03.110(d), giving ADEC authority to include appropriate terms and conditions in the discharge permits that it issues.

ADEC has implemented this authority in 18 AAC 83.560, a regulation that closely tracks its federal counterpart, 40 CFR 122.47(a). ADEC can include compliance schedules in its APDES permits, for purposes of compliance with the Clean Water Act and with the APDES regulations, under circumstances similar to those allowed under federal law. *Id.* These compliance schedules are enforceable like any other permit condition. 18 AAC 83.405(b); AS 46.03.760(a); AS 46.03.765.

ADEC has another regulation that governs compliance schedules for purposes of compliance with water quality standards, 18 AAC 70.910. ADEC promulgated this regulation several years ago, at EPA's suggestion, in order to allow such compliance schedules to be incorporated into federal permits through the state's certification process. For purposes of APDES permits to be issued under 18 AAC 83, the terms of the new and more specific regulation, 18 AAC 83.560, would supersede any contrary provisions of 18 AAC 70.910. The latter regulation would still govern the use of compliance schedules for contexts outside of the APDES program (e.g., state certification of CWA Sec. 404 permits under CWA Sec. 401).

d. Variances.

State law provides authority for the State to review and act upon variances from applicable effluent limitations. To the extent that the State will consider variances, the State provisions are at least as stringent as federal requirements. State law does not allow any variances or adjustments to permit limitations not authorized under federal law.

State Statutory and Regulatory Authority: AS 46.03.020(12), AS 46.03.110(d); 18 AAC 83.365-.375.

Remarks of the Attorney General:

ADEC's APDES regulations provide for variances in several different contexts. 18 AAC 83.365 - .375. These provisions are all modeled on, and consistent with, federal law. This is illustrated in the following table:

Comparison of Federal and State Variances

Type of Variance	Federal Law	State Law
Non-conventional pollutants, based on economic impacts.	CWA § 301(c) 40 CFR § 122.21(m)(2) 40 CFR 124.62(b)(1)	18 AAC 83.365(c)(1), (d) 18 AAC 83.160(b)(1)
Certain non-conv. pollutants based on no water quality impacts.	CWA § 301(g) 40 CFR § 122.21(m)(2) 40 CFR 124.62(e)(2)	18 AAC 83.365(c)(2)&(3), (d) 18 AAC 83.160(e)(2)
Innovative technology.	CWA § 301(k) 40 CFR 124.62(a)(2)	18 AAC 83.160(a)(2)
Delay in POTW construction.	CWA § 301(i)(1)&(2) 40 CFR 124.62(a)(1)	18 AAC 83.160(a)(1)
Thermal.	CWA § 316(a) 40 CFR 122.21(m)(6) 40 CFR 124.62(a)(3)	18 AAC 83.365(g) 18 AAC 83.160(a)(3)
POTW w/ marine discharge.	CWA § 301(h) 40 CFR 122.21(n)(1)	18 AAC 83.370(b)
WQ-based effluent limitations. [for non-POTWs] [for POTWs]	CWA § 302(b)(2) 40 CFR 122.21(m)(5) 40 CFR 122.21(n)(3) 40 CFR 124.62(b)(2)	18 AAC 83.365(f) 18 AAC 83.370(c) 18 AAC 83.160(b)(2)
Fundamentally different factors	CWA § 301(n) 40 CFR 122.21(m)(1) 40 CFR Part 125, Sub. D 40 CFR 124.62(e)(1) & (f)	18 AAC 83.010(c)(3) 18 AAC 83.365(b) 18 AAC 83.160(e)(1) & (f)
Expedited variance procedures	40 CFR 122.21(o)	18 AAC 83.375

Alaska's APDES program does not allow for variances under circumstances where they are not also allowed under federal law. Because ADEC has modeled its variance provisions on the federal counterparts, state law is no less stringent than federal law in this area.

4. Authority to Limit Permit Duration.

State law provides authority to limit the duration of permits to a fixed term not exceeding five years. State law also provides for the automatic continuance of

an expired permit if the permittee files a timely and complete application for a new permit.

(Federal Authority: CWA § 402(b)(1)(B); 40 CFR 122.6, 122.46.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.110(d); 18 AAC 83.020, 18 AAC 83.155(c).

Remarks of the Attorney General:

Alaska statutes provide that a waste disposal permit authorizing disposal of pollutants into state waters “may not be issued for a term in excess of five years from the date of issuance.” AS 46.03.110(d). This statute also authorizes ADEC to prescribe in regulations the circumstances under which an expiring permit may be administratively continued. The APDES regulations provide for the automatic continuance of such permits under the same circumstances and with the same effect as under federal regulations. *Compare* 18 AAC 83.155(c) with 40 CFR 122.6. There is nothing in the state’s Administrative Procedures Act, AS 44.62, or in other state law, to prohibit permit continuance as provided in the APDES regulations.

5. Authority for Entry; Inspection and Sampling; and Applying Monitoring, Recording, and Reporting Requirements to Direct Dischargers.

State law provides authority to:

- a. Require any permit holder or industrial user of a publicly owned treatment work to:
 - (1) Establish and maintain specified records;
 - (2) Make reports;
 - (3) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate, biological monitoring methods);

- (4) Take samples of effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as may be prescribed); and
 - (5) Provide such other information as may reasonably be required.
- b. Enable an authorized representative of the State, upon presentation of such credentials as are necessary, to:
- (1) Have a right of entry to, upon, or through any premises of a permittee, or of an industrial user of a publicly owned treatment works in which premises an effluent source is located or in which any records are maintained;
 - (2) At reasonable times have access to and copy any records required to be maintained;
 - (3) Inspect any monitoring equipment or method which is required; and
 - (4) Have access to and sample any discharge of pollutants to State waters or to publicly owned treatment works resulting from the activities or operations of the permittee or industrial user.

Federal Authority: CWA §§ 304(i)(2)(A) & (B), 308(a), 402(b)(2), and 402(b)(9); 40 CFR 122.41(i) & (j)(1), 122.42(a), 122.44(i), and 122.48.)

State Statutory and Regulatory Authority: AS 46.03.020(10) & (12), AS 46.03.050, AS 46.03.060, AS 46.03.100, AS 46.03.110, AS 46.03.860; 18 AAC 83.405, 18 AAC 83.425, and 18 AAC 83.455.

Remarks of the Attorney General:

Section 402(b)(2) of the Act requires that the state have authority to issue permits that comply with 33 U.S.C. § 1318, and have authority to undertake the kinds of inspection and sampling activities as are outlined in section 1318.

