Clean Water Act Section 404 Dredge and Fill Program Assumption

Feasibility Report

Prepared for
Alaska Department of Environmental Conservation
Anchorage, Alaska

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THE STATE of ALASKA
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Dear Members of the Alaska Legislature:

I am excited to provide you with the Clean Water Act Section 404 Dredge and Fill Program Assumption Feasibility Study you directed the Department of Environmental Conservation (DEC) to complete during the 2022 Legislative session. The results of this study further demonstrate the necessity of the State to act expeditiously to take on these responsibilities from the U.S. Army Corps of Engineers by submitting an application to the Environmental Protection Agency (EPA). DEC looks forward to demonstrating the environmental and economic benefits State oversight of this program will bring to Alaska. After evaluating the results of this study, it is the Dunleavy Administration's intention to include funding for this effort in the Governor's amended FY24 budget slated to come out later this month.

Alaska has two-thirds of the country's wetlands and 43% of Alaska's land area is wetlands. I would like to highlight several items from this report. First, we have always said that Alaskans know more about protecting our wetlands than anyone from the Lower 48. Alaska does not have a shortage of wetlands with approximately 175 million acres, less than .1% of which have been developed to date. With the recent January 18, 2023, federal rule change that further expands the definition of regulated Waters of the United States, lands that will be subjected to 404 permits will only be increasing. It's the ideal time for Alaska to take this step and control environmental protection and economic development through the assumption of the 404 Dredge and Fill Program.

With support of the Alaska Legislature, we will make an Alaskan 404 Program as strong, or stronger than the requirements set out by the EPA. This is, in fact, a requirement of assuming the program. Permittees are required to compensate for unavoidable impacts to wetlands. We will have the opportunity to provide compensatory mitigation options that are presently not utilized and veer from the federal focus of restoring damaged wetlands, creating new wetlands, or putting lands into perpetual conservation easements as their primary mitigation options. Alaska has not lost wetlands like other states – there's little to restore; places where wetlands can thrive in Alaska are already a wetland; and many of Alaska's wetlands already have protection status as 88% are under public management (Alaska already has well over 150 million acres of lands set aside for conservation purposes). In short, the existing federal tools provided for mitigation do not maximize environmental benefit to Alaska. State implementation of the flexible compensatory mitigation requirements, however, could do just that: for example, the State could allow project developers to remediate contaminated sites that affect water quality in the watersheds of their activities. This is one example of how Alaska's oversight of this program could provide tremendous environmental and social benefits to communities and developers alike when Alaska gains oversight of this program.

By bringing this program under the State, Alaska will be in the position to take greater control of its destiny and not be subjected to changing federal administrations. Projects will benefit from increased coordination within the existing State regulatory framework as well as, in certain instances, avoid the huge cost and time burden of a NEPA analysis without decreasing environmental protection. Further, this tremendous opportunity will ensure that Alaskans can hold its State government accountable for actions far easier than holding Washington DC to task nearly 5,000 miles away.

The Lower 48 has lost well over 50% of its wetlands, a model Alaska will never follow. As we've heard time and time again, nobody does it better than Alaska. Given the expertise of our regulators and our ongoing commitment to setting the bar as high as possible, there is no better time than now to take over this program and ensure protection of our environment while providing the opportunity for responsible economic development to occur.

Once again, we look forward to speaking with you more about this amazing opportunity for Alaska. An Alaskan 404 Program will bring efficiencies to the process, decrease permitting timelines and associated costs of projects, while improving water quality and protecting the important ecological functions of wetlands in ways that reflect Alaska's priorities. Please don't hesitate to reach out to us if you have any questions and we look forward to your support of this critical work beginning with the FY24 budget.

Sincerely,

Jason W. Brune
Commissioner

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ACRONYMS

Alaska District	U.S. Army Corps of Engineers, Alaska District
APDES	Alaska Pollution Discharge Elimination System (CWA Section 402 Program assumed by Alaska)
AJD	Approved Jurisdictional Determination
ASWI	Alaska Statewide Wetland Inventory
ASWM	Association of State Wetland Managers
CFR	Code of Federal Regulations
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
CWA 404 or "404"	Federal program, Permits for Dredged or Fill Material, assumable by the State
CWA 402 or "402"	National Pollutant Discharge Elimination System (Wastewater Discharge) program, assumed by Alaska as the APDES program
DEC	Alaska Department of Environmental Conservation
DF&G	Alaska Department of Fish and Game
DNR	Alaska Department of Natural Resources
ECOS	Environmental Counsel of the States
EDMS	Environmental Data Management System (at DEC)
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
EPM	Environmental Program Manager
EPS	Environmental Protection Specialist
FDEP	Florida Department of Environmental Protection
FTE	Full-Time Equivalent
FY	Fiscal Year
G2G	Government-to-Government
GP	General Permit
ILF	In-Lieu Fee
IP	Individual Permit (or "Standard Permit")
IRT	Interagency Review Team
JD	Jurisdictional Determination
LOP	Letter of Permission
MOA	Memorandum of Agreement
MDE	Michigan Department of Environment, Great Lakes, and Energy
NACEPT	National Advisory Council for Environmental Policy and Technology
NEPA	National Environmental Policy Act
NJDEP	New Jersey Department of Environmental Protection
NPDES	National Pollutant Discharge Elimination System
NWP	Nationwide Permit
ORM-2	Operations and Maintenance Business Information Link Regulatory Mode (Corps data system)
PGP	Programmatic General Permit
PJD	Preliminary Jurisdictional Determination
RGP	Regional General Permit

SB	Senate Bill
SHPO	State Historic Preservation Office
SIRT	State Interagency Review Team
SP	Standard Permit (or, "Individual Permit")
SPGP	State Programmatic General Permit
USACE	U.S. Army Corps of Engineers or "Corps"
USFWS	U.S. Fish and Wildlife Service

EXECUTIVE SUMMARY

The federal Clean Water Act (CWA or Act) has two main programs: the Section 402 Program to control point-source pollution discharges to surface waters and the Section 404 Program to regulate the discharge of dredge or fill material into wetlands and other waters of the United States. The CWA states "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of [s]tates to prevent, reduce, and eliminate pollution." It is built on the principle of cooperative federalism, 33 U.S.C. Section 1251(b). Congress preserved for states like Alaska the "primary responsibilities and rights" to prevent water resources pollution, stating: "it is the policy of Congress that the states . . . implement the permit programs under sections [402] and [404]." *Id.* Section 1251(b). Alaska assumed the 402 Program in 2008, joining 46 other states that implement the program. This report reviews the feasibility for Alaska to assume the 404 Program.

With over 174 million acres of wetlands and vast amounts of other waterbodies, Alaska's stake in administering the Section 404 Program of the CWA is unlike that of any other state (see comparisons in Table 1. Historic Wetland Loss/Gain by State – Table and Graphs). A great proportion of Alaska's economy – construction projects, public works, roads, mines, residential properties, or oil development – affects wetlands and often requires a Section 404 permit from the U.S. Army Corps of Engineers (Corps).

Alaska	Acres	Percent of Surface Area
Alaska Wetlands Acreage	174,683,900	43%
Deepwater (lakes and coastal)	29,870,400	7.40%
Total	**204,554,300**	**50.400%**

Source: Status of Alaska Wetlands, U.S. Fish and Wildlife Service. 1994

An assumed 404 Program means the State, rather than the Corps would issue Individual Permits (IPs), referred to by the Corps as Standard Permits (SPs)[1] and General Permits (GPs) for the discharge of dredged or fill material into certain waters. While the State can assume dredge and fill permitting responsibility from the Corps for most areas, the CWA requires that the Corps retain permitting jurisdiction for certain "non-assumable" waters that must remain subject to federal purview (generally, waters used to transport interstate or foreign commerce). Waters where the State would assume responsibility and waters where the Corps would likely retain jurisdiction is explained in Section 4 and demonstrated in Figure 2. - Figure 5. However, as shown in this report we estimate that the State would assume responsibility for approximately 75% of the 404 permit actions the Corps currently administers in Alaska. The remaining 25% would remain with the Corps.

A state program cannot impose any less stringent requirements than those set forth in EPA's state assumption regulations (40 CFR § 233).[2] To assume the Corps' permitting responsibility over

[1] Individual Permit (a term generally used by states) and Standard Permit (a term used by the Corps) refer to a similar permit tool and only authorize one project. A General Permit may be used to authorize multiple projects.
[2] The regulations provide that state 404 Programs "shall, at all times, be conducted in accordance with the requirements" of Section 404 and the Section 404 State Program Regulations (40 CFR § 233). States are not allowed to "impose any less stringent requirements for any purpose."

assumable waters, the State must show that its program is at least as stringent as the current federal 404 Program and has sustainable funding. Therefore, State assumption of the Corps' program does not decrease environmental protection in Alaska. In many respects, Alaska's management of the 404 Program may result in increased environmental protection and better management of resources. State assumption of the 404 Program has other important advantages.[3] These benefits are explained in detail in Section 2, and summarized here:

- **Program assumption will maintain or improve environmental protection.** State assumption of the 404 Program will increase State and local involvement in key decisions and will better reflect the environmental priorities and needs of the state. State dredge and fill permitting can be better targeted to represent Alaska's environment and better protect the unique characteristics of Alaskan conditions, which is different from elsewhere in the U.S. A State 404 Program can be coordinated with existing key State programs already in place, such as the Alaska Department of Environmental Conservation (DEC) Wetland Management Plan; Alaska's Water Quality Standards; water quality monitoring program; the biannual Water Quality Assessment and Monitoring Report (which identifies impaired waters that may benefit from compensatory mitigation required of some 404 permittees); State land management and permitting programs; State fish and game programs; and State coordination programs for projects requiring multiple permits, including other environmental permits.

