



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Environmental
Conservation

OFFICE OF THE COMMISSIONER

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March 13, 2023

The Honorable Bill Wielechowski
State Capitol
Juneau, AK, 99801

Dear Senator Wielechowski:

Thank you for the dialog in the Senate Resources Committee on both February 13 and February 27, and the follow-up questions you posed in your letter dated March 2, 2023. I appreciate the opportunity to continue the dialog on this important program and provide responses to your requests for more information.

1. *All correspondence between Jade North, LLC and DEC staff and all versions of the 404 Feasibility study prepared by Jade North, LLC that DEC staff received.*

The Department of Environmental Conservation (DEC) staff exchanged numerous emails with Jade North, LLC during the deliberative stages of the preparation of the Feasibility Study. As you are aware, drafts are also a part of the deliberative process. We respectfully decline to produce these documents.

2. *A list of the environmental groups consulted with on the 404 Feasibility study and a copy of their correspondence.*

DEC has conducted a number of briefings, presentations, consultations, and other outreach efforts on the topic of the Section 404 Dredge and Fill Program (404 Program) assumption.

DEC reached out to the environmental community by engaging at the Alaska Forum on the Environment (AFE). Commissioner Brune, 404 Program Manager Shannon Miller, and AAG Julie Pack presented specifically on the 404 proposal to ensure stakeholders were informed and to be available for questions. Commissioner Brune also attended several sessions and included the 404 assumption effort as part of his keynote address in an effort to reach as broad of an audience in the environmental community as possible. A list of environmental groups who were at AFE is attached.

DEC has engaged on an ongoing basis with the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps). DEC has met separately with the following state environmental protection agencies: Nebraska, Michigan, New Jersey, Florida, and Arizona. DEC has solicited feedback from states and other participants in the Western States Water Council.

DEC has engaged extensively with the Environmental Council of States (ECOS) and continues to do so.

DEC has also met with the following groups: Alaska Chamber of Commerce; Alaska Miners Association; Alaska Municipal League; Alaska Oil and Gas Association; Alaska State Homebuilding Association; Alaska Support Industry Alliance; Alaska Water and Wastewater Management Association; Anchorage Home Builders Association; ANCSA Resource Managers; Associated General Contractors of Alaska; Council of Alaska Producers; MatSu Homebuilders; Pacific Seafood Producers of Alaska; Resource Development Council; organized unions; United Fishermen of Alaska; and more. Environmental interests are represented in each of these groups.

Additionally, as of this year, I established ongoing quarterly meetings with the goal of improving DEC's partnership and communication with Alaska's Indigenous People. Our first meeting, held on February 14, 2023, was announced at AFE, provided by email to tribal organizations, and shared on DEC's website and social media and was open to all tribes, regional and village corporations, and all others who were interested. Our goal with this, and subsequent quarterly meetings, is to establish a line of communication between DEC and the tribes and regional and village corporations; share and receive information; identify the efforts, activities, and permits that DEC is working on; and learn if there are areas of interest or concern that we can work together to address. During the first quarterly meeting, each of the directors provided an overview of their division and the current work and hot topics they are engaged in. We also include an overview of the assumption of the 404 Program.

As I have stated before in committee, I hold a standing policy in my office that I, and my staff, are willing and look forward to speaking with anyone about the effort to assume the 404 Program, and any other DEC issue of interest.

3. *The names of tribes consulted with before the 401 Certificate Issuance [on the Donlin Gold Project].*

During the hearing, you asked a specific question about DEC's consultation with tribes and as I explained in that hearing, "government-to-government consultation" is a term of art created by federal law and executive order that requires the federal government to engage in certain processes in relation to sovereign tribes. Since this is a legal creation of federal law, it does not exist under state law.

However, nothing precludes states from forming intergovernmental agreements and state-tribal compacts to promote positive state-tribal relationships and foster collaborative policy development. In fact, DEC has a Tribal Government Liaison position that coordinates with divisions and other state agencies and works closely on tribal concerns. DEC also maintains a tribal relations website at <https://dec.alaska.gov/commish/tribal> that includes a 2002 policy statement describing the DEC's tribal engagement process. The Division of Water also has a Local and Tribal Government Liaison that implements the division's communication and engagement processes established in the Program Description for implementing the Clean Water Act Section 402 permitting program. As we develop the Section 404 Program for approval and prepare the Program Description, we anticipate a similarly structured engagement process for tribal organizations.