Section 1318 itself covers several different topics: the discharger's record-keeping, reporting, monitoring, and effluent sampling; the regulator's right of entry, inspection, copying and sampling; and the public character of the records, subject to the discharger's claim of trade secrets. The first two categories of issues are discussed below, while the third, concerning public records, is addressed in Part I, Sec. 7 of this statement, at pp. 21-23, *infra*.

a.) Permittee's Obligations:

ADEC has the authority to include in the permits that it issues requirements that the permittee keep records, make reports, monitor, sample effluents, and provide other information that ADEC may require. 33 U.S.C. § 1318(a)(A). AS 46.03.110(d) gives ADEC broad authority to include "terms and conditions" in its permits that are directed to avoiding pollution and otherwise carrying out the policies of AS 46.03.

Under AS 46.03.100(h), ADEC can include in permits monitoring and reporting requirements "authorized by law," as well as those necessary to ascertain compliance with permit limits and water quality standards. The statute as revised in 2008 specifically refers to CWA Sec. 308 as delineating the scope of ADEC's authority.

The 2008 legislation also authorized ADEC to require monitoring, sampling and reporting even outside of a discharge permit. *See* AS 46.03.020(13). ADEC has clarified in its regulations that it may require the owner or operator of a point source to perform monitoring and reporting, for any of the purposes outlined in CWA Sec. 308(a), even outside of the permit conditions themselves. 18 AAC 83.425(d). Any such order would be fully enforceable under AS 46.03.760(e), .765, and .790(a), all of which authorize enforcement of "an order of the department". ADEC has discussed in its program description how it will approach the question of which requirements belong in APDES permits, and which will be imposed instead through orders.

ADEC's APDES regulations further provide that APDES permits will include monitoring and reporting requirements. 18 AAC 83.455. These regulations are modeled on the federal requirements. *See* 40 CFR 122.48 & 40 CFR 122.44(i). Another provision, to be included in all APDES permits, requires representative sampling, record retention, and use of approved test procedures. 18 AAC 83.405(k).

ADEC also has the authority to conduct investigations, in the course of which it can compel the attendance of witnesses and production of documents by means of an administrative subpoena. AS 46.03.020(7). Those subpoenas can be enforced in court through contempt proceedings. AS 44.62.590(b); Alaska Civil Rule 45(g).

b) Regulator's Rights:

ADEC staff has access to premises where effluent sources or records are located, as well as authority to sample effluents, as required by 33 U.S.C. § 1318(a)(B). Under Alaska statutes, ADEC's general right of access to private property is not absolute. Alaska Statute 46.03.020(6) provides that ADEC generally needs the consent of the owner or occupier to enter upon property "to investigate either actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with a regulation" adopted by ADEC. However, the requirement of the consent of the owner or occupier does not explicitly apply to ADEC's right of entry to determine compliance with a permit.

ADEC has broader authority over permitted activities than it has in the absence of a permit. AS 46.03.020(12); AS 46.03.110(d). Acting under this broad authority, ADEC has promulgated regulations that make it a condition of all APDES permits that the permittee give ADEC representatives access to the permitted premises. 18 AAC 83.405(j).⁶ There is no conflict between this

⁶ This is the same approach that ADEC used in its Clean Air Act, Title V permit program. *See* 1998 Inf. Op. Att'y Gen. (May 18, 663-98-0203); 18 AAC 50.345(h).

regulation and AS 46.03.020(6), because the latter statute does not on its face apply to inspections for purposes of permit compliance.

If ADEC suspects that there is an unpermitted discharge, and needs to inspect the premises to ascertain its status, then its entry presumably would be subject to AS 46.03.020(6), because the purpose of the entry would be to ascertain compliance with a regulation, rather than a permit. If the owner or occupier refused ADEC access, or if ADEC determines that it is beneficial to gain access without any advance notice to the discharger, then ADEC can obtain access by an administrative search warrant. AS 46.03.860. Such a warrant allows ADEC to enter any property to ascertain compliance with a regulation adopted under AS 46.03. The use of administrative search warrants to gain access to properties to determine program and permit compliance is consistent with EPA's own practice.⁷

Moreover, the Alaska Supreme Court has followed U.S. Supreme Court and Ninth Circuit Court of Appeals case-law in adopting an "attenuated probable cause" standard for the issuance of administrative search warrants. The Alaska Court describes that standard as follows: "There need be no probable cause to suppose a violation to support a warrant to inspect. All that is required is a showing that reasonable administrative standards for inspection have been established and are met in the inspection in question." *Woods & Rohde, Inc. v. State Dep't of Labor*, 565 P.2d 138, 151-52 n.69 (Alaska 1977) (citation omitted). This is the same standard that governs availability of administrative search warrants under federal law. *See* 1998 Inf. Op. Att'y Gen. at 5-6 (May 18, 663-98-0203).

ADEC can obtain administrative search warrants when the owner denies access. ADEC and the Department of Law have long understood and implemented the administrative warrant provision of AS 46.03.860 as not requiring the land-owner's consent. *See* 1998 Inf. Op. Att'y Gen. at 2 (May 18,

⁷ *See, e.g., Bunker Hill Co. v. EPA*, 658 F.2d 1280, 1282 (9th Cir. 1981); *Matter of Alameda County Assessor's Parcels Nos. 537-801-2-4 and 537-850-9*, (N.D.Ca. 1987). *See also Trustees for Alaska v. EPA*, 749 F.3d 549, 560 (9th Cir. 1984) (noting that CWA section 308 "was not self-enforcing.")

663-98-0203) (“If consent for entry and inspection is denied, a warrant can be obtained under AS 46.03.860.”). This department explained Alaska’s statutory rights of access in considerable detail in response to similar questions raised by EPA in its review of ADEC’s authority for purposes of primacy under Title V of the Clean Air Act. *Id.*⁸ EPA approved Alaska’s Title V program in 2001. 66 FR 38940.

In short, ADEC’s access powers for purposes of inspections are as broad as EPA’s under federal law.

6. Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearings:

State law provides authority to comply with requirements of the CWA and EPA Guidelines for “State Program Submissions”, 40 CFR Part 123 (hereinafter “the Guidelines”) to:

- a. Notify the public, affected States, and appropriate governmental agencies of proposed actions concerning the issuance of permits;
- b. Transmit such documents and data to and from EPA and to other appropriate governmental agencies as may be necessary; and
- c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for permits.

(Federal Authority: Generally: CWA §§ 101(e) and 304(h)(2)(B).

Function 7(a): CWA §§ 402(b)(3) [public notice]; 402(b)(5) [notice to affected states]; 402(b)(6) [notice to Army Corps of Engineers]; 40 CFR 124.6 [tentative permit determinations] 124.10 [public notice], and 124.8 [fact sheet].