- **Compensatory Mitigation.** Compensatory mitigation (compensating for impacted wetlands) may be the most significant issue associated with implementing State program assumption. A more flexible, State mitigation approach may allow Alaska to address more pressing water quality protection and restoration needs than the federal program that is focused on restoration and creation of new wetlands. Alaska has such a large percentage of undisturbed wetlands that the requirements set for the lower 48 states to restore or replace impacted wetlands may not be suitable for Alaska. Techniques used to avoid, minimize, and compensate for wetlands impacts may not work as well in Alaska. This issue provides an opportunity to work with EPA and the Corps to develop the required compensatory mitigation in a manner that is appropriate for Alaska. Developing a compensatory mitigation system that meets federal requirements, is efficient for project applicants, and is appropriate for Alaska, will be one of the greatest benefits from a State-assumed program. Importantly, federal law currently provides that, "to the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, ***provide flexibility for regional variations in wetland***

[3] "When States and tribes assume the Section 404 permit program, they protect the waters to the same level as the federal government and often increase efficiencies and remove redundancies in permitting processes." U.S. Army (2018, August 7). *Army Issues Memorandum to Empower States and Tribes in their Permitting Authority*. Retrieved December 28, 2022, from https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_authority

conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation."[4]

- **Opportunity to reduce the high costs and burdens of federal 404 permitting.** Applicants for 404 permits spend significantly on the permitting process. Any government actions that reduce the timeframe for issuing a permit (while still meeting all environmental protection needs) can represent a cost savings to permit applicants and the permitting agency. With Alaska's short construction season, a 2-month permit delay may mean delaying construction to the following year. Project delays almost always result in higher project costs, usually with no environmental benefit. State-assumed programs can create streamlined timelines by creating state-specific general permits, establishing more stringent statutory timelines, permit coordination and increasing program stability, among other options discussed in this report.

- **Assumption would increase Alaska's control over its economic future.** An important part of Alaska's history is the fight to obtain more State control over Alaska's resources from the federal government. The Corps' wetland permit is the remaining, frequently used permitting authority retained by the federal government over State and private land. Assuming control would allow Alaska to coordinate permitting for projects, including control over scheduling, and priorities. Assuming permitting control over much of the State's wetlands would be a major increase in State control over development in Alaska.

- **State government is closer and more accountable to Alaskans than the federal government.** State leadership employees are accountable to the legislature, which is closer to individual Alaskans than the federal government. The DEC budget and description of agency services and progress reports go through the legislature, with public review, every year. It is easier for the State to craft solutions for Alaska's unique wetland, social, and economic circumstances than it is for the Corps, which must be concerned about how these may or may not apply to other states. DEC can prioritize resources and schedules to respond to Alaska priorities, whereas the federal government must adhere to national priorities. An obvious example of the better physical access Alaskans have to State government is that permittees and the public can meet with DEC employees and legislators in offices located around the state. It is easy to meet with a State employee, but to meet with the Corps in Alaska, one must gain access to a military base, which can be difficult.

[4] *See* National Defense Authorization Act For Fiscal Year 2004, Pub. L. 108–136 § 314(b) (2003). Based on this congressional direction, in 2008, the Corps and EPA jointly issued regulations establishing standards and criteria for compensatory mitigation ("2008 Mitigation Rule"). See 73 Fed. Reg. 19593 (Jun. 9, 2008); 40 CFR Part 230, Subpart J. In doing so, the 2008 Mitigation Rule expressly required the Corps to account for "regional variations" when applying the standards and criteria. *See* 40 CFR § 230.91(a)(1) ("standards and criteria shall, to the maximum extent practicable . . . provide for regional variations in wetland conditions, functions, and values"). The preamble to the rule further clarified that the rule "does not prescribe a one-size-fits-all" approach to compensatory mitigation. 73 Fed. Reg. at 19616-17.

- **State courts are more knowledgeable about Alaska's unique conditions than are federal courts.** Lawsuits contesting Corps-issued permits are litigated in federal courts, including the possibility for challenges to permitting decisions to occur in federal courts as far away as Washington, D.C. Most (but not all) lawsuits contesting a DEC permit would be litigated in Alaska State courts where many Alaskans have more familiarity with the applicable procedures. For example, obtaining legal representation in federal courts can be more costly and specialized than in State courts in some instances. State courts tend to be more familiar with Alaska conditions and issues than courts hearing cases outside of Alaska.

- **Some projects may not be subject to federal NEPA review.** Congress has established that the National Environmental Policy Act (NEPA) only applies to "major federal activities" and not to state actions like issuance of state 404 permits. Likewise, Congress has directed that EPA approval of state 404 Programs is not subject to NEPA. The Corps' wetland permit is frequently the federal action that requires federal NEPA review – an Environmental Assessment (EA) or the longer Environmental Impact Statement (EIS). Under a state-assumed program, projects that are not on federal land, do not involve federal funding, or that lack another federal nexus may not require federal NEPA review. Eliminating federal NEPA review would not impact many of the smaller projects in Alaska but could significantly decrease costs and accelerate the timeline for some of the larger Alaska projects, without compromising State agencies' ability to protect the environment.

- **State assumption provides opportunities for permit streamlining.** Permit streamlining can result in cost savings for permittees and regulators.[5] DEC could accelerate wetland permitting in several ways. For example, State assumption will eliminate the requirement for DEC to certify that the Corps' permit meets Alaska water quality standards. Thus, rather than the need for two separate regulatory actions (with the chance for similar but slightly different required conditions) for the same activity, the separate certification would be eliminated. State assumption may also mean faster agency coordination. In addition, the State could make greater use of General Permits and delegate some activities to Alaska's larger local governments. Likewise, for 404 purposes, EPA has utilized programmatic consultation approaches under the Endangered Species Act that provide for more streamlined review of species impacts.

- **The State could make more use of Alaska-specific policies and procedures.** Alaska agencies are better situated to craft policies and procedures that work for Alaska's diverse geography and climate. Alaska could develop policies for different eco-regions of the

[5] "Many States have determined that State and tribal implementation of the Section 404 permit program saves substantial money as they are able to incorporate the review process into their existing program. This action supports infrastructure investment as removal of redundancies in State/tribal and federal reviews will help provide more timely completion of permit review requirements." U.S. Army (2018, August 7). *Army Issues Memorandum to Empower States and Tribes in their Permitting Authority*. Retrieved December 28, 2022, from https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_authority

state without having to worry about national effects. Alaska may be better situated to craft Alaska-specific mitigation policies.

- **The State program would have a more inclusive and more predictable appeals process.** Under the Corps' program, only an applicant (or owner of the permitted property) may administratively appeal a federal wetlands permit. The federal appeals process has no firm deadline and can extend for a long time. Individual citizens must go to federal court. Under a State-assumed program DEC should use its existing appeals process, which is open to Alaska citizens that participated in the permit process, allows for an informal review by the Water Division Director, and an administrative appeal to the DEC Commissioner with firm deadlines, and allows unsatisfied appellants to generally go to State court. The faster, more predictable, more open appeals process has advantages for both industry and ordinary Alaskans.

- **The State program has the potential to be more stable and predictable to applicants than the federal program.** It is expected that the State program will provide more stability and predictability than the federal program. Recent experience with numerous changes to the federal definition of Waters of the United States (WOTUS) and the extent of the Corps' jurisdiction have caused confusion to agencies and applicants.[6] Michigan and some other states have provided a more stable and predictable program than the Corps' program, as their regulatory programs cover both WOTUS and non-WOTUS locations. The multiple federal boundary changes between WOTUS and non-WOTUS are less disruptive in states with programs that cover both. Under the 404-oversight process, Alaska will have one year to update existing state regulations to reflect changes in federal regulations (or two years, if a statutory change is required), providing more time to inform permittees of coming changes.

State assumption of the 404 Program would require overcoming some challenges. These are explained in Section 3 and summarized below.

- **Cost.** Based on current estimates, development of the application to EPA to assume the 404 Program, drafting regulations and program tools, along with staff hiring and training would require ramping up over two years. We estimate that, during the first year, these efforts would require bringing on 28 positions and $5.0 million. The second year (and program implementation beginning in the third year and beyond) would require 32 permanent positions and cost the State approximately $4.8 million per year. The State could pay for this program through General Funds, fees, or a combination of these. The estimated costs of the assumed program and potential funding mechanisms are explored in Sections 5.3 through 5.4 of this report.

[6] The definition of WOTUS was changed again during the writing of this report. The EPA December 30, 2022 announcement and a link to the revised definition can be found at: Revising the Definition of "Waters of the United States" | US EPA This new definition is scheduled to become effective 60 days after publication of the new definition in the Federal Register.

- **Clarifying Responsibility between Federal and State Agencies.** The CWA does not allow the State to assume permitting responsibility for all waters and wetlands in Alaska. While the Department of Environmental Conservation (DEC) would likely issue 75% of dredge and fill permits, the Corps would still have authority for the other 25%. Some projects would require only a State permit, some a federal permit, and some might cross boundaries and involve permits from both the Corps and DEC. Section 4.6 discusses options for projects which cross the boundary of assumable waters. Different states have handled this issue in different ways. In any case, the State would need clear maps and guidelines to avoid potential permittee confusion.

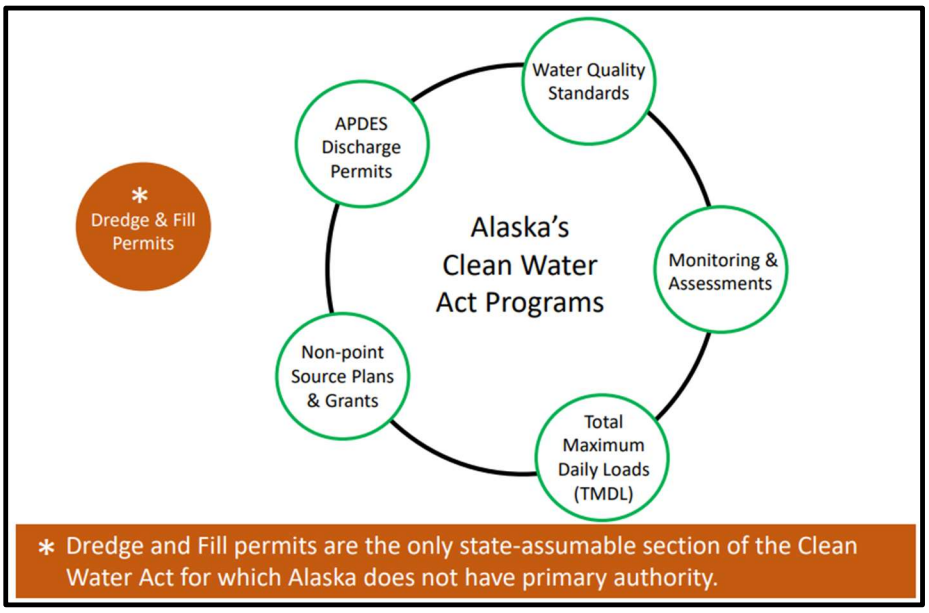
- **Environmental Review.** Under a State-assumed program, DEC would have to conduct the environmental review currently conducted by the Corps. This includes writing decisions consistent with federal regulations (known as the "404(b)(1) guidelines ") which give direction to the dredge and fill permitting process required for a federal wetlands decision. This review may involve other agencies: working with the U.S. Fish and Wildlife Service on endangered species, and work with the State Historic Preservation Office (SHPO) on cultural resources issues. Finally, because federal NEPA review may not be required for some projects, DEC's environmental review guidelines (that must be at least as stringent as the Corps' 404(b)(1) guidelines) supporting a permit decision may receive more public interest.

