

How will the State assuming the Section 404 Dredge and Fill Permitting program (404 Program) affect the proposed Pebble Mine project?

As testified to by the Department of Law in the Senate Resources committee, State assumption of the 404 Program cannot change the 404(c) veto. The reasons are as follows:

First, EPA's statutory power, as laid out in Section 404(c) of the Clean Water Act (CWA), remains unaffected by the State's assumption of the 404 Program.

Second, state-assumed 404 Programs are specifically prohibited, by regulation, from issuing (or trying to re-issue) a 404 permit in this type of scenario. Under 40 C.F.R. 223.20(c), a state administering an assumed 404 Program may not issue a 404 permit "[w]hen the proposed discharges" associated with the project at issue "would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the [EPA] under section 404(c)" of the CWA "or when the discharge would fail to comply with a restriction imposed thereunder." This regulation, in other words, specifically prohibits states from disregarding vetoes previously issued by EPA following assumption of the 404 Program.

Third, the Alaska Department of Fish & Game (ADF&G) is charged with protecting anadromous fish in the state, including in the Bristol Bay area; any development of the Pebble deposit would need to obtain a Title 16 permit before proceeding. Title 16 permits are required for "all activities" altering or affecting the "natural flow or bed" of catalogued anadromous waterbodies. The experts at ADF&G will only approve a Title 16 permit for the project if "any adverse effect upon fish or wildlife, or their habitat" is sufficiently mitigated pursuant to ADF&G's robust mitigation requirements. This permitting process had not yet been initiated before EPA vetoed the project but would be required for the project to proceed.

Lastly, the Alaska Legislature has the power, via Bristol Bay Forever, to stop the Pebble mine. Now codified at AS § 38.05.142(a), Bristol Bay Forever provides that, in addition to any permits required by law, a final authorization "must be obtained" from the Legislature for a large-scale metallic sulfide mining operation located within the watershed of the Bristol Bay Fisheries Reserve.

Permitting the Pebble mine never was, never will be, and never *could* be DEC's motivation for seeking assumption of the 404 Program. DEC is pursuing assumption of the 404 Program because we firmly believe it will have tremendous benefits for the State of Alaska. A myopic focus on the Pebble project misconstrues our motives and obscures these benefits – to the detriment of the State of Alaska.

How will the State assuming the 404 Program impact homebuilding and other development? How does compensatory mitigation come into play?

There are a number of ways a State-run 404 Program would benefit and help housing development, infrastructure, and resource development. The most significant benefit is through the implementation of the compensatory mitigation requirements. Under the 404 Program,

projects that are unable to adequately avoid or minimize impacts to wetlands need to compensate for those impacts. In Alaska, the existing U.S. Army Corps of Engineer (USACE) approach has been to require lands be set aside either by requiring the project proponent to purchase comparable wetlands through a land trust compensatory mitigation bank or setting a portion of their lands aside in perpetuity. In a housing scenario, that is costly to both the developer and the public, described as follows.

One developer informed DEC that he recently worked through the 404 Program permitting process with the USACE for a 9-acre proposed development in Juneau. The USACE's functional assessment of the parcel was determined to be "moderate" and resulted in the developer owing 3.89 credits for the 9-acre development, costing \$564,050. The 3.89 acres in compensatory mitigation offset had to be paid with his land or a land trust mitigation bank since these were the only USACE approved sources of mitigation. The developer was required to pay \$145,000 per credit to the local land trust or set aside (i.e., not develop) 3 of his 9 acres to fill 1 acre. This developer highlighted for us the increasing cost of the mitigation credits per acre – what used to cost him \$30,000 per acre as mitigation last year is now costing \$125-145,000 per credit acre. As he described, when you factor in the payment to land trusts, the set-aside of property for non-use (now and in the future), and the continued tax liability for that unused land, the permit development and land development expenses, it is costing him approximately \$400,000 to develop a single acre for housing or industrial/commercial land.