Function 7(b): CWA § 402(b)(4) [notice and permit applications to EPA], and 402(b)(6) [notices and fact sheets to Army Corps of Engineers]; 40 CFR 123.42 [receipt and use of Federal data], 123.43 [transmission of data to EPA], 124.10

⁸ See also 61 FR 64463 at 64469-64470 (Dec. 5, 1996)(EPA’s interim approval); and 66 FR 38940 at 38942 (July 26, 2001)(EPA’s final approval).

[notice to other government agencies] and 123.44 [EPA review of and objections to State permits].

Function 7(c): CWA § 402(b)(3) [opportunity for public hearing]; 40 CFR 124.10, 124.11, 124.12, and 124.57 [public hearings].

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.110; 18 AAC 83.115, 18 AAC 83.120.

Remarks of the Attorney General:

The state must give the public notice of each draft permit (40 CFR 124.10(a)(1)(ii)), and also provide an opportunity for a hearing (40 CFR 124.11). Alaska law requires that ADEC do both. AS 46.03.110(b) requires that ADEC give public notice of each application for, or draft of, a waste disposal permit. In the APDES program, ADEC will go to public notice on draft permits. *See* 18 AAC 83.120(a). The required contents of the public notice mirrors federal law. *Compare* 18 AAC 83.120(d)-(f) *with* 40 CFR 124.10 & 124.57. Any interested person (not just the applicant) may request a hearing on the permit, under ADEC regulations. 18 AAC 83.120(h). ADEC must give at least thirty days notice of such a hearing. 18 AAC 83.120(b).

ADEC has committed in the Memorandum of Agreement with EPA to provide EPA a copy of each application for a permit. Similarly, ADEC will send appropriate permit documents to other interested state and federal agencies. 18 AAC 83.120(c). ADEC will also notify any affected Indian tribe. 18 AAC 83.120(c)(1)(C). Other than tribes that may qualify for treatment as a state under CWA Sec. 518(e), 33 U.S.C. § 1377(e), there are no other states “the waters of which may be affected” by a discharge in Alaskan waters. *See* 33 U.S.C. § 1342(b)(3).

The APDES regulations require that ADEC prepare a fact sheet with draft permits under the same circumstances as EPA does. *Compare* 18 AAC 83.115(b) *with* 40 CFR 124.8(a). The contents of the fact sheet also mirror the federal

regulations. *Compare* 18 AAC 83.115(c) *with* 40 CFR 124.8(b) & 124.56. State regulations also require preparation of a response to comments when the final permit is issued, as required by federal law. *Compare* 18 AAC 83.120(o) *with* 40 CFR 124.17.

7. Authority to Provide Public Access to Information.

State law provides authority to make information available to the public, consistent with the requirements of the CWA and 40 CFR Part 123, including the following:

a. The following information is available to the public for inspection and copying:

(1) Any NPDES permit, permit application, or form;

(2) Any public comments, testimony or other documentation concerning a permit application; and

(3) Any information obtained pursuant to any monitoring, recording, reporting, or sampling requirements or as a result of sampling or other investigatory activities of the State.

b. The State may hold confidential any information (except effluent data, permits and permit applications) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person.

(Federal Authority: CWA §§ 304(h)(2)(B), 308(b), 402(b)(2) and 403(j); 40 CFR Part 2 and 122.7.)

State Statutory and Regulatory Authority: AS 40.25.100 - .220; 2 AAC 96, 18 AAC 83.010(a), 18 AAC 83.165.

Remarks of the Attorney General:

The state of Alaska has a very broad public records law, AS 40.25.100 - .220. Essentially all records kept by state agencies are open to the public, unless they fall within a statutory exception. *See generally Kenai v. Kenai Peninsula Newspapers Inc.*, 642 P.2d 1316 (Alaska 1982). The exceptions are listed at AS 40.25.120(a). One of the statutory bases for confidentiality of state records is that the records are “required to be kept confidential by a federal law or regulation.” AS 40.25.120(a)(4). Based on this provision, ADEC can protect as confidential under state law any record that is entitled to confidentiality under federal law. It follows that any records entitled to protection as trade secrets under federal law can also be treated as such by ADEC. Accordingly, state law satisfies 33 U.S.C. § 1318(b).

Conversely, ADEC’s APDES regulations reflect the requirement, under federal law, that certain types of information may not be held as confidential. 18 AAC 83.165(b). The APDES regulations adopt the federal substantive criteria for evaluating claims of confidentiality for business records. *See* 18 AAC 83.010(a) & 18 AAC 83.165(a), adopting by reference 40 CFR 2.208. There are no other provisions of state law that would shield from the public the information that is required to be public under federal law, 40 CFR 122.7.

ADEC can supply any information requested by EPA under 40 CFR 123.41. *See* 18 AAC 83.165(c).

8. Authority to Terminate or Modify Permits:

State law provides authority to terminate or modify permits for cause including, but not limited to, the following:

- a. Violation of any condition of the permit (including, but not limited to, conditions concerning monitoring, entry, and inspection).
- b. Obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; or

- c. Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(Federal Authority: CWA § 402(b)(1)(C); 40 CFR 122.41(f), 122.62 and 122.63.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.120; 18 AAC 83.135 - .145.

Remarks of the Attorney General:

ADEC has the authority to terminate or modify permits for the reasons listed in CWA §402(b)(1)(C). That authority is found at AS 46.03.120(a), as amended in 2005. AS 46.03.120(a) authorizes ADEC to terminate an APDES permit in the following circumstances: for violation of any condition; when the permit was obtained by misrepresentation or failure to fully disclose relevant facts; when there has been a material change in the quantity or type of waste disposed of; or for a change in any condition that requires either a temporary or permanent reduction or elimination of the discharge.

AS 46.03.120(b) governs permit modification, and it provides authority for ADEC to modify a permit for any of the bases listed for termination, and in some other circumstances as well: if there has been a material change in the quality or classification of state waters; and for state APDES permits, for reasons provided in governing regulations. ADEC has adopted regulations that spell out the circumstances under which it can modify APDES permits. Those circumstances closely track the federal counterparts. *Compare* 18 AAC 83.135(b) *with* 40 CFR 122.62(a). ADEC's list of changes that may be processed as minor modifications also closely tracks federal law. *Compare* 18 AAC 83.145 *with* 40 CFR 122.63.

The APDES regulations include one additional provision that is not found in the federal counterpart, covering situations where ADEC is "making a change in a permit provision that will neither result in allowing an actual or potential increase in the discharge of a pollutant or pollutants into the environment nor result in a reduction in monitoring of a permittee's compliance with applicable

statutes and regulations.” See 18 AAC 83.145(a)(6). This provision will ensure that any modifications that the department may approve as minor (e.g., approving the use of a more sensitive analytical methodology for discharge monitoring) are, in fact, minor in nature, and that the state’s program continues to provide a level of protection at least as stringent as the federal program. Thus, 18 AAC 83.145(a)(6) limits the department’s discretion to apply the minor modification process to changes that have no potential for additional deleterious impact on the environment or reduce the ability to confirm a permittee’s compliance with applicable requirements. If a proposed change could not meet these regulatory requirements, the proposed change would be subjected to the draft permit and public notice requirements set forth in 18 AAC 83.115, 18 AAC 83.120, 18 AAC 83.130 and 18 AAC 83.135.