- **EPA Oversight.** EPA has a history of close oversight over state programs which assume portions of the CWA regulatory authority. Experience in Alaska's 402 wastewater discharge program assumption process indicates that significant time and effort will be required to work with EPA to ensure that the agency's oversight is appropriate and allows DEC's assumed 404 process to remain efficient and not burden permittees with responsibilities beyond what the law requires. DEC can expect to develop a series of MOUs with EPA to address program issues. While EPA has the right to review the State's decisions, experience with other states that have assumed the 404 Program indicates that once the State assumes the program, formal EPA objections to State permits are rare. Where concerns arise over particular projects, the Corps, EPA, and the state are usually able to work cooperatively to resolve issues and move forward.

- **Tribal involvement.** Tribal governments enjoy a government-to-government relationship with the federal government and may express concerns about loss of this relationship when a federal program is assumed by a state, however, Alaska governors have issued Administrative Orders over the years to support consultation between State agencies and tribes. DEC has an "ADEC Tribal Consultation Policy" that applies to the agency's work, including work under assumption of a program from the federal government. Concerns over the potential loss of involvement by tribal governments was expressed during State assumption of the 402 wastewater discharge permitting program. To address those concerns for the 402 Program, DEC developed a guidance document "APDES Guidance for Local and Tribal Governments." The same tribal concerns should be anticipated in the 404-assumption process and can be addressed by developing similar program guidance.

The recommended program.

The 404 dredge and fill program is the only CWA program available to states for which Alaska does not have authority (see figure below). The Corps' wetlands permit is the remaining major permitting authority retained by the federal government over development on state and private land in Alaska. Given the benefits to the environment and economy of the state, DEC should take the necessary steps to assume the 404 Program from the Corps. Assuming the Corps' 404 permitting program will allow the State to issue approximately 75% of the 775 annual permit actions currently issued by the Corps (about 580 actions per year). See Table 2 Comparison of Corps Program Staffing Size to Proposed Alaska Program Staffing that describes estimated actions/year based on a five-year average. With full program funding, the quickest possible timeframe to achieve program assumption approval is about two years The first year would require 28 FTE and $5.0 million, ramping up to an ongoing program in the next year with 32 FTE and a budget of $4.8 million (the cost decreases somewhat in the second year because one-time office equipment and supplies are purchased for 28 FTE during the first year). Based on regional workload, the 32 staff required to maintain the program would be allocated with approximately14 staff in Anchorage, 12 staff in Fairbanks, and 6 staff in Juneau. Section 5.4 of this report describes different methods to fund the cost.



1. INTRODUCTION AND BACKGROUND

1.1 Introduction

In 1972, the U.S. Congress passed the historic law which has come to be known as the Clean Water Act (CWA). The act prohibits discharge of pollutants into waters of the U.S. (WOTUS) without a permit from the U.S. Environmental Protection Agency (EPA) (Section 402) and prohibits the addition of dredged or fill material into WOTUS without a permit from the U.S. Army Corps of Engineers ("the Corps") (Section 404). Throughout this report, the required permit may be referred to as a "404 permit" or the commonly used term, "wetlands permit" even though the permit is required for the addition of dredged or fill material to WOTUS, not just "wetlands." As described in Section 4, WOTUS includes certain wetlands. WOTUS also includes most rivers, creeks, lakes, swamps, estuaries, or any perennially wet areas. In Alaska, these waters make up almost half of the state's surface area. Section 404 results in an often-onerous permitting process for the discharge of dredged or fill material into WOTUS, including wetlands.

The CWA also provides that individual states can assume primacy over Section 402 and Section 404 permitting. All but three states have assumed 402 permitting, but only three other states have successfully assumed the 404 Program: Florida, Michigan, and New Jersey. Part of the reason that fewer states have chosen to assume 404 permitting is that wetlands average only 5% of the surface area of the lower 48 states.[7] This report analyzes the feasibility of Alaska assuming the 404-permitting process from the Corps and provides information to assist the State with program assumption.

1.2 Background

Section 404 of the CWA regulates the discharge of dredged or fill material into the nation's waters and wetlands, requiring a Section 404 permit issued by the Corps before dredged and fill material may be discharged in waters of the U.S. While Section 404 is often described as a wetlands program, it applies to all waters of the U.S., not just wetlands.

In 1977, Congress amended the federal CWA to provide a legal mechanism for states to assume the Act's Section 404 dredge and fill permit program. With more coastline than the rest of the country combined, and over 174 million acres of wetlands in Alaska (many of them unique to the state such as permafrost and tundra), Alaska's stake in administering the Section 404 Program of the CWA is unlike that of any other state (see Figure 1. Alaska Wetlands Compared to Lower 48 Wetlands). In Alaska, almost every development project affects WOTUS, and therefore, Alaska has a unique interest in ensuring that the permitting process protects Alaska resources, while encouraging and streamlining responsible development. Given Alaska's size, high percentage of wetlands, and climactic diversity, our state is ideally suited to assume the 404-permitting program and can serve as the model for other western states considering primacy.

[7] Dahl, T.E. 1990. Report to Congress: Wetlands Losses in the United States 1780's to 1980's. U.S. Department of Interior, Fish and Wildlife Service, Washington D.C., 13 pp. Table 1, page 6.

DEC has broad authority to regulate pollutant discharges to the lands and waters of the state but does not directly regulate dredge and fill activities affecting Alaska waters. While the State does not currently issue permits for these activities, it has significant expertise in the program. Under CWA Section 401, the State has the obligation to review applications for the Corps of Engineers 404 permits and to determine whether the permitted activity will comply with State water quality standards. DEC must issue what is essentially a second authorization for the proposed activity. Thus, the DEC has many years of review and participation in the issuance, modification, or denial of 404 permit applications.

In 2013, the legislature passed, and the governor signed, SB 27 directing DEC and the Alaska Department of Natural Resources (DNR) to evaluate the potential benefits, costs, and consequences to the State of assuming primacy for regulating dredge and fill activities under 33 U.S.C § 1344. The bill directs the agencies to take reasonable steps to assume primacy and provides broad authority to take actions, including adoption of regulations necessary to obtain federal approval of a State program and to implement the program.

In 2014, DEC conducted an analysis of the workload, potential costs, staffing needs, budget, and timeline for assuming the program from the Corps and for implementing the program. Recent federal actions have made it more conducive now for states to assume the 404 Program. For example, EPA approved Florida's 404 Program in December 2020. Alaska can refer to Florida's experience and application to help with Alaska's effort to prepare a program that fits Alaska's unique circumstances. Also, the 2018 EPA-Corps MOA[8] concerning mitigation in Alaska provides mitigation flexibility that the State could duplicate in an EPA-State MOA if it operated the program (the "2018 MOA," see Appendix 1. 2018 MOA Between Corps and EPA Regarding Mitigation Sequence in Alaska).

Subsequent to the passage of SB 27, the legislature removed funding for DEC to continue its work towards program assumption. In the FY 2023 budget, the legislature approved funding to explore assumption and included intent language stating:

> "It is the Intent of the Legislature that $1 million is appropriated for the purpose of the Department of Environmental Conservation to complete a feasibility study on the assumption of primacy of Section 404 of the Clean Water Act. The report will be submitted to the four co-chairs of the Finance Committees and Division of Legislative Finance by February 1, 2023."

This report is in response to the legislature's intent language. It updates work conducted in 2014, including a workload analysis (wetlands determinations, jurisdictional determinations (JD's), permitting, mitigation, compliance review, and enforcement) using the Corps' most recent five years of data, staffing, and budget needs. In addition, this report details the benefits of a State-administered 404 Program, challenges with program development and implementation, and includes a discussion on the waters that would likely fall under a State program. It further makes

[8] MEMORANDUM OF AGREEMENT BETWEEN The Department of the Army AND The Environmental Protection Agency CONCERNING Mitigation Sequence for Wetlands in Alaska under Section 404 of the Clean Water Act. Copy at Appendix 1. 2018 MOA Between Corps and EPA Regarding Mitigation Sequence in Alaska

recommendations throughout the report based on a review of Alaska's experience obtaining primacy for the CWA Section 402 wastewater discharge permitting and on the experience of other states that have assumed the Section 404 permitting program (Michigan, New Jersey, and most recently, Florida).

1.3 404 Assumption Standards vs. Corps' Regulatory Program Standards

It is important to keep in mind that under the 404 Program assumed by the State of Alaska, EPA may exert greater control than they do over the Corps while implementing similar standards. While similar work will be required of the State, the EPA focus and effort expended on CWA programs at the State-level is likely to be different, primarily due to greater EPA oversight and involvement. While EPA can veto a Corps-issued permit, EPA cannot remove program operation authority from the Corps either at the headquarters or regional level. EPA retains the authority to oversee a state-assumed program and the State should anticipate a significant amount of EPA oversight, particularly early in the State's operation of the program.