Another proposed subdivision development, a 90-acre parcel with approximately 65% wetlands, was determined to be undevelopable for the precise cost reasons outlined above. A large parcel of developable land for housing, which could be serviced by water and sewer, will remain undeveloped due to cost.

An additional example comes from a housing and subdivision developer in Bethel that was filling 18.6 acres of wetlands and was required to repair three culverts and set aside 28.6 acres of land as compensatory mitigation.

These examples show the USACE imposed costs of housing/subdivision development. Those costs are then passed along to the purchasing public making housing anything but affordable. Under a State-assumed 404 Program, the State plans to take full advantage of the flexibility provided under the law for compensatory mitigation. One mitigation option the State is exploring is through an in-lieu fee program. With this option, developers may choose to pay a fee instead of paying a land trust for lands to be set aside. The fees collected under this program will be used to help with water quality improvement projects that will benefit Alaskans, to include the cleanup of contaminated sites, funding for Village Safe Water improvements, fixing perched culverts, and other water quality improvement projects. This option will allow for the development of housing without the constraints of setting aside lands where limited housing and land is already an issue. This approach will also address the inflation of trust lands mitigation banks since it will provide an alternative option. The general public will benefit by the improved water quality the in-lieu fee program projects provide as well as the reduced cost of housing development.

While these are examples of housing development projects, the in-lieu fee program will be available to other project types as well including, but not limited to, utilities, driveways, roads, and other rural, residential, commercial, and industrial development. Anything the State can do to reduce permitting time and costs while protecting human health and the environment will generally translate favorably to resource development interest and investment in the state.

For many small, routine, and easily categorized projects, quick over-the-counter types of approvals would be appropriate. The State 404 Program would develop that aspect of the program and expand beyond what the USACE is currently doing. This will better address local project needs and incorporate local area knowledge – that will save time for project proponents and staff. For larger or more complex projects, increased communication throughout the permitting and public notice phase of the project, the efficiencies of working with one State agency, and the reduction of National Environmental Policy Act (NEPA) required provisions will be a significant time and cost savings for both permittees and permittees.

How will DEC address and ensure Tribal engagement in the 404 Program?

“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.

DEC has a Tribal Government Liaison position that coordinates with divisions and other State agencies and works closely on tribal concerns. Additionally, DEC 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 CWA Section 402 Permitting Program, outlining the Department’s public participation guidance and strategies. Several paragraphs of the document discuss engagement efforts, including section 4.0 - Supplemental Communication Tools, which outlines a consultation process led by the Division of Water’s Local and Tribal Government Liaison. **This consultation and process is in addition to the routine public participation process available to the general public and takes place prior to issuance of a public notice of a draft permit.** Additionally, the Division of Water maintains a helpful document on our “[APDES Information for Tribes](#)” website titled APDES Guidance for Local and Tribal Governments. As we develop the 404 Program for approval and prepare the Program Description, we anticipate a similarly structured engagement process for tribal organizations, which DEC will work to refine in communication and collaboration with Local and Tribal Governments.

The APDES process for Local and Tribal government engagement was outlined in [Appendix H Public Participation in the APDES Process](#), in the Departments application to EPA for APDES Program primacy. Under the subsection *Local and Tribal government consultation (page 8)*, it states:

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

Lastly, DEC recently established ongoing quarterly meetings with the goal of improving DEC’s partnership and communication with Alaska’s Indigenous People. Our goal with these 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. The meetings are announced in an email to tribal organizations, shared on DEC’s website and social media, and are open to all tribes, regional and village corporations, and all others who are interested.

What will the 404 Program cost?

In FY24, the cost for the 404 Program is \$4.9 million. During FY24, DEC will hire and train staff, develop the 404 Program application, prepare draft regulations, meet with stakeholders (including local and Tribal governments), develop mitigation options and plans, and begin developing agreements with other agencies. The FY24 budget includes contractor support, interagency Reimbursable Service Agreements (RSAs), funding for 28 staff, etc.