Based on the provisions of AS 46.03.120 as amended, and on the APDES regulations, ADEC has the requisite authority to terminate or modify permits, as set out in Sec. 402(b)(1)(C) of the CWA, 33 U.S.C. 1342(b)(1)(C).

9. Authority to Enforce the Permit and the Permit Program.

State law provides authority to:

- a. Abate violations of:
 - (1) Requirements to obtain permits;
 - (2) Terms and conditions of issued permits;
 - (3) Effluent standards and limitations and water quality standards (including toxic effluent standards and pretreatment standards applicable to dischargers into publicly owned treatment works); and
 - (4) Requirements for recording, reporting, monitoring, entry, inspection, and sampling.
- b. Apply sanctions to enforce violations described in paragraph (a) above, including the following:

- (1) Injunctive relief, without the necessity of a prior revocation of the permit;
 - (2) Civil penalties;
 - (3) Criminal penalties for willful or negligent violations; and
 - (4) Criminal fines against persons who knowingly make any false statement, representation or certification in any forms, notice, report, or other document required by the terms or conditions of any permit or otherwise required by the State as part of a recording, reporting, or monitoring requirement.
- c. Apply maximum civil and criminal penalties and fines which are comparable to the maximum amounts recoverable under Section 309 of the CWA, or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied. Each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be obtained.

(Federal Authority: CWA §§ 402(b)(7), 309, 304(a)(2)(C), 402(h), and 504; 40 CFR 123.26 and 123.27.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.760, AS 46.03.765, AS 46.03.790.

Remarks of the Attorney General:

ADEC has the authority to enforce the APDES permits that it issues. This authority takes three main forms: criminal enforcement; civil injunctive relief; and civil damages.

a. Criminal Enforcement:

ADEC's criminal enforcement authority arises under AS 46.03.790. Under that statute, it is a Class A misdemeanor for someone, with ordinary negligence, to violate any aspect of the APDES program. *See* AS

46.03.790(i), a new subsection added by the 2008 APDES bill.⁹ This includes an unpermitted discharge of oil. *Id.* Each day of each such violation is considered a separate violation. AS 46.03.790(c).

Alaska law provides for a fine of up to \$10,000, for an individual, or \$200,000, for an organization, upon conviction of a Class A misdemeanor. AS 12.55.035(b)(5), (c)(1)(B). In the case of an organization, the court may impose a larger fine representing three times the pecuniary gain enjoyed by the defendant or the loss incurred on another by the defendant's conduct. AS 12.55.035(c)(2),(3). Fines at these levels satisfy the federal requirement. *See* 40 CFR 123.27(a)(3)(ii).

Alaska law also makes it a crime to provide false information to ADEC in connection with the APDES program. Under AS 46.03.790(i)(3), it is a class A misdemeanor, punishable by fines up to \$10,000 per violation, to provide false information required by a regulation adopted under AS 46.03.020(12). Similarly, it is a class A misdemeanor to provide false information "in an application, notice, record, report, permit, or other document filed, maintained, or used for purposes of compliance with a permit issued or a regulation adopted under AS 46.03.020(12)." AS 46.03.790(i)(4). Finally, it is a class A misdemeanor to render inaccurate a monitoring device or method required to be maintained by a permit issued under or a regulation adopted under AS 46.03.020(12). AS 46.03.790(i)(5). These statutes satisfy the applicable federal regulation, 40 CFR § 123.27(a)(3)(iii).

b. Civil Injunctive Relief:

Federal law requires that a state have either administrative "cease and desist" authority, or the ability to seek a court-ordered temporary restraining order (TRO) enjoining unauthorized activity that is endangering

⁹ The new subsection 790(i) will actually be re-numbered as 790(h) when this bill is codified, in order to move the definitions subsection, currently 790(g), to the end of the section.

or damaging public health or the environment. 40 CFR 123.27(a)(1). As explained below, ADEC has both.

Under AS 46.03.820, ADEC's Commissioner can order a person to discontinue activity that presents an imminent or present danger to public health or would be likely to result in irreversible damage to the environment. Upon receipt of such an order, the person must immediately discontinue the activity, even if the person exercises his right to a hearing to challenge the basis for the order. AS 46.03.820(a)¹⁰. The Attorney General can enforce compliance with the order through court action. AS 46.03.820(d).

In addition, under AS 46.03.765, ADEC can bring an action in Alaska Superior Court, seeking to enjoin on-going or threatened violations of ADEC-issued permits, and of ADEC's regulations and statutes. In such an action, ADEC can request a TRO "upon a showing of an imminent threat of continued violation, and probable success on the merits." *Id.* There is no requirement that ADEC first revoke a permit, or exhaust any other administrative enforcement actions, before seeking civil injunctive relief.

c. Civil Damages:

Federal law further requires that ADEC have civil penalty authority for certain violations, in at least the amount of \$5,000 a day for each violation. 40 CFR 123.27(a)(3)(i). Such penalties can be recovered either through an administrative assessment or through court action. 40 CFR 123.27(a)(3). While ADEC does not have the authority to assess civil penalties administratively as part of its APDES program, it does have the ability to recover such penalties in court.

Under AS 46.03.760(e), ADEC can bring suit in the Alaska Superior Court to recover civil damages for violations of ADEC statutes, regulations, orders, permits, approvals, acceptances, or terms or conditions of a permit,

¹⁰ ADEC's "emergency powers" under this statute appear to be broader than EPA's authority under the federal counterpart. *Compare* AS 46.03.820 *with* 33 U.S.C. § 1364.

approval or acceptance issued by ADEC under the APDES program.¹¹ Such damages are limited to no more than \$100,000 for the initial violation, and no more than \$10,000 for each subsequent day of violation. *Id.* Unlike in the realm of criminal enforcement, ADEC need not prove a particular mental state in order to recover civil damages. Such damages can reflect several factors: reasonable compensation for environmental harm; ADEC's response costs; economic savings from the violations; and the need for an enhanced civil penalty to deter future non-compliance. *Id.* ADEC's ability to recover such civil damages in court satisfies the federal requirement. 40 CFR 123.27(a)(3)(i).¹²

ADEC also has various other administrative enforcement mechanisms available to it, such as Notices of Violation and Compliance Orders by Consent. These are described in the Program Description. While ADEC often uses these mechanisms as a first response to certain violations, there is no requirement in state law that ADEC first exhaust such mechanisms before seeking civil or criminal penalties or injunctive relief, as described above. Nor is ADEC required to revoke a violator's APDES permit before pursuing the civil and criminal remedies described above.