As I stated in my testimony to your question during the Senate Resources hearing on February 27 (1:10:15) – “DEC in my time has never denied a meeting with a tribe, a regional corporation, or a village corporation...” I stand by that statement. On January 30, 2019, the Orutsararmiut Native Council (“ONC”) reached out regarding the Donlin Gold Project 401 Certification requesting a meeting on behalf of itself and several tribes. The tribes requested this meeting be held between February 27 and March 1 of that year. DEC listened: this meeting was held on February 28 from 1:30 to 2:30 pm, included ONC, and was open to any tribal attendees who wished to join. Respectfully, I believe that the March 27, 2019 letter that you read into the record during the February 27, 2023 hearing misrepresented my, and DEC’s, unwavering commitment to engaging with tribes—and our demonstrated follow-through.

4. *Evidence of research that the Federal Government would help pay the State of Alaska to assume the 404 Primacy program.*

One challenge identified in the Feasibility Report is the cost associated with assuming the 404 Program. DEC is working with other states, through ECOS, to obtain funding for primacy programs, namely the 404 Program. Primacy programs, such as the 404 Program, are administered through cooperative federalism, meaning the federal law is established by national standards while states implement them within their borders. One of the key principles of cooperative federalism is that “states that choose to implement federal programs should be both adequately funded by the federal government to do so as Congress directed in authorizing statutes and should also invest state resources (either directly or through fees or other methods) sufficient to implement a successful program.”¹ Listed as a 2023 priority of ECOS, is the continued advocacy for financial support.² Additionally, I discussed this lack of federal funding support for the assumption and implementation of the 404 Program with U.S. Senator Lisa Murkowski and Congresswomen Mary Peltola directly and U.S. Senator Dan Sullivan’s staff. The entire Alaska Congressional Delegation expressed support to help the state obtain federal funding to develop and implement this program.

5. *The average turnaround time for Air Quality Permits in the last year and the timetable “goal” of DEC. Has industry expressed frustration?*

In 2022, the average issuance time for an Air Quality permit, from complete application to permit issuance, was 126 days. DEC’s performance measure for air permit issuance is 130 days. Generally, DEC’s air permitting programs receive far more praise than frustration from industry.

6. *Does Title 16 Fish Habitat Permitting have a public review process? Is that equivalent to a NEPA public process?*

During the hearing on February 27, we mistakenly stated that Title 16 Fish Habitat Permits were subject to public notice and comment processes. They are not. This fact, however, has no bearing on whether NEPA equivalency is required for a state to legally assume the 404 Program or on the question of what NEPA-like information will be produced during the state’s review process. The information generated by the environmental review process pursuant to the Section 404(b)(1) Guidelines (or their state equivalent) for example, will have significant overlap with information made available via the NEPA process.

¹ <https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf>

² <https://www.ecos.org/wp-content/uploads/2023/01/ECOS-President-Priorities-for-2023.pdf>

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Under a state assumed 404 Program, DEC will conduct an environmental review analysis under 404(b)(1) along with the adjudication of the permit application. There will be a public review component to this process and the details will be established during program development.

In my time as commissioner, I have strived for increasing public participation and engagement through public comment and scoping periods. I have implemented the Smart Comment platform on our website where comments are both encouraged and immediately available for public review. Transparency and public engagement are paramount to ensuring the permits and regulations we issue at DEC are respectful of, and responsive to, public input and I look forward to implementing these same standards for the 404 program.

Please let me know if you would like more information or have additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Brune", with a long, sweeping underline.

Jason Brune,
Commissioner

Attachments:

List of 2023 AFE Participants

Cc: The Honorable Cathy Giessel, Senator
The Honorable Click Bishop, Senator
Julia O'Connor, Staff to Senator Giessel
Anne Rittgers, Staff to Senator Bishop
Nick Moe, Staff to Senator Wielechowski