In addition to being the authority to approve a state program (determining the state program is at least as stringent as the federal program), under Section 404(j) EPA can review and potentially object to any permit a state program proposes to issue, if EPA does not believe the permit complies with the 404(b)(1) guidelines. The state is prohibited from issuing the permit until EPA's objections are resolved. When Alaska took on the CWA Section 402 (wastewater discharge permitting program), EPA oversight was significant during the early years, including requests to the State to be more restrictive on permittees than the program formerly operated by EPA. DEC was able to work cooperatively with EPA to resolve those concerns. While creating an increased workload for the State, EPA only conducted one formal objection to a State-proposed permit. The issue was resolved in the State's favor, further indicating State competency in implementing a program assumed from the federal government. In the other states that have assumed 404 primacy, formal EPA objections are a relatively rare occurrence, based on discussions with other states with 404 Program assumption. For example, EPA has objected to 17 permits in Florida's two years of operating the program (just over 1% of all GP authorizations and IPs) and only federalized one permit. New Jersey has only had 1 EPA objection.

Additionally, EPA retains authority to revoke a state program (under 40 CFR § 233 State Program Regulations Subpart F – Federal Oversight) if the state is failing to meet the requirements of the approved program (or is operated inconsistently with the federal regulations, including updating the state program over time to remain consistent with revisions to the federal program after a state-assumption). There is a process for a state to rectify any deficiencies prior to revocation. EPA has not revoked any state 404 Programs, although there are only three state-assumed programs so far. EPA has similar authority to revoke delegation to states of other CWA programs but has rarely attempted to exercise that authority.

Below is a general summary of Corps and EPA responsibilities under the Corps-administered 404 Program:

Corps' Responsibilities

- Administers the day-to day program, including Standard (Individual) Permits, Regional General Permits (RGPs), and General Permit decisions.
- Conducts, verifies, and approves Jurisdictional Determinations (JDs)[9] based on the current definition of Waters of the United States (WOTUS).
- Develops policy and guidance supplying guidance in the form of Regulatory Guidance letters, Engineer Forms, and Special Public Notices.
- Enforces Section 404 provisions of CWA permits.
- Completes coordination with state and Federal agencies on Nationwide General Permits (NWP) reauthorizations (typically every five years).
- Completes Compensatory Mitigation Bank authorizations. The Corps leads the State Interagency Review Team (SIRT) for compensatory mitigation bank completeness review, approvals, and denials.
- The Corps is the lead or cooperating agency on major federal permit actions for Section 404 permits requiring an EIS.
- The Corps is responsible for maintaining the U.S. Army Corps of Engineers, Alaska District (Alaska District) web site updating guidelines, policy and issuing Public Notices. The web site is also the portal for submittal of permit applications and information requests.

EPA's Responsibilities

- Develops and interprets policy, guidance and environmental criteria used in evaluating permit applications for the CWA.
- Determines scope of geographic jurisdiction and applicability of exemptions. Develops CWA and WOTUS regulation and policy.
- Approves and oversees state and Tribal assumption.
- Reviews and comments on Individual Permit (IP) applications.
- Can elevate specific cases (Section 404(q)). Recommend permit denial or special conditions. Comments on all 404 Public Notices
- Enforces Section 404 provisions
- Can veto a 404 permit decision under 404(c) due to unacceptable adverse effects.
- Participate as a SIRT member.

Only three other states have assumed the 404 Program, as compared to 47 states that have assumed the 402 Program. There are a number of reasons for this. One significant reason is that, unlike 402 Program delegation which gives program approval for all waters of the United States located within the state, the CWA does not provide for state 404 permitting assumption for all WOTUS and retains some WOTUS in Corps' jurisdiction (non-assumable waters). So, if the State assumes 404 permitting, the Corps will still have permitting jurisdiction over some

[9] Jurisdictional Determination is the process for delineating which wetlands fall under the Corp's regulatory jurisdiction and which don't.

WOTUS. This is a significant challenge to State 404 assumption and will be discussed in more detail later in this report.

1.4 Program Assumption in Other States

Only three other states have successfully assumed the 404 Program: Florida, New Jersey, and Michigan:

Michigan. Michigan assumed the 404 Program in 1984. Michigan has 6.5 million acres of wetlands (approximately 10% of its surface area). Michigan's budget for its 404 Program is $12.3 million and includes 82 staff in 10 offices.

New Jersey. New Jersey assumed the 404 Program in 1994. New Jersey has 915,000 acres of wetlands (approximately 16% of its surface area). New Jersey's budget for its 404 Program is $14.5 million and includes 176 staff.

Florida. Florida assumed the 404 Program in 2020. Florida has approximately 10 million acres of wetlands (approximately 24% of its surface area). Florida's budget for its 404 Program is $11.3 million and includes 170 staff.

In addition to these three states, Nebraska, Oregon, and Arizona have engaged in efforts to assume the 404 Program. Nebraska is in the process of developing its application to the EPA, and Oregon abandoned its effort and chose to focus on its state wetlands permitting process instead. Arizona undertook an extensive stakeholder review of potential program assumption and while that effort produced significant information, they abandoned the effort in April 2020. In the last several years, EPA has made it easier to delineate between assumable and non-assumable wetlands, and this should make it more feasible for more states to assume 404 (See Section 4).

2. BENEFITS OF ALASKA 404 ASSUMPTION

2.1 Program assumption will improve environmental protection

A State-assumed wetlands program will provide better environmental protections for Alaska's unique wetlands. First, the EPA will not allow a state to assume a 404 wetlands permitting program unless it can demonstrate that it can provide environmental protections at least as stringent as the federal program. Second, State assumption of the 404 Program will increase State and local involvement in key decisions and will better reflect the environmental priorities and needs of the state. State wetland permitting can be better targeted to represent Alaska's environment and better protect the unique characteristics of Alaskan conditions, which are different from elsewhere in the U.S.

A state 404 Program can be coordinated with existing permitting programs, ensuring that all the environmental protections in all the other state and federal permits are considered in the context of Alaska's unique environmental conditions. Other existing state programs that can be coordinated with a 404 program include the DEC Wetland Management Plan; Alaska's Water Quality Standards; water quality monitoring program; the biannual Water Quality Assessment and Monitoring Report (which identifies impaired waters that may benefit from compensatory mitigation required to 404 permittees); State land management and permitting programs; State fish and game programs; and State coordination programs for projects requiring other environmental permits.

2.2 Compensatory Mitigation Flexibility

Compensatory mitigation is the primary means of the 404 Program's contribution to the national goal of "no net loss" of wetlands. Under the 404(b)(1) Guidelines, "compensatory mitigation" is defined as "the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved."[10] There are three mechanisms for providing compensatory mitigation: mitigation banks, in-lieu fee programs, and permittee-responsible mitigation (listed in order of preference as established by, and defined in, the 404(b)(1) Guidelines).[11]

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[10] 40 CFR § 230.92.

[11] Compensatory mitigation for impacts to WOTUS can be accomplished by using an In-Lieu Fee program, a mitigation bank, or through permittee-responsible mitigation, defined in 33 CFR § 332.2 and copied below:

In-lieu fee program means a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

Thus, under federal law, unavoidable impacts to wetlands associated with a 404 permitted activity must be mitigated. In other states, this is commonly accomplished by restoration of formerly impacted wetlands. Alaska is in a different situation with respect to wetlands than the rest of the U.S. In Florida, a state with a great quantity of wetlands, fully half of the wetlands had disappeared as of two decades ago.[12] California has lost more than 90% of the wetlands which once spread across the state.[13] Alaska is different. Our vast wetland acreage remains intact. Alaska has yet to lose 0.1% of its wetlands and over 88% are under public management.[14] This puts the state in a distinct position compared to the rest of the country (see Table 1. Historic Wetland Loss/Gain by State – Table and Graphs). In many areas, the state lacks degraded wetlands to be rehabilitated. Rehabilitating degraded wetlands within a permittee-impacted watershed, a common and realistic mitigation practice elsewhere in the U.S., is frequently not a realistic option in Alaska.

Further, wetlands are just more common in Alaska: 43% of Alaska is wetlands (not counting lakes, rivers, streams, and coastal waters which add another 7%). In Utah, vegetated wetlands account for only 1% of the land area, with rivers and ponds accounting for 2-3% more, most of that being in the Great Salt Lake.[15] Wetland mitigation techniques that are common and realistic elsewhere in the U.S. are often not suited to Alaska's situation.

As noted, compensatory mitigation must be considered for any remaining unavoidable impacts in order to replace lost aquatic functions and values. In 2004, Congress directed the Corps to update the Guidelines and issue regulations establishing standards and criteria for the compensation component of the mitigation sequence. Congress explicitly instructed: "To the *maximum extent practicable*, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, *provide flexibility for regional variations in wetland conditions,*

Mitigation bank means a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.

Permittee-responsible mitigation means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

[12] U.S. Fish and Wildlife Service. Florida's Wetlands, An Update on Status and Trends 1985 to 1996. https://www.fws.gov/wetlands/documents/Floridas-Wetlands-An-Update-on-Status-and-Trends-1985-to-1996.pdf
[13] U.S. Fish and Wildlife Service. https://www.fws.gov/wetlands/data/Water-Summary-Reports/National-Water-Summary-Wetland-Resources-California.pdf
[14] "The U.S. Fish and Wildlife Service estimates that during the 200-year period between 1780 and 1980, approximately 1/10 of a percent of the original wetland acreage in Alaska was lost (Dahl 1990)." Status of Alaska Wetlands. 1994.
[15] Utah Geological Survey. https://www.fws.gov/wetlands/data/Water-Summary-Reports/National-Water-Summary-Wetland-Resources-California.pdf. For information on all states, see Table 1.

functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation" (emphasis added).[16]

Based on this direction, in 2008, the Corps and EPA jointly issued regulations establishing standards and criteria for compensatory mitigation ("2008 Mitigation Rule"). In doing so, the 2008 Mitigation Rule expressly required the Corps to account for "regional variations" when applying the standards and criteria.[17] The preamble to the rule further clarified that the rule "does not prescribe a one-size-fits-all" approach to compensatory mitigation.[18]

For nearly 30 years, the Corps and the EPA have recognized that compensatory mitigation in Alaska presents unique complexities because, as a state dominated by pristine wetlands, opportunities for compensatory mitigation in and adjacent to a project area are frequently limited or nonexistent. [19] *See* Alaska Wetlands Initiative (May 13, 1994).[20] Based on this recognition, EPA and the Corps have developed Alaska-specific guidance for mitigation sequencing under Section 404. (see Appendix 1. 2018 MOA Between Corps and EPA Regarding Mitigation Sequence in Alaska). With the 2018 MOA, the EPA and Corps reiterated their understanding that mitigation in Alaska is unique. It repeats the agencies' continuing acknowledgement that "[r]estoring, enhancing, or establishing wetlands for compensatory mitigation [in Alaska] may not be practicable due to limited availability of sites and/or technical logistical limitations." *Id*. at 2.