ADEC's enforcement authority, as summarized above, includes the power to take legal action against sister state agencies. Alaska Constitution Art. III, Sec. 16; *Legislative Council v. Knowles*, 988 P.2d 604, 609 n. 22 (Alaska 1999).

d. Public Participation.

Federal law also requires that the state enforcement program provide for public participation, either through intervention of right in ADEC's civil enforcement, or through a combination of ADEC being responsive to civil

¹¹ While 46.03.760(a), which authorizes a more narrow range of civil damages, also applies to violations of AS 46.03, the reference in AS 46.03.760(e) to "the [APDES] program authorized by AS 46.03.020(12)" is more specific, and hence supersedes the general application of sec. 760(a).

¹² Presumably any "NPDES filing requirement" or "duty to allow or carry out inspection, entry or monitoring activities", as referenced in 40 CFR 123.27(a)(3)(i), would be included as permit conditions and so subject to enforcement through civil damages.

complaints, not opposing intervention efforts, and giving public notice of proposed settlements. 40 CFR 123.27(d). Under the rules governing Alaska's courts, intervention of right is available under the same circumstances as in federal courts: Alaska Rule of Civil Procedure 24(a) is essentially identical to its federal counterpart, Federal Rule of Civil Procedure 24(a). Both rules provide for intervention of right, in a civil case, where the applicant's interest is at risk. EPA has indicated that if the State commits to not opposing intervention-by-right on the basis that the intervenor's interest is adequately represented by the State, then the combination of the state court rule and the State's commitment satisfies 40 CFR 123.27(d). ADEC has elected to satisfy the federal requirement in this manner, and a suitable commitment to the effect described above is included at Sec. 7.03(1) of the Memorandum of Agreement between the State and EPA.

e. Limitations, Prerequisites, or Additional Defenses.

State law does not create any limitations or prerequisites to enforcement actions. In other words, ADEC is not required to pursue or complete any administrative process before proceeding with enforcement. Nor does state law create any defenses to enforcement that would be inconsistent with federal requirements.

There is an Alaskan statute that confers privileges and immunities for certain environmental audits. AS 09.25.450 - .490. EPA has previously considered the issue of whether that law created an obstacle to approval of the state's Clean Air Act Title V permit program. EPA concluded that it did not. 66 FR 38940, 38945 (July 26, 2001). EPA's rationale for that conclusion is equally applicable to NPDES program approval.

10. Conflict of Interest: State Board Membership.

No State board or body which has or shares authority to approve permit applications or portions thereof, either in the first instance or on appeal,

includes (or will include, at the time of approval of the State permit program), as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit. No State law requires representation on the State board or body which has or shares authority to issue permits of any person who would violate the conflict of interest provision contained in CWA Sec. 304(i)(2)(D).

(Federal Authority: CWA § 304(i)(2)(D); 40 CFR 123.25)

State Statutory and Regulatory Authority: AS 44.64, AS 39.52; 18 AAC 15.220, 18 AAC 83.170.

Remarks of the Attorney General:

ADEC has promulgated a regulation to satisfy 40 CFR 123.25(c). *See* 18 AAC 83.170. Under that regulation, a person cannot approve an APDES permit if he has received a significant portion of income from permittees or applicants within the preceding two years. *Id.* The department has outlined in Sec. 6.4.2 of the Program Description how it intends to implement that regulation.

11. Incorporation by Reference

State law provides authority to incorporate federal legal authority by reference. The incorporation by reference is proper and enforceable under State law, and encompasses all of the federal NPDES regulations which are applicable to the State's APDES program. State law does not permit the prospective incorporation of federal law.

State Statutory and Regulatory Authority: AS 44.62.245(a); 18 AAC 83.010.

Remarks of the Attorney General:

ADEC's APDES regulations refer to, and adopt by reference, many federal regulations. 18 AAC 83.010. Under Alaska law, ADEC can incorporate federal regulations by reference in state regulations. AS 44.62.245(a). However, without specific statutory authority, ADEC cannot adopt future versions of the federal regulations prospectively. *Id.* That means that as the applicable federal requirements are revised, ADEC will have to revise its own APDES regulations to update the state's incorporation by reference of the federal requirements.

Federal regulations adopted by reference in state regulations are fully enforceable as state law by ADEC. *See State Dep't of Revenue v. Dyncorp*, 14 P.3d 981, 984 n.10 (Alaska 2000)(state regulation incorporated body of case-law interpreting federal code and regulation); *C.f. Northern Lights Motel v. Sweany*, 561 P.2d 1176, 1180-81 (Alaska 1977)(state regulation incorporated Uniform Building Code).

12. Authority to Issue General Permits.

State law provides the Department with the authority to issue and enforce general permits in accordance with the federal general permits regulation at 40 CFR 122.28.

(Federal Authority: CWA § 402(a); 40 CFR 122.28, 123.23 and 123.27.)

State Statutory and Regulatory Authority: AS 46.03.100(b)(2); 18 AAC 83.205 - .215.

Remarks of the Attorney General:

ADEC has clear statutory authority to issue and enforce general permits. AS 46.03.100(b)(2). The APDES regulations also address the issuance of general permits, and these new state regulations closely track their federal counterparts. *Compare* 18 AAC 83.205 - .215 with 40 CFR 122.28.

13. Judicial Review. (40 CFR 123.30)

Remarks of the Attorney General:

Alaska law satisfies 40 CFR 123.30 because it provides an opportunity for judicial review in state court of the final approval or denial of permits by the state. Moreover, Alaska law does not restrict standing to seek judicial review any more than does federal law. Both state and federal courts limit judicial review to persons who participated in the agency's permit review process, and both recognize similar kinds of interests as providing standing to appeal.

APDES permit decisions, including permit denials, will be subject to both administrative review and then judicial review. Administrative review takes the form of adjudicatory hearings, which are governed by 18 AAC 15.195 – 920. APDES permits are made subject to these administrative procedures by 18 AAC 83.175. Administrative review of ADEC's APDES permits will be handled by an independent Office of Administrative Hearings (OAH), pursuant to AS 44.64.030. ADEC may retain final decision authority. AS 44.64.060(e).