The 404 Program implementation costs in FY25 and beyond are approximately \$4.7 million. The FY25 and beyond budget includes funding for four more positions (32 staff total), interagency RSAs for implementation and support, funding for 32 staff, etc.

The FY24 budgets include an allocation of \$175,000 for an interagency RSA for the Department of Law to support the ongoing legal needs associated with establishing the 404 Program, including the application for the Environmental Protection Agency (EPA) approval and drafting Program regulations. This allocation in the budget is included for FY25 and beyond and will be used for the Department of Law to support the ongoing legal needs associated with permit development and issuance, enforcement, and appeals/litigation. At nearly 4% of the annual budget for the 404 Program, this legal support is significantly more than currently allocated to and spent by the CWA Section 402 Alaska Pollutant Discharge Elimination System program and the Division of Water programs-wide annual average of 1% for legal costs.

Why is the State ramping up the effort for the 404 Program application so quickly?

AS 46.03.020(14) authorizes DEC to “take all actions necessary to receive federal authorization” of the 404 Program. This statute has been in place since 2013 and it is beyond time to fund that effort and move the application development and approval process along.

The Environmental Protection Agency (EPA), the entity that will ultimately approve the State’s 404 Program and application, expects and requires that a 404 Program be fully staffed and operational at the time the State’s 404 Program and application are approved. EPA and the State anticipate that the application will be completed and submitted in approximately 14 months after the program is funded.

Full staffing is needed to develop the 404 Program application and build the knowledge and provide training to the implementing staff. Developing the application and engaging staff will allow the State to secure EPA approval quickly, allowing the State to pursue and offset the cost of the program through permit fees (permit fees are not collected until the 404 Program is approved and implemented).

Will the State charge for 404 Program permitting fees?

With the State 404 Program, DEC will work with stakeholders to determine and implement an appropriate permitting fee and schedule. As we implement the 404 Program, we anticipate developing a hybrid funding scenario with some General Fund support, some federal grant support, and permit fees providing the remainder of the program funding needs.

It is important to note that the State’s Section 401 Water Quality Certification that is required for issuance of USACE 404 Program permits will not be required for State-assumed waters – the State will issue the 404 Program permit, and as part of that adjudication, the State will review and evaluate water quality information and compliance with the State’s Water Quality Standards (18 AAC 70). The Section 401 Program Water Quality Certification will still be required for USACE retained waters and issued permits.

Will the State receive any federal funding to assume 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 the Environmental Council of States (ECOS), is the continued advocacy for financial support.² During the week of March 27-31, 2023, Commissioner Brune

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>

met with other states at the ECOS, where they unanimously passed a resolution in support of federal funding for states that assume the 404 Program.³

DEC Commissioner Jason Brune discussed this lack of federal funding support for the assumption and implementation of the 404 Program with U.S. Senator Lisa Murkowski and Congresswoman 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.

Who supports the State assuming the 404 Program?

Homebuilders, residential and commercial land developers, general contractors, and other industries affected and impacted by 404 Program permitting and USACE implementation costs support the State assuming the 404 Program. Letters of support and/or verbal testimony have been provided by:

- Individual Homebuilders
- Alaska State Homebuilding Association
- Associated General Contractors
- Construction Companies
- Engineering Firms
- Individual Land Developers
- Council of Alaska Producers
- Resource Development Council
- Alaska Chamber of Commerce
- Greater Fairbanks Chamber of Commerce
- The Alliance
- Alaska Miners Association

Why Haven't Other States Assumed the 404 Program?

The primary reasons given are:

1. Lack of federal funding assistance. Unlike other federal programs that states can assume (e.g., air quality, wastewater discharge, solid waste, drinking water, etc.), there is no federal funding support for states that take on the 404 Program, despite the fact that state assumption relieves the USACE of a significant portion of its work.
 - a. DEC, with support from the Environmental Council of the States (ECOS) and NAWM, is seeking a change that will allow federal grant funds to help support state-implemented 404 Programs. The DEC commissioner has sought and received support for the action from U.S. Senator Lisa Murkowski and Congresswoman 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. Partial federal support will increase other state's interest in program assumption.