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[16] *See* National Defense Authorization Act For Fiscal Year 2004, Pub. L. 108–136 § 314(b) (2003) ("NDDA").

[17] *See* 73 Fed. Reg. 19593 (Jun. 9, 2008); 40 CFR Part 230, Subpart J and 40 CFR Part 230.91(a)(1) ("standards and criteria shall, to the maximum extent practicable . . . provide for regional variations in wetland conditions, functions, and values").

[18] See 73 Fed. Reg. at 19616-17. "With respect to providing flexibility for regional variations in wetland conditions, functions and values, as previously noted, we believe that today's rule achieves the proper balance of binding requirements and flexibility necessary to ensure that compensatory mitigation decisions are reasonable and based on case-specific circumstances. An adequate degree of flexibility is necessary for this rule because practices for restoring, establishing, and enhancing aquatic resources vary by resource type and by geographic region. For example, today's rule does not proscribe a one-size-fits-all set of ecological performance standards to evaluate the success of all compensation projects. Instead, the rule recognizes that ecological performance standards will vary depending upon aquatic resource type, geographic region, and compensation method but requires that they be based the best available science that can be measured or assessed in a practicable manner. Thus, consistent with the NDAA, today's rule provides flexibility for regional variations in wetland and aquatic resource conditions, functions and values to the maximum extent practicable."

[19] *See also* Memorandum of Agreement Regarding Mitigation under CWA Section 404(b)(1) Guidelines (Feb. 6, 1990) ("[T]here are certain areas where, due to hydrological conditions, the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands").

[20]To further understand how to best apply the Guidelines in Alaska, EPA and the Corps convened a detailed study—the Alaska Wetlands Initiative—with a broad range of stakeholders, including the State. The Alaska Wetlands Initiative resulted in several policy refinements and goals, the most relevant of which was the intent to issue a "written statement that recognizes the flexibility to consider circumstances in Alaska in implementing alternatives analyses and compensatory mitigation requirements under the Section 404 regulatory program," which was intended to provide "greater predictability to the Section 404 program." The statement was attached to the Summary Report, and "recognize[d] that . . . restoring, enhancing, or creating wetlands through compensatory mitigation may not be practicable due to limited availability of sites or technical or logistical issues." Copy at Alaska's Wetlands.

While the 2018 MOA provides significant flexibility, it could be argued that it has not been exercised to the extent agreed to. With 404 Program assumption, Alaska has the opportunity to develop a mitigation system that reflects Alaskan conditions and potentially expands the types of projects that can be considered as compensatory mitigation for permitted activities. The 404(b)(1) guidelines that direct DEC's permit approval process provide significant flexibility for evaluating projects and determining mitigation needs. With Alaska's vast wetlands resources and limited development there are few opportunities for "traditional" mitigation projects that seek to restore damaged resources, and little need to "lock up" areas and protect them from future development. Accordingly, Alaska needs to have a greater range of mitigation options that make more critical improvements to habitat or water quality but don't specifically replace an acre of wetlands filled with a new acre of similar type wetlands. Those opportunities could include restoration of impacted wetlands in other watersheds; cleanup of orphan contaminated sites that affect water bodies/wetlands; replacement of perched culverts that prevent fish passage to spawning areas; elimination of invasive aquatic species; projects that reduce contamination in urban runoff or other sources of non-point source pollution (such as impermeable surfaces and rain gardens); placement of sewage pump-out facilities in harbors, or even projects for villages which have the effect of improving water quality (such as lining landfills). For examples of potential mitigation projects that can improve water quality, see projects previously funded by DEC's Alaska Clean Water Act Grants.[21] If allowed by federal authorities, projects such as improvements in sewage lagoons and better solid waste disposal facilities (alternatives to using a tundra pond) benefit Alaska's rural villages which are in desperate need of improved infrastructure and have limited opportunities for restoring damaged wetlands. The State could also work to bank mitigation projects ahead of time that enhance critical habitat for Endangered Species.

Thus, DEC has the opportunity under an assumed 404 Program to develop an approval program for mitigation banks and ILFs that better reflect Alaska's water protection and restoration needs.

The State will need to describe how they intend to evaluate the success of mitigation.[22] For example, New Jersey's program relies on the use of best professional judgement to evaluate the success of mitigation sites, which provides significant flexibility.

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[21] Information on previously funded projects can be found at: Map of Previously Funded ACWA Projects (alaska.gov).

[22] During the CWA 404 program assumption process, Alaska could seek to maximize the use of the 2018 MOA while also attempting to gain EPA support for other approaches that comply with the Guidelines' inherent flexibilities. For example, Alaska could also try to harness the allowance for "other suitable metric" under 40 CFR § 230.93(f) for purposes of Alaska and note that, based on such metric, mitigation ratios of less than one-to-one could be appropriate in particular circumstances. EPA has expressed openness to flexible approaches. In the preamble to the 2008 Mitigation Rule, EPA and the Corps suggested that the "other suitable metric" language was added to the rule to increase flexibility in determining necessary compensatory mitigation requirements. 73 Fed. Reg. at 19621 (adding the reference to "other suitable metric" in response to comments because "there are a variety of methods that can be used to determine the number of credits provided by a compensatory mitigation project").

State 404 permit conditions and decisions will have to address compensatory mitigation for those impacts to wetlands that cannot be avoided or minimized according to the Mitigation Rule.[23] This effort will include evaluating mitigation options, requiring mitigation, monitoring compliance, and documenting the required type and amount of compensatory mitigation for each authorization issued. EPA may provide more oversight to Alaska's implementation of compensatory mitigation than the Corps, at least initially. While the State is likely to be able to address and resolve EPA requests, those efforts do require staff time to address. The State can anticipate significant EPA oversight of a State managed mitigation program, indicating the State needs to develop a program that is as stringent as the 404(b)(1) guidelines but streamlined to focus on Alaska-specific wetland types and creative mitigation opportunities.

2.3 Opportunity to reduce the high costs and burdens of federal 404 permitting.

According to a 2002 study cited by the Supreme Court in *Rapanos v. United* States, nationally, applicants for a USACE individual permit spend, on average, 788 days and $271,596 to complete the 404 permit process, while an applicant for a nationwide permit spends, on average, 313 days and $28,915—not including the costs of mitigation or design changes.[24] In Alaska, the Corps' permit timeframes are currently much shorter, but continuous improvements to permitting timelines can reduce permittee costs. The timeline for these permits can be "guided by . . . time limits" set in 33 CFR. § 325.2(d), but is often extended due to litigation, inter-agency disputes, or additional federal processes (e.g., NEPA review, etc.). All of these can contribute to extended timelines as well as additional costs to both the applicant and the agency. The 2002 study cited in *Rapanos* also found as follows:

> The acreage of waters of the United States impacted by a project has a statistically significant effect on the cost of both nationwide and individual permit preparation costs. Utilizing the survey data, we determined a statistical relationship between these factors for both types of permits. For individual permits, application costs were measured as $43,687 plus $11,797 for each acre of impact. For nationwide permits, costs were measured as $16,869 plus $9285 for each acre of waters of the United States impacted.

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[23] Department of Defense, U.S Army Corps of Engineers, 33 CFR § 332 and Environmental Protection Agency 40 CFR § 230, Subpart J, June 2008. Compensatory mitigation is described at 33 CFR 332.1 Purpose and general considerations. "(a) ***Purpose.*** (1) The purpose of this part is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army (DA) permits pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) or sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401, 403). . ."

[24] 547 U.S. 715, 721 (2006) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74–76 (2002)). A copy of this 2002 journal article is available at https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1523&context=nrj. If adjusted to today's dollars, these estimates may exceed $400,000. We are not aware of a more recent study of this nature. Also, note the timing and costs associated with 404 permitting in this study likely underestimate current timing and costs because it was done prior to *Rapanos* decision, which introduced a much more technically complicated significant nexus test for jurisdiction under the Clean Water Act.

Thus, permitting costs have statistically significant fixed and variable components and permits are more expensive to obtain for larger projects.[25]

Although state-assumed 404 Programs must still be as stringent as the federal program, the localized nature of a state program as well as key features of the assumption process provide opportunities for increased efficiency and cost savings. State-assumed programs can create streamlined timelines by creating state-specific general permits, establishing more stringent statutory timelines, and increasing program stability, among other things.

2.4 Increased control over the State's economic future

Alaska is a resource state, rich with fish, minerals, oil and gas, and other natural resources. An important part of Alaska's history is the fight to obtain State control over Alaska's resources from the federal government. Alaska currently administers programs to control air emissions and water discharges, fish habitat within streams, dam safety, water rights, and spill control and response, among its other authorities. The Corps' wetlands permit is the remaining major permitting authority retained by the federal government over development on state and private land.[26] Assuming permitting control over much of the state's wetlands would be a major increase in State control over development in Alaska.

Having multiple governments with control over permitting makes it difficult to establish priorities or control schedules for significant permitting actions. The benefits of having a single point of access for complex permitting actions have long been recognized in Alaska. DNR's Office of Program Management and Permitting (OPMP) is premised on this idea. OPMP offers a voluntary coordinating function for State, but not federal, permitting activities. Almost all large developers in the state have made the voluntary decision to pay OPMP to provide complex project permitting coordination, which is evidence that industry values the idea of strong permit coordination. While OPMP has no independent permitting authority, it requires coordination between State agencies, can hold agencies accountable to schedules, and ensure that resources are focused on significant issues. Unfortunately, it cannot provide that function for federal permitting activities, of which the Corps' wetlands program is the most influential. Allowing Alaska to set priorities and focus resources on important State actions is a huge, if difficult to quantify, benefit for Alaska economic development.