Alaska law provides the public the opportunity to seek judicial review, in the Superior Court, of any final agency decision. AS 44.62.560(a); AS 22.10.020(d) & (e); Alaska Rule of Appellate Procedure 601(b). The final decision of the OAH (if ADEC delegates the final decision to OAH under AS 44.64.030(c)) or of ADEC (if ADEC retains authority over the final decision) will be a final agency decision that may be appealed to the court. AS 44.64.030(c); 18 AAC 15.300(c). If ADEC denies the request for an adjudicatory hearing, that denial is also a final agency decision that may be appealed to the Alaska Superior Court. *See* 18 AAC 15.220(b)(4); Ak. App. Rule 601(b).

Standing to appeal a final agency decision extends to all the parties in the administrative review. *See* Alaska Rule of Appellate Procedure 602(h) (defining parties before the court as the parties before the agency below). *See also City of Kenai v. State*, 736 P.2d 760, 762 (Alaska 1987) (recognizing standing to appeal agency decision for entity with direct interest in agency proceeding, who was

“factually aggrieved” by agency decision, and who participated in agency proceeding.) Parties to the administrative hearing include the permit applicant, department staff, and each person whose request for a hearing or for intervention was granted. *See* 18 AAC 15.920(9).

State law does not impose a narrow standing requirement that would restrict the right to judicial review to entities claiming a pecuniary or property interest in the APDES permit decision. *See* 40 CFR 123.30. To the contrary, standing to obtain judicial review of agency decisions is construed broadly under established Alaska case-law. *See, e.g., Gilbert M. v. State*, 139 P.3d 581, 586 (Alaska 2006) (“Neither the interest nor the injury asserted [to support standing to appeal] need be great; ‘an identifiable trifle is enough for standing to fight out a question of principle.’”) ¹³

By comparing state case-law with federal case-law on the issue of standing to appeal permit decisions, it is clear that state law is no more restrictive in that regard. Indeed, while the state’s standing requirements are not constitutional, but rather a doctrine of judicial self-restraint ¹⁴, federal standing requirements are rooted in Article III of the U.S. Constitution. *See, e.g., Texas Independent Producers v. EPA*, 435 F.3d 758, 764 (7th Cir. 2006) (requiring injury in fact, causal link and redressability, and citing *Lujan*). ¹⁵

The time frame for appealing final state permit decisions to the Superior Court is thirty days (Ak. Appellate Rule 602(a)(2)), while the federal system allows 120 days (33 U.S.C. § 1369(b)(1)). However, all that is required by that date is a simple notice of appeal listing the points the appellant wishes to raise. *See* Ak. Appellate Rule 602(c). Actual preparation of a record and briefing of the appeal takes place over the ensuing months. *See* Ak. Appellate Rules 604 – 605.5.

¹³ *See also Sonneman v. State*, 969 P.2d 632, 636 (Alaska 1998); *State v. Enserch*, 787 P.2d 624, 629-31 (Alaska 1989); *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987); *Moore v. State*, 553 P.2d 8, 23-24 (Alaska 1976) (“the concept of standing has been interpreted broadly in Alaska, favoring increased accessibility to judicial forums.”); *Coghill v. Boucher*, 511 P.2d 1297, 1303 (Alaska 1973) (“this court has departed from a restrictive interpretation of the standing requirement.”)

¹⁴ *See Gilbert M. v. State*, 139 P.3d at 586.

¹⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992). *See also Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000); *Trustees for Alaska*, 749 F.2d 549, 554-55 (9th Cir. 1994); *Montgomery Envir. Coalition v. Costle*, 646 F.2d 568, 576-78 (D.C. Cir. 1980)

Accordingly, the shorter time frame for initiating the appeal will not discourage or frustrate the public's opportunity to participate in the permitting process. *See* 40 CFR 123.30.

In summary, Alaska law provides the public an opportunity for judicial review of permit decisions that is no more restrictive than under federal law.

[Part II: Pretreatment Program]

I hereby further certify that in my opinion the laws of the State of Alaska provide adequate authority to carry out those aspects of a State pretreatment program, as required by 40 CFR 403, indicated below. I have noted those authorities which are contained in lawfully enacted or promulgated statutes or regulations which shall be in full force and effect by the date of program approval. I have not found authorities required by 40 CFR 403 which the State is not currently capable of implementing. The specific authorities provided include the following:

1. Authority to Apply Categorical Pretreatment Standards for Industrial Users.

State law provides authority to apply to industrial users of publicly owned treatment works (POTWs) pretreatment effluent standards and limitations promulgated under section 307(b) and (c) of the CWA as amended, including the general prohibition against pass through and interference, prohibitive discharge standards under 40 CFR 403.5 and local limitations developed by the POTW.

(Federal Authority: CWA sections 307, 510 and 40 CFR 403.5, 403.8, 403.10.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.900; 18 AAC 83.010(g).

Remarks of the Attorney General:

The Alaska Legislature has specifically authorized ADEC to “take all actions necessary to receive authorization from...[EPA]...to administer and enforce a...[NPDES] program in accordance with” CWA sec. 402(b) and 40 CFR Part 403. AS 46.03.020(12). CWA section 402(b)(9) requires that a state seeking EPA program approval must have authority to insure that industrial users of POTWs will comply with the relevant sections of the CWA. 33 U.S.C. 1342(b)(9). 40 CFR Part 403 are the primary federal regulations that govern the pretreatment program. ADEC, in its APDES regulations, has adopted by reference the governing federal regulations. *See* 18 AAC 83.010(g), adopting 40 CFR Part 403, as well as the industry sector effluent limitations and guidelines (which include categorical pretreatment standards for existing and new sources), 40 CFR parts 405-471. Thus, ADEC’s APDES regulations incorporate by reference all applicable requirements of 40 CFR 403.5, 403.8 and 403.10.

ADEC has additional statutory authority over the construction and operation of publicly owned treatment works (POTWs). ADEC requires plan approval for construction or operation of sewerage systems and treatment works. AS 46.03.100(c).

2. Authority to Apply Pretreatment Requirements in Permits for Publicly Owned Treatment Works.

State law provides authority to apply in terms and conditions of permits issued to publicly owned treatment works the applicable requirements of section 402(b)(8) of the CWA as amended and 40 CFR 403 including:

- a. A compliance schedule for the development of a POTW pretreatment program as required by 40 CFR 403.8(d);
- b. The elements of an approved POTW pretreatment program as required by 40 CFR 403.8(c);

- c. A modification clause, requiring that the POTW's permit be modified or alternatively revoked and reissued after the effective date for approval of the State pretreatment program to incorporate into the POTW's permit an approved POTW pretreatment program or a compliance schedule for developing a POTW pretreatment program in accordance with the requirements of 40 CFR 403.10(d);
- d. Prohibitive Discharge limitations applicable to industrial users as required by 40 CFR 403.5; and
- e. Demonstrated percentages of removal for those pollutants for which a removal allowance was requested in accordance with the requirements of 40 CFR 403.7;

(Federal Authority: CWA sections 402 (b) (1) (A), 402 (b) (1) (C), 510; 40 CFR 122.44 (j), 122.62 (a) (7), (9).)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.900; 18 AAC 83.010(g), 18 AAC 83.145(a)(8), 18 AAC 83.460.