³ <https://www.ecos.org/wp-content/uploads/2023/04/08-3-404-Assumption-v2023.pdf>

2. The benefit to the state is too small. Many states realized that their piece of the USACE's 404 Program permitting pie is too small to make it worth the effort to assume a new program. This is due to lack of wetlands in most states and the number of waterbodies where the Corps would retain permitting jurisdiction. Alaska's stake in the 404 Program is like no other state, given the sheer areal extent of Alaska's wetlands. The state with the next largest percentage of wetlands is Florida, and they assumed the program in 2020.
3. Lack of jurisdictional clarity. Prior to 2018, it was unclear which waters were assumable under the 404 Program. In 2015, the EPA convened the "Assumable Water Subcommittee" workgroup to provide advice and develop recommendations for what waters could be assumed. In 2017, the workgroup provided formal recommendation that the Corps retain Sec 10 waters under the Rivers and Harbors Act, plus a 300-foot administrative boundary, which could be adjusted to accommodate the unique regulatory, topographical, and hydrological needs of the state. In 2018, the Corps accepted this recommendation, and by doing so removed one of the major hurdles for states to assume the 404 Program.
4. Alaska's economy and history are unique. Most states do not have resource-based economies that are reliant on the land. For those economies that are not resource based, the difficulty in developing the land is not as important. Examples include California's Silicon Valley, the North Carolina research triangle, Boston's education and health care economies – they are not dependent on specific land parcels. Wetland questions are not economic questions to these states. They are to Alaska. Other states with mature land-based economies, such as the farming economies in the Midwest, have filled in much of their wetlands for development already and most likely learned to live with the presence of the remaining out-of-bounds wetlands. In Alaska's developing resource-based economy, we are confronted with both land-protection and land-development issues. The older states confronted this generations ago (and in some cases were solved in an environmentally unfriendly way – not how Alaska chooses to do things).

Are there any other potential cost savings?

Anything the State can do to reduce permitting time and costs while protecting human health and the environment will generally translate favorably to resource development interest and investment in the state. Anecdotally, this may translate to increased permitting needs and revenue (decreasing reliance on general funds), improved water quality and wetland management with through an in-lieu fee program.

Instead of paying a land trust for lands to be set aside as compensatory mitigation, a project proponent may have the option to pay for credits in an in-lieu fee program. The fees collected will be then used for water quality improvement projects that will benefit Alaskans. Examples of water quality projects include clean up of contaminated sites, funding for Village Safe Water improvements, fixing perched culverts, and other water quality improvement projects. Having a state in-lieu fee program will allow Alaska to fund project that may otherwise languish.

Are Michigan, New Jersey, and Florida having trouble maintaining the 404 Program?

No. These three states assumed the 404 Program at different times and continue to implement them successfully: Michigan in 1984, New Jersey in 1994, and Florida in 2020.

Michigan – “In 2009, Governor Granholm proposed ceding wetlands permit authority back to the U.S. EPA as a cost-cutting measure. However, Michigan environmental groups opposed the plan and it was never implemented.”⁴ Michigan’s dredge and fill program has successfully been implemented for decades and Michigan representatives that spoke with DEC did not indicate any recent issues in implementing the program, rather, only reported on its successes. It is important to note, however, that in 1997 EPA began a review of Michigan’s program and issued a final report in 2008 of necessary corrective actions, with associated timelines, that needed to be implemented. Changes were made and the program was updated and continues to be successfully implemented.

New Jersey – In 1987, New Jersey’s Legislature reached bipartisan support for assuming the 404 Program. In a letter from the New Jersey Department of Environmental Protection Commissioner Shawn LaTourette to Alaska DEC Commissioner Jason Brune, dated April 3, 2023, Commissioner LaTourette expressed the benefits to their state coming from assuming the 404 Program. He further went on to say that the program has proven a “successful endeavor for New Jersey.”