Fractured control over the permitting process can undermine a state's ability to attract investment. The Fraser Institute, a Canadian policy institute, surveys worldwide mining executives on their opinions about different states and countries approach to mining. While the results are specific to mining, they provide some insight into how Alaska is perceived. The 2021

[25] 42 Natural Resources J. at 74. Based on this study, $50,000 per acre would be a conservative estimate of costs associated with obtaining an individual Section 404 permit from the Corps. Adjusted to present dollars, that figure would likely exceed $80,000 per acre today.

[26] The federal government retains control over activities on federal land, and to some extent over federally financed activities. In addition, if the state assumed the 404 Program, federal agencies would still retain some authority over activities on state and private land such as NMFS and USFWS authorities under the Endangered Species Act, NMFS authority over essential fish habitat, and Federal Energy Regulatory Commission authority over certain energy projects.

survey shows that 48% of executives believed that "uncertainty concerning environmental regulation" is a mild or strong determinant of investment. A similar percentage, 45%, said that "regulatory duplication and inconsistencies" were similarly discouraging. Having the State be the dominant permitting authority over much more of the state will improve certainty about processes, scheduling, and priorities for permitting significant projects, and will reduce regulatory duplication, which should help to improve these discouraging percentages.

2.5 State government is closer and more accountable to Alaskans than the federal government

State government agencies are accountable and responsive to the legislature and are closer to individual Alaskans than the federal government. The State is better positioned to craft policies and procedures to address Alaska's unique wetland, social, and economic circumstances than the Corps, which must be concerned about how new policies and procedures may or may not apply to other states. DEC can also prioritize resources and schedules to respond to Alaska priorities, whereas the federal government must adhere to national priorities.

A State-administered program ensures accountability to permittees, Alaskans, and the Alaska legislature. Alaska permittees and the public have ready access to their legislators and the DEC budget, services, and progress reports go before the legislature, with public review, for approval every year. This increased accountability will result in a continuous drive to improve environmental protection as well as permitting efficiency and timelines.

Under 404 Program assumption, the State would have flexibility in development of policies and procedures that are best suited to Alaska, provided that the base federal requirements are met. Specifics concerning mechanisms by which DEC can craft a more Alaska-specific wetland program are discussed later in this section.

Permittees and the public have better physical access to DEC employees, to the Commissioner of DEC, and to legislators in offices located around the state. It is easy to meet with a State employee. To meet with the Corps, one must gain access to a military base, requiring special logistics.[27] Finally, the Corps is a military agency where rotation of both enlisted and non-civilian employees is routine. Longer term Alaska residents are more likely to understand the unique circumstances about Alaska and Alaska wetlands.

2.6 State Courts are more familiar with Alaska's unique conditions than courts located outside Alaska

Lawsuits contesting a federal wetlands permit are litigated in federal court. If the State assumes the program, challenges to State permits would primarily occur in State court. Federal court

[27] It is a complex process with many opportunities for delay. If you are a member of the public that does not already have military base access, to get on base requires having someone with base access sponsor you, bringing your driver's license and vehicle registration and proof of vehicle insurance to the visitor center, and waiting in line behind others trying to access the base. Access is granted if your sponsor did everything correctly and the person at the visitor center receiving your sponsor's information did everything correctly so that the person on duty at the gate when you arrive at the visitor center is aware you're coming. If not, you may need to wait for someone on base to pick you up from the visitor center.

jurisdiction is warranted for claims that a state program is being implemented in a manner that is inconsistent with federal law or possibly for constitutional claims. Experience with DEC's primacy over the federal 402 Program, and DNR's primacy over the federal coal regulatory program shows that the vast majority of lawsuits over State permits in these programs are decided in State, not federal court.

Federal courts are less knowledgeable of Alaska's unique conditions than Alaskan courts, which results in frequent, bipartisan reversal for the few cases that make it to the U.S. Supreme Court. Having more permitting litigation decided in State court is viewed by many as a significant advantage due to the State court's familiarity with Alaska's needs, including the need for balancing development and environmental protection.

2.7 State assumption will allow some projects to avoid federal NEPA review

In general, any project involving a major federal action that significantly affects the quality of the human environment ("major federal action") requires the federal government to perform a review under the NEPA. This review results in the preparation of a Finding of No Significant Impact (FONSI), Environmental Assessment (EA), or an EIS. The EIS is an expensive and time-consuming process.

The "major federal action" that triggers the need for a NEPA review in Alaska is typically:

- Federal funding
- Projects on federal land
- Projects requiring a federal approval of some sort, such as a Corps' wetlands permit.

The Corps' wetlands permit is the most frequent trigger for a NEPA review for projects that are not federally funded or not on federal land. This is because 43% of the state is wetlands and almost all large projects affect wetlands. If the State assumes the program, there would be a significant category of projects that affect State-assumable wetlands but not retained federal wetlands. These projects, assuming they are not federally funded nor on federal land, might not require a federal permit. These would lack the federal trigger for NEPA review or subsequent EIS. Examples could include State roads, energy projects, oil and gas development, mines, or other projects. Avoiding the federal NEPA analysis would dramatically decrease the cost and time required for project development.

The proportion of federal NEPA analyses which involve the multi-year EIS has increased, and the process has become lengthier over recent years. Recent examples include the proposed Donlin Gold Mine which required six years (July 2012 through August 2018), and the Ambler Road Project that was applied for almost six years ago and is still on-going (application June 2016 with no final decision). There are economic benefits to avoiding the costly, time-consuming, and rigid EIS process while still assessing environmental impacts and ensuring appropriate mitigation measures. These benefits include greater schedule certainty and avoiding delay. A shorter process imposes lower development costs. Further, Alaska competes for investment dollars with other international locations, many of which have a much shorter project

development time. Shortening Alaska's project development time, even for a portion of Alaska's projects, may be an important method of increasing our share of world investment dollars.

A federal NEPA document such as an EIS or an EA is not an authorization. Completing one does not authorize a project to undertake any activity. These are solely public disclosure documents that describe the impacts. The authorization to begin an activity is in the State or federal permit. The suite of State permits is relatively comprehensive, and even without NEPA analysis, the permits would still address the major environmental impacts: wetlands, discharge to air, water, stream impacts, etc. In addition, many State authorizations, especially the 404(b)(1) analysis required for a State wetland permit on assumable wetlands, or a State best interest finding, require a publicly available description of impacts.

NEPA is also identified as a State assumption challenge in Section 3 below.

2.8 Permit Streamlining: the potential for faster processing times

In 2010, the Association of State Wetlands Managers (ASWM) wrote in their report, CWA Section 404 Program Assumption, A Handbook for States and Tribes: "State permit programs are often more timely than federal programs. In Michigan, for example, actions must typically be taken on completed permit applications within 90 days, and the average permit processing time is approximately 60 days (less for general or minor permits). In New Jersey, generally permit decisions are made in 60 days on average while wetland boundary verifications generally are completed in 90 days and IP decisions take less than 180 days."

Florida assumed 404 permitting in 2020 and their average permit issuance time is 61 days.[28] Oregon operates a State program with requirements similar to the federal program and they issue permits in about half the time it takes the Corps.

The Alaska District issues GP authorizations in an average of 44 and 46 days – Regional General Permits (RGPs) and Nationwide Permits (NWPs) respectively. SPs are issued in an average of 158 days (Appendix 2. Timeframe for Corps' Actions).

A cost analysis conducted by DEC for the 402-primacy workgroup for a hypothetical new mining project indicated that under primacy an APDES permit issued six months quicker could save the company millions of dollars over the life of the project. Given Alaska's short construction season, that alone could mean a permit delay could result in delaying a project for up to a year. Presumably, faster 404 permit issuance at the State level could allow a large project to realize similar savings, no longer leaving Alaska dependent on the Corps to permit important projects for the State.

With respect to Standard Permits (SP's or "individual permits"), the Corps of Engineers has a reasonably good record of timeliness in Alaska. However, Alaska has the potential to improve overall timelines for permits 1) by using Alaska-specific guidance documents providing better targeting of Alaska conditions; 2) because a State permit for assumable waters will eliminate one State approval: the 401 certification; 3) through faster and better agency permit coordination; 4)

[28] Personal communication of report authors with Florida Department of Environmental Protection.

through increased use of General Permits tailored for Alaska conditions; and 5) by delegating some permit authority to qualifying local governments (e.g., the Municipality of Anchorage). Additional permit streamlining ideas are included in Appendix 3. Recommendations for Related Program Coordination to Improve Alaska Permitting Efficiency.[29]

Finally, as noted in Section 2.10, Alaska is likely to have a significantly faster appeals process than the Corps.

2.8.1 Alaska-specific guidance documents

The Corps and EPA develop guidance documents based on their national perspective. A potential benefit of State program assumption would be guidance documents that are prepared for the specific needs of Alaska permittees and facilities, considering Alaska's unique environmental conditions. Additionally, posting fact sheets, frequently asked question summaries, and other guidance documents on the State web site would improve access and transparency for permittees, stakeholders, and the public. This would give the applicants greater direction in applying for permits and ultimately result in quicker processing times.

2.8.2 Reduced bureaucracy: eliminating the 401 certification

Under a Corps-led program, the Corps issues a permit for a dredge/fill activity. However, under Section 401 of the CWA, DEC must review and certify (referred to as a "401 certification") that the Corps' permit will result in a project that complies with Alaska's water quality standards. Federal regulations recently changed, and the Corps has changed their 404 permitting process – they no longer coordinate the permit application and issue a joint public notice with DEC. To compensate, DEC has developed an online 401 certification application that now essentially duplicates the Corps' application (unnecessary redundancy). The Corps doesn't share their permit conditions prior to the State issuing the 401 certification with conditions. This may result in having similar Corps and DEC permit stipulations that are slightly different, but enough so that it may cause confusion for the permittee. Therefore, there are two approvals for the same project for the same activity: dredge and fill in wetlands. There are also potentially two rather than one opportunities for project opponents to appeal a project, creating unnecessary project delays. The 401certification can, for some projects, be a lengthy, complex analysis. The State's 401 certification for the proposed Donlin Gold Mine was prepared after the Corps' wetland permit. It required a separate analysis and was separately appealed within DEC and separately litigated.