Remarks of the Attorney General:

See general remarks at Part II, Sec. 1, *supra*. The pretreatment program requirements for POTWs are set out in the APDES regulations, at 18 AAC 83.460. That regulation requires that a POTW's pretreatment program satisfy 40 CFR Part 403. Another regulation provides that a POTW's permit may be modified to incorporate the conditions of an approved or modified pretreatment program. 18 AAC 83.145(a)(8).

3. Authority to Require Information Regarding the Introduction of Pollutants into Publicly Owned Treatment Works and Compliance with Section 204 (b).

State law provides authority to:

- a. require in permits issued to POTWs conditions requiring the permittee to:
 - (1) Give notice to the State permitting agency of new introductions into such works of pollutants from any source which would be a new source as defined in section 306 of the CWA if such source were discharging pollutants directly to State waters;
 - (2) Give the State notice of new introductions of pollutants into such works from a source which would be a point source subject to section 301 if it were discharging such pollutants directly to State waters;
 - (3) Give the State notice of a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit; and
 - (4) Identify in terms of character and volume of pollutants any significant source introducing pollutants subject to pretreatment standards under section 307 (b) of the CWA as amended.
- b. require compliance by industrial users with CWA requirements concerning user charges and construction costs.

(Federal Authority: CWA sections 402 (b) (8), 204 (b); 40 CFR 122.42 (b), 403.8, 403.10.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.900; 18 AAC 83.010(g), 18 AAC 83.610(b)(1)(A), 18 AAC 83.610(b)(1)(B), and 18 AAC 83.460(a)(1).

Remarks of the Attorney General:

See Part II, Sec. 1, *supra*, for general discussion of ADEC's statutory and regulatory authority. ADEC's APDES regulations also include these specific notice requirements at: 18 AAC 83.610(c) and 18 AAC 83.460(a)(1).

Although the APDES regulations do not include specific provisions requiring industrial users' compliance with user charges and construction costs under CWA Sec. 204(b), the authority to require such compliance is inherent in ADEC's statutory mandate to administer an NPDES program in accordance with CWA Sec. 402(b). *See* AS 46.03.020(12). State authority to require compliance with CWA Sec. 204(b) is a necessary element of a state program. *See* CWA Sec. 402(b)(9), 33 U.S.C. 1342(b)(9).

4. Authority to Make Determinations on Requests for Pretreatment Program Approval and Removal Allowances.

State law provides authority to review, approve, or deny:

- a. Requests for POTW pretreatment program approval in accordance with the requirements of 40 CFR 403.8 (f) and 403.11; and
- b. Requests for authority to reflect removals achieved by the publicly owned treatment works in accordance with the requirements of 40 CFR 403.7, 403.10 (f) (1) and 403.11.

(Federal Authority: CWA sections 307(b), 402(b)(8); 40 CFR 403.7, 403.8, 403.10, 403.11.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.900; 18 AAC 83.010(g).

Remarks of the Attorney General:

See general remarks at Part II, Sec. 1, *supra*. Once Alaska's APDES program is approved by EPA, ADEC will become the "Approval Authority"

responsible for reviewing and approving pretreatment programs submitted by POTWs. *See* 40 CFR 403.3(c) & 40 CFR 403.9(a), adopted by reference in 18 AAC 83.010(g). Similarly, as the Approval Authority, ADEC would consider any request by a POTW with an approved pretreatment program to reflect removal credits. 40 CFR 403.7(a)(3)(i).

5. Authority to Make Initial Determinations on Categorization of Industrial Users and Requests for Fundamentally Different Factors Variances.

State law provides authority to:

- a. Make a determination as to whether or not an industrial user falls within a particular industrial subcategory in accordance with the requirements of 40 CFR 403.6; and
- b. Deny and/or recommend approval of requests for Fundamentally Different Factors variances for industrial users as required by 40 CFR 403.10 (f) (1) and 403.13.

(Federal Authority: CWA sections 402 (b) (1) (A), 402 (b) (8), 510; 40 CFR 403.6, 403.10, 403.13.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.900; 18 AAC 83.010(g).

Remarks of the Attorney General:

See general remarks at Part II, Sec. 1, *supra*. ADEC has adopted these federal requirements by reference, and will assume the authority for enforcing them upon EPA's approval of the state program.

6. Authority to Apply Recording, Reporting and Monitoring Requirements.

State law provides authority to:

- a. Require any industrial user of a POTW to:

- 1) submit the report required by 40 CFR 403.12 (b) which:
 - (a) Sets forth basic information about the industrial user (e.g., process, flow);
 - (b) Identifies the characteristics and amount of the waste discharged by the industrial user to the POTW; and
 - (c) Proposes a schedule by which any technology and/or operation and maintenance practices required to meet pretreatment standards will be installed;
 - 2) Submit the reports required by 40 CFR 403.12 (c) which account for the industrial user's progress in installing any required pretreatment or operation and maintenance practices;
 - 3) Submit the report required by 40 CFR 403.12 (d) following the final compliance date for the applicable pretreatment standard;
 - 4) Submit periodic reports on continued compliance with applicable pretreatment standards as required by 40 CFR 403.12 (e); and
 - 5) Submit any other reports required under the NPDES or pretreatment regulations or under State law.
- b. Require POTWs subject to the requirements of 40 CFR 403.8 (a) to:
- 1) Report on progress in developing an approvable POTW pretreatment program as required by 40 CFR 403.12 (h); and
 - 2) Submit any other reports required under the NPDES or pretreatment regulations or under State law.
- c. Require POTWs subject to the requirements of 40 CFR 403.8 (a) and all industrial users subject to pretreatment standards to:
- 1) Establish and maintain records as required by 40 CFR 403.12 (n);
 - 2) Install, calibrate, use and maintain monitoring equipment or methods (including where appropriate biological monitoring

methods) necessary to determine continued compliance with pretreatment standards and requirements;

- 3) Take samples of effluents (in accordance with specified methods at such locations, at such intervals, and in such manner as may be prescribed); and
- 4) Provide other information as may reasonably be required.

(Federal Authority: CWA Section 308 (a) and (b), 402 (b) (2), 402 (b) (9); 40 CFR 122.41 (i) & (j), 122.48, 123.26 (c), 403.7, 403.8, 403.10, 403.12.)

State Statutory and Regulatory Authority: AS 44.46.020, AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.900; 18 AAC 83.010(g).