Florida – According to Florida’s dredge and fill permitting program employees that the Alaska DEC spoke with, Florida’s Department of Environmental Protection (DEP) has no intention in returning the program to EPA. In DEP’s first report to EPA, DEP expressed experiencing some initial challenges early in their implementation of the state dredge and fill program.⁵ Namely, upon program approval, DEP received a larger than anticipated number of applications from the USACE and a higher than anticipated number of applications from the regulated community. In consultation with EPA and other federal and state agencies, DEP has implemented practical solutions and policies.

Isn’t DEC already under-resourced with challenges administering its programs?

No. This is a rumor and has no merit.

DEC recognized it needed to improve its employee retention rate, and it has done so reducing it from ~30% per year in 2018 to less than 15% per year in 2022. An emphasis has been placed on retaining, developing, and promoting employees from within DEC. Many benefits of working for DEC includes the opportunity to telework, rotational days off, and an investment in employees’ professional growth:

- An average of over 40 hours of training has been invested in each employee over the last year. DEC leadership is focused on developing their team and meets individually with

⁴ <https://www.michbar.org/file/journal/pdf/pdf4article2390.pdf>

⁵ <https://floridadep.gov/sites/default/files/Final%20State%20404%20Program%20Annual%20Report.pdf>

their employees to determine their interests and areas for professional development. This has enabled leadership to provide their staff with relevant training and other opportunities that will help cultivate each employee and develop their skills to allow them to continue to advance in a direction tailored to their professional goals.

- For those individuals that want to become future leaders, DEC created the DEC Leadership Academy. The Leadership Academy provides future DEC leaders the opportunity to learn from DEC Directors, work on department projects that will benefit the department and enrich the employees working on them, as well as get a department-wide perspective.
- Further efforts toward retention have been made by increasing department-wide communication. An all-staff meeting is held monthly where all DEC employees have an opportunity to learn what is happening within the department. This has provided employees with greater understanding of how their job and role fits within the overall mission of DEC. And lastly, DEC has implemented a bi-weekly lunch-and-learn. This allows staff the opportunity to present to their colleagues on any DEC-related topic. Lunch-and-learns are well attended and have been a further value to staff in creating a department-wide comradery.

How will DEC be able to find staff with existing Alaska workforce shortages?

DEC has developed a 404 Program implementation plan. Included in the plan is an overall hiring plan, which includes order of hiring, recruitment strategies, training, and work assignments.

- DEC will share internally the entire list of new positions and a general timeline on when positions will be recruited. This will ensure opportunities for staff within DEC that may want to transfer into the new program either via a lateral to the same class/level position or to apply for a promotional position. While DEC doesn't encourage "robbing" one program to fill positions in another program, it is Department policy to support staff interests and assign them to work they are most interested in doing, whenever feasible.
- DEC will share information about 404 Program job opportunities with other state agencies.
- DEC will share information about 404 Program job opportunities with UAA, UAF, UAS, APU.
- DEC will share information on job opportunities with interested business organizations including the Resource Development Council, the Alaska Oil and Gas Association, the Association of General Contractors, Alaska Homebuilders, Alaska Miners Association, etc.
- DEC will meet with the USACE and discuss opportunities for Intergovernmental Personnel Agreements that allow USACE staff to work within/for DEC for designated time periods and for DEC staff work in the USACE's offices. These staff exchanges provide great learning opportunities for both agencies. FY24 will focus on program/application development and FY25 will focus on technical aspects including

permitting, compliance, jurisdictional determinations, wetlands delineation, and compliance.

- DEC will advertise through online recruiting resources.
- DEC will advertise the new program and seek recruitment through the Environmental Council of States (ECOS) and the National Association of Wetlands Managers (NAWM).
- DEC may consider borrowing staff from other states' USACE or state offices with wetlands programs to temporarily fill some of the new positions.