Under State assumption, the State issues the wetland permit for assumed waters, and there is no separate 401 certification. State assumption eliminates one certification and one potential appeal. Note that the State will continue to issue 401 certifications for Corps permits in retained waters.

Assumption brings three streamlining benefits – a single application for the permittee, elimination of redundant (but possibly slightly different) permit stipulations (resulting in more clarity), and a single public review and appeal process.

[29] Other recommendations, based on review of other assumable programs and other states with 404 Program assumption can be found in Appendix 4. Other Programmatic Recommendations.

2.8.3 Faster agency coordination

State agencies are accustomed to coordinating with one another under deadlines. The Corps does not establish deadlines for sister federal agencies to provide comments on dredge and fill applications. This can delay the Corps' processing. According to State of Florida officials, Florida was able to establish reasonable timeframes for federal agencies to provide comments on state 404 permits, as part of Florida's 404 assumption application. In particular, for a permit application, EPA agreed to notify Florida Department of Environmental Protection (FDEP) within 30 days from the date of receipt of a permit application whether EPA "intends to review the permit application…" EPA also agreed that it "may notify FDEP within 30 days of receipt that there is no comment," although EPA generally reserves the right to raise an objection within 90 days of receipt of the permit application based on "any new information" identified during the comment period. Florida also negotiated an MOU with the FWS to establish timeframes for ESA review by the FWS. Alaska may be able to negotiate a similar feature in its assumption.

The State of Alaska has developed a robust coordination system for resource development projects. DNR's Office of Project Management and Permitting has the statutory authority (AS 38.05.020(b)(9)) to "lead and coordinate all matters relating to the state's review and authorization of resource development projects." Also, the State Pipeline Coordinator's Section has statutory authority under AS 38.35 to coordinate pipeline projects. These systems have been used by Alaska for decades and have been proven to be very effective.

2.8.4 Greater use of General Permits

A General Permit is a single permit covering similar activities of similar size in similar types of waterbodies or regions of the state. They contain standard conditions that the project must adhere to. The General Permit goes through a public notice and comment period, but project-specific approvals do not. Each General Permit can specify the approach to streamline State approval, depending on the environmental risk or complexity associated with the proposed activity. For example, the following three types of General Permits are like those which exist within the existing national wetlands program.

- For small, low risk, "simple" activities, a General Permit could require that the permittee merely notify the state a permit-specified number of days prior to undertaking a project under the General Permit. This simple "registration" approach allows the state to know when and where these projects are occurring, so spot-check compliance inspections could be undertaken on a certain percentage of the projects. For extremely simple activities with minimal disturbance, the State could establish permit-by-rule, which allows the activity to occur without notifying DEC.
- A "medium complexity" General Permit might require a simplified project description and a general approval to begin work within a specified time period (30 days for example), whether the permittee has heard back from DEC or not. For example, Oregon uses "general authorizations" where the applicant sends in notice 30 days prior to work and can start work even if they don't receive a response from the state.

- A "higher complexity" General Permit might require a more detailed project description and a specific written DEC approval to the permittee before work can begin under the terms of the General Permit.

Each of these approaches reduces the level of effort by the permittee and the State, while still protecting water resources.

General Permits specific to Alaskan projects and conditions allows the State to be more nimble than complex Nationwide General Permits issued by the Corps that must address a huge range of environments and impacts across the country. State assumption allows the State to focus on General Permits that are specific to Alaska conditions without the need for national applicability.

Alaska is a large state with diverse conditions, many of which only exist in part of the state. Examples include permafrost wetlands of the North Slope or forested wetlands of southeast Alaska. While the Corps has the ability to be specific to particular regions of Alaska, it also has national priorities. Accordingly, it is much easier for the State, which focuses only on Alaska.

2.8.5 Use of delegated authority to local governments

A state with an assumed 404 Program may have more incentive to regionalize permitting, whereas the Corps is incentivized to follow national priorities. A state 404 Program can issue a General Permit to a local government to cover specific types of local projects, based upon a local wetlands conservation plan. The local government then issues project approvals under authority granted by the state's General Permit. The local government must first have a local wetlands conservation plan that can be used to guide development for projects with specified requirements to protect waterbodies. States have more interest in reducing the permitting burden, and are closer to local businesses, the economy, and local governments than the Corps, so DEC would have more incentive to issue this type of delegation to local government. The municipality of Anchorage currently administers some wetland authorizations under delegated authority from the Corps. While DEC could make greater use of this approach, because of the complexity, it is likely to only be used by Alaska's larger cities.

2.8.6 Statewide Programmatic General Permits (SPGPs)

Statewide Programmatic General Permits (SPGPs) are issued by the Corps and administered by the state. They are for specific types of activities: those that are standard, similar in nature, and cause minimum environmental impact individually and cumulatively; and where use of the SPGP reduces duplication of regulatory control by the state and the Corps.

SPGP agreements may be negotiated today; they are not dependent on a state assuming the 404 Program. Prior to state program assumption, SPGPs can be used to cover specified activities in any WOTUS (including waters that would be retained by the Corps after program assumption). They are complex agreements (permits) but provide an opportunity for states to gain more expertise in the 404 Program. After State assumption, DEC could develop SPGPs for State implementation of certain activities in Corps-retained waters. This would increase the amount of 404 permitting brought under the State umbrella.

2.9 Alaska-specific Policies and Procedures

One of the most obvious benefits to assuming the Corps' wetland program is the ability to create policies and procedures that work for Alaska's diverse geography and climate. Alaska is home to a variety of wetlands and conditions which do not exist in the rest of the United States. Construction and development seasons are much more compressed in Alaska than in other states. From the forested wetlands of southeast Alaska to permafrost wetlands of the North Slope, Alaska is just different. While the Corps' policies and procedures do recognize the difference, there is much more potential to create policies and procedures which recognize the diversity within Alaska. Under 404 Program assumption, Alaska would have flexibility in development of policies and procedures that are best suited to the state, provided that the base federal requirements are met.

2.9.1 Wetlands Delineation

As part of a 404-program assumption application, a state must demonstrate that it has the methodology and capacity to make wetlands delineation decisions. Currently, the Corps relies on the 1987 Wetlands Delineation Manual and the 2007 Alaska Regional Supplement. Alaska is not one eco-region; it is many and the differences between regions within the State are greater than they are across all of the lower 48 states. If superimposed over the lower 48, Alaska would stretch from coast to coast and from the Canadian border to the Mexican border. It is the only arctic state in the nation. Alaska, under an assumed program, could start with the 1987 Wetlands Delineation Manual and the 2007 Alaska Regional Supplement, and could later choose to develop delineation guidance that is more specific to ecoregions, climate, and topography, such as permafrost or forested wetlands areas, so long as it continues to include all State-assumed WOTUS. DEC can use functional assessment procedures specific to the ecological types of wetlands present within specific regions of the State. These Alaska-specific ecoregion manuals do not have to be complete prior to program assumption and can be worked on over time and adopted as amendments to the approved program.

Having Alaska-specific delineation has the potential to make delineation easier for applicants. It also has the potential, by recognizing areas of different importance, to make distinctions which increase resource protection in Alaska.

2.10 A more inclusive and predictable appeals process

The DEC administrative appeals process has some noticeable differences from the Corps administrative appeals process that could provide significant advantages to the public and to applicants under a State-assumed 404 Program.

A Corps-issued federal wetlands permit may only be appealed by an affected party[30] (generally, the permit applicant). The public has no opportunity to appeal except through a federal court appeal, a complex and expensive undertaking. This limitation is inconsistent with DEC

[30] § 331.2 Definitions. Affected Party: means a permit applicant, landowner, a lease, easement or option holder (*i.e.,* an individual who has an identifiable and substantial legal interest in the property) who has received an approved JD, permit denial, or has declined a proffered Individual Permit.

regulations, which provide for DEC administrative appeal process (18 AAC 15 Administrative Procedures) for members of the public who participated in the public review process of the draft permit and are directly and adversely affected by the permit's issuance. To be consistent with State law and for administrative efficiency, the State should use the informal review and adjudicatory hearing process similar to that already used by DEC for 402 (and other environmental) permits found at 18 AAC 15.185-340. The 402 administrative appeals process only allows appeals from the applicant and the public that commented or participated in a hearing on the draft permit; allows for an informal review by the Water Division Director and an adjudicatory hearing before the DEC Commissioner, prior to a State court appeal; limits issues in a GP authorization that can be appealed; and does not automatically stay the permit during the appeal. Using the Chapter 15 DEC administrative appeals process requires concerned Alaskans and permittees to first engage the agency for decisions they are concerned about, rather than going directly to a State court appeal.

While expanding the public's right to appeal a 404 permit under a State-assumed program provides advantages to Alaska citizens, it may concern applicants. However, there are other significant differences from the federal process that may render the State's process more efficient than that used by the Corps, benefitting permittees:

- As previously explained, State assumption eliminates the separate state 401 certification, which limits the opportunities for appeal. Under the current system, groups that wish to delay a project have two opportunities to appeal: one appeal to the Corps under the 404 permit, and one appeal to the State under the 401 certification. State assumption means that there would normally only be a single appeal -- to the State for permits issued in assumed waters.
- The federal system requires someone who objects to a decision (other than the applicant) to go directly to federal court. The obvious advantage of the State's appeals system to citizens is that they do not need an attorney and can engage the agency without going to court. The State's appeal system requires that the citizen (or permittee) inform DEC about potential issues with a permit (through informal review or adjudicatory hearing) before they sue. DEC can amend the decision if appropriate. However, if the agency upholds the decision, the review provides an opportunity for DEC to learn about issues that may be litigated and to augment the administrative record before the issues reach the court. The advantage to the agency and applicant is that it results in more defensible decisions if the issue does eventually end up in court.
- The federal appeals process has no firm deadlines. The State's Chapter 15 appeals process includes deadlines that provide certainty to the applicant.
- In the federal appeals process, decisions are made in federal court. Under the State's system, decisions are made by the Commissioner of DEC and appealable to State court. This keeps the decision with an official who is concerned about its effect on Alaska policy and is accountable to the Alaska public.