Remarks of the Attorney General:

See general remarks at Part II, Sec. 1, *supra*. The sampling, record-keeping and reporting requirements listed in this Section are mostly derived from 40 CFR Part 403, incorporated by reference into ADEC's pretreatment program. 18 AAC 83.010(g). To the extent that state law may require the submission of any other information, either by an industrial user or by a POTW, ADEC is the agency with the general authority to enforce such law. AS 46.03.020; AS 44.46.020.

7. Authority to Apply Entry, Inspection and Sampling Requirements.

State law provides authority to enable authorized representatives of the State, and POTWs with approved pretreatment programs, upon presentation of such credentials as are necessary, to:

- a. Have a right of entry to, upon or through any premises of a POTW or of an industrial user of a POTW in which premises an effluent source is located or in which any records are maintained;

- b. At reasonable times have access to and copy any records required to be maintained;
- c. Inspect any monitoring equipment or method which is required; and
- d. Have access to and sample any discharge of pollutants to State waters or to a POTW resulting from the activities or operation of the POTW or industrial user.

(Federal Authority: CWA section 308 (a) and (b), 402 (b) (2), 402 (b) (9):
40 CFR 122.41 (i), 123.26 (c), 403.7, 403.8, 403.10, 403.12.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.760, AS 46.03.765, AS 46.03.790, and AS 46.03.900; 18 AAC 83.010(g), 18 AAC 83.405(j).

Remarks of the Attorney General:

See general remarks at Part II, Sec. 1, and Part I, Sec. 5, *supra*. The discussion of ADEC's access authority, under Part I, Sec. 5, is equally applicable to POTWs. Inspection and entry provisions will also be included in each APDES permit, including those for POTWs. 18 AAC 83.405(j). For unpermitted facilities, where site access is denied, ADEC will gain access through administrative search warrants, under AS 46.03.860. *See* discussion at Part I, Sec. 5, *supra*.

8. Authority to Issue Notices, Transmit Data, and Provide Opportunity for Public Hearings and Public Access to Information.

State law provides authority to comply with the requirements of 40 CFR 403.11 to:

- a. Notify the public, affected States, and appropriate governmental agencies of:

- 1) Requests for POTW pretreatment program approval or for removal credit allowances; and
 - 2) Approval of POTW pretreatment programs or POTW removal credit authority;
- b. Transmit such documents and data to and from the United States Environmental Protection Agency and to other appropriate governmental agencies as may be necessary;
 - c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for POTW pretreatment program approval or removal credits; and
 - d. Ensure that requests for POTW pretreatment program approval and all comments received pertaining to these requests for program approval are available to the public for inspection and copying.

State law provides authority to make information available to the public, consistent with the requirements of the CWA and General Pretreatment Regulations, including any information obtained pursuant to any monitoring, reporting, or sampling requirements or as a result of sampling or other investigatory activities of the State. The State may hold confidential any information (except effluent data) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person.

(Federal Authority: CWA section 308 (a) and (b), 101; 40 CFR 403.11, 403.14.)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.900; 18 AAC 83.010(g).

Remarks of the Attorney General:

See general remarks at Part II, Sec. 1, Part I, Sec. 6, and Part I, Sec. 7, *supra*. By assuming the role of the “Approval Authority” (upon EPA’s approval of the State program), ADEC will follow the notice and approval procedures set out in 40 CFR 403.11. State law that governs the public character of most state records is discussed at Part I, Sec. 7, *supra*. As described in that discussion, the APDES regulations adopt the federal substantive criteria for evaluating claims of confidentiality for business records. *See* 18 AAC 83.010(a) & 18 AAC 83.165(a), adopting by reference 40 CFR 2.208.

9. Authority to Enforce Against Violations of Pretreatment Standards and Requirements.

State law provides authority to:

- a. Enforce against violations by industrial users and POTWs of:
 - 1) Permit requirements;
 - 2) National categorical pretreatment standards, including the general prohibition against pass through and interference;
 - 3) Prohibitive discharge limitations developed in accordance with 40 CFR 403.5;
 - 4) Local limits developed by the POTW;
 - 5) Requirement for recording, reporting, monitoring, entry, inspection and sampling;
- b. Enforce against violations described in paragraph (a) above using enforcement mechanisms which include the following:
 - 1) Injunctive relief;
 - 2) Civil and criminal penalties and fines which are comparable to the maximum penalties and amounts recoverable under section 309 of the CWA or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied.

(Federal Authority: CWA section 309, 402 (b) (7), 402 (h); 40 CFR 403.8, 403.10)

State Statutory and Regulatory Authority: AS 46.03.020(10)&(12), AS 46.03.050, AS 46.03.100, AS 46.03.760, AS 46.03.765, AS 46.03.790; 18 AAC 83.010.

Remarks of the Attorney General:

ADEC's general enforcement authority is described in Part I, Sec. 9, *supra*. Those enforcement tools are equally available for violations of the requirements of the pretreatment program. The governing statutes (specifically, AS 46.03.760, .765, and .790) all apply to violations of: a provision of AS 46.03; a regulation adopted under AS 46.03; or a permit or approval, or terms or conditions of said permit or approval, issued under AS 46.03. These references are broad enough to encompass the regulatory requirements of the state's pretreatment program, because ADEC has promulgated those pretreatment regulations under the authority of AS 46.03. Thus, the discussion of ADEC's enforcement authority in Part I, Sec. 9, *supra*, is equally applicable to violations of the state's pretreatment program requirements.

Because ADEC has adopted 40 CFR Part 403 into state regulation by reference, ADEC can enforce the requirements of Part 403 using its normal enforcement tools. *See* Part I, Sec. 11. The APDES regulations also specifically provide that ADEC may enforce pretreatment standards, including local limits developed by a POTW. 18 AAC 83.460(b).

10. Incorporation by Reference.

State law provides authority to incorporate federal legal authority by reference. The incorporation by reference is proper and enforceable under State law and encompasses all of EPA's NPDES regulations which are

applicable to all State pretreatment programs. State law does not permit the prospective incorporation of federal law.

State Statutory and Regulatory Authority: AS 44.62.245(a); AS 46.03.020(10),(12).

Remarks of the Attorney General:

See Part I, Sec. 11, *supra*. Under Alaska law, ADEC can incorporate federal regulations by reference in state regulations. AS 44.62.245(a). However, without specific statutory authority, ADEC cannot adopt future versions of the federal regulations prospectively. *Id.* That means that as the applicable federal requirements are revised, ADEC will have to revise its own APDES regulations to up-date the state's incorporation by reference of the federal requirements.

Dated: April ____, 2008

At Anchorage, Alaska

TALIS J. COLBERG
ATTORNEY GENERAL
STATE OF ALASKA