

**NATIONAL POLLUTANT DISCHARGE ELIMINATION  
SYSTEM PRIMACY WORKGROUP REPORT**

February 24, 2005

**FINAL**

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## EXECUTIVE SUMMARY

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

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

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

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

## I. INTRODUCTION

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

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

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

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

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

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

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

## **II. CHARACTERISTICS OF AN ALASKA NPDES PERMITTING PROGRAM**

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

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

## Permit Application Process

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

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

## Permit Limits and Monitoring Requirements

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

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

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

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

## **Guidance Documents**

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

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

## **Public Participation and Public Notice Process**

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

## **Permittee Review of Draft and Proposed Final Permits**

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

## **Compliance Assistance**

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

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

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

## **Appeals Process**

The workgroup highlighted the appeals process in Alaska as being a significant difference between DEC and EPA. Under primacy, the Commissioner of the Department of Environmental Conservation would be the final administrative arbiter as opposed to the Environmental Appeals Board. The Commissioner would have the authority to delegate decision-making authority to an Administrative Law Judge. All permit terms and conditions in a new permit and contested provisions in a modified or renewed permit are not automatically stayed under the state appeals process in contrast to the federal appeals process. There are opportunities to build into the state process deadlines for completing steps in the appeals process. Judicial review of state permitting decisions will be conducted by an Alaska Superior Court instead of the federal 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.

**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.