Using DEC's administrative appeals process has significant advantages over the federal process for both citizens and applicants.

2.11 A State program may be more stable

The Corps' 404 Program has been subject to significant changes over the last few years. These changes have caused confusion and uncertainty among agencies and applicants. The last three federal administrations have amended the definition of WOTUS. In addition, two Supreme Court cases have also affected the definition of WOTUS, and the court recently heard one additional case, though it has yet to announce a decision. These regulations and court cases have expanded and contracted the Corps' jurisdiction over wetlands and other waters. The changing jurisdiction has led to significant applicant and agency confusion. Each time applicants have had to understand which waters require a Corps permit and which are exempt.[31]

If the State were to assume the program and comprehensively regulate both WOTUS and non-WOTUS, it would largely eliminate confusion among applicants about the changing Corps' definition and requirements. If the fill was regulated in either case, the applicant could largely ignore the definitional change. While extending the State's program to non-WOTUS Waters of the State could impose an increase in the regulatory burden on applicants and DEC, the non-WOTUS are more likely to be regulated through a General Permit (GP) or through a permit-by-rule.[32] If the State puts an emphasis on using GPs and permits-by-rule, there is potential to insulate applicants from the changing federal definition, but to do so in a manner which does not greatly increase the regulatory burden on either applicants or DEC.

The State of Michigan took this approach and reported significant advantages for the State and applicants. According to the Association of State Wetland Managers (ASWM),[33]

> "Experience in Michigan indicates that its wetland regulatory program requirements have remained much more stable and predictable over the past 18 years than the 404 permit program administered by the Corps of Engineers in most states. There are two reasons for this stability. First, because Michigan's program relies on State, rather than federal law, it is not impacted by changes in the federal program unless those changes render the State program inconsistent with the federal program [i.e., Michigan requires an application regardless of WOTUS status]. Therefore, numerous changes that have resulted in a significant degree of controversy and confusion at the

[31] EPA and the Corps published new WOTUS regulations on January 18, 2023 (effective March 20, 2023). (See Appendix 5. State of Alaska Comments to the Proposed Rule Redefining WOTUS for State comments on the proposed rule.) However, on October 3, 2022, the U.S. Supreme Court heard arguments in a case that is expected to provide the Court's interpretation of the allowable definition of WOTUS in regulation (Sackett vs Environmental Protection Agency). The Supreme Court is expected to rule in spring 2023.

[32] Permit-by-rule spells out situations where an activity such as minor fill of certain types of wetlands can occur without the need for a specific permit authorization. DNR provides an excellent example of permit-by-rule by setting out Generally Allowed Uses where activities can occur on state lands without a permit (11 AAC 96.020). A permit-by-rule may still impose stipulations that an activity must follow.

[33] Expanding the States' Role in Implementing CWA § 404 Assumption, ASWM, 2010, L. Stetson and J. Christie.

> federal level have not directly impacted Michigan's program (e.g., early revision of the delineation manual and regional updates, rule changes following the Tulloch decision, and, most recently the SWANCC and Rapanos decisions)...Thus, the combination of elements of the State and federal programs has served to temper changes in State regulation and policy, and has led, overall, to a more stable, predictable dredge and fill permitting program that has existed in most states over the past decade."

Adopting a program that includes all wetlands (WOTUS and non-WOTUS) has two other advantages. First, it would reduce or eliminate the need for a "jurisdictional determination" which is frequently a first step in the Corps' process. In this step, an applicant must not just determine if they are proposing fill within a wetland but also what type of wetland (i.e., whether it is water of the state (WOTS), or WOTUS and therefore under the Corps' jurisdiction). This can be an expensive and time-consuming step. Second, extending the program to WOTS might allow EPA to grant more flexibility to Alaska's program. If the State were regulating non-WOTUS locations, then EPA may be more comfortable with lesser oversight over the State's WOTUS/non-WOTUS determinations, because it does not make the difference between regulation or non-regulation. Instead, it just changes the type of regulation.

A state program that includes non-WOTUS in Alaska would increase regulation of industry in locations that are currently unregulated. However, the State can avoid any significant increases in the regulatory burden by emphasizing General Permits and Permits-by-Rule for these waters.

3. CHALLENGES WITH ALASKA 404 ASSUMPTION

3.1 State Costs

While a State assumed 404 Program may ultimately result in cost savings through efficiency, a State 404 Program will nevertheless require the creation of a new unit of State government, which will have upfront costs to create. The federal government does not provide funding to operate a state-assumed program, and currently only provides very small grants for wetlands program development activities. Section 5.2 of this report estimates that operating the 404 Program for assumable waters will require 32 permanent positions and cost the State $4.8 million per year. The State could pay for this program through General Funds, fees, or a combination. The funding requirement and mechanisms are discussed in Sections 5.3 and 5.4 of this report. Public acceptance of the program costs will hinge, in part, on an understanding of the benefits of a State-run program.

The State is in the process of garnering multi-state support for federal funding for state 404 Programs, including possibly presenting another resolution to the Environmental Council of States (ECOS) to specifically urge EPA to provide funding for state 404 Program implementation.

3.2 Clarifying Responsibility between Federal and State Agencies

Unlike 402 primacy, 404 assumption does not give the State authority over all 404 permitting. Some waters would be under State authority, and some areas would remain under Section 404 permitting authority of the Corps. The State would likely issue approximately 75% of Alaska's wetland permits, and the Corps would issue the remaining 25%. Some projects would require only a State 404 permit, some would require a Corps 404 permit. Section 4 discusses options for projects which cross the boundary of assumable waters. The State could offer a variety of options to these applicants so that State assumption does not increase permitting difficulty. However, it is critical that the State create guidelines and detailed maps to clearly delineate which wetlands are under Corps' authority, and which are under DEC authority.

3.3 Environmental Review

As explained in Section 2.7, the Corps' 404 Permit is a trigger for federal analysis under the NEPA. For projects that are not federally funded or located on federal lands, the need for a Corps' 404 permit is often the only "major federal action" that triggers a need for NEPA review. Importantly, most projects permitted by the Corps are authorized with only limited analysis for purposes of NEPA: a categorical exclusion from NEPA or a finding of no significant impact. However, some larger projects have often required either a longer Environmental Assessment (EA) or a much longer and more expensive EIS. If the State assumes the 404 Program, an EA or EIS may no longer be required for activities that are neither federally funded nor on federal land and that impact only State-assumed waters.

In the last five years, 2017-2021, the Corps was the lead agency for four EISs for projects located in Alaska.

Eliminating some NEPA analyses may concern some people, but it does not eliminate any permit. It does not eliminate or even lessen any government jurisdiction over environmental impacts. It does not eliminate any environmental protection. Where NEPA analysis is eliminated, it eliminates a document that brings together a description of environmental impacts for the public and agencies to use. However, some or all of the same information concerning environmental impacts of a project are available elsewhere, such as in state permits and, under 404 Program assumption, in the 404(b)(1) analysis for the permit.

Currently, the Corps prepares an EA for every standard permit (SP) it issues, more than 50 per year. These assessments are usually relatively short. Many are quite short: three to five pages. The Corps combines these with the analysis under 404(b)(1) that it must complete to issue the permit. They are combined because the required 404(b)(1) analysis is comprehensive enough to effectively substitute for or cover the same subjects as a short EA. Under the State assumed program, DEC will still be required to write the 404(b)(1) analysis for each SP. Therefore, there will be little loss for eliminating NEPA requirements for those projects which require an EA.

3.3.1 404 (b)(1) Guidelines

The 404(b)(1) Guidelines, found at 40 CFR §230 include over 50 pages of federal regulations describing the permit process. These guidelines describe the analysis required before the Corps may issue a permit to authorize placing dredged or fill material into WOTUS. They require the Corps to evaluate a project's impacts on the physical, chemical, biological, and human use characteristics of the aquatic environment and special aquatic sites. They also require analysis of compensatory mitigation. A state program must use these guidelines or a set of guidelines that EPA determines is equivalent. DEC could adopt the federal rules by reference (ensuring they are equivalent to the federal program), then amend them over time to "Alaskanize" them. Alternatively, DEC could develop its own regulations with program assumption. The State adopting its own version will be more challenging to demonstrate equivalency to EPA.

3.3.2 Endangered Species Act

Program Assumption. Section 7 of the Endangered Species Act generally requires federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) to ensure that a permitting action is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat. EPA has determined that "approval of state and tribal requests to assume a CWA section 404 program is a discretionary action," and that EPA "should consult with the Services under section 7 of the Endangered Species Act if a decision to approve a state or tribal CWA section 404 program may adversely affect ESA-listed species or designated critical habitat..."[34] As part of the State 404 assumption process, DEC will work with EPA and the USFWS to ensure that Alaska wetland permitting procedures provide ESA protections. It is anticipated that Alaska will need to prepare a biological assessment for submittal to EPA in conjunction with the 404-assumption application process. Alaska would coordinate with EPA and the USFWS on obtaining a biological opinion

[34] https://www.epa.gov/cwa404g/consultation-cwa-section-404-program-requests-endangered-species-act-and-national-historic

from the UFWS concerning the potential for impacts to species and measures to minimize any such impacts.

Program Implementation. Alaska will need permitting procedures that ensure protection of federally listed threatened and endangered species and their critical habitat. Nebraska intends to have a Nebraska State biologist within their agency to produce a biological assessment for potential impacts to threatened and endangered species. They have an electronic tool to determine if a project would impact State-listed threatened and endangered species and BMPs to protect them, but it will have to be updated to incorporate federal threatened and endangered species. They consult with Nebraska Game and Parks when the database triggers a threatened and endangered species review.

Florida consults directly with the USFWS as a part of its process. Florida developed a Memorandum of Agreement (MOA) with USFWS to set out the consultation process. This MOA has timelines that the federal agency must adhere to in providing comments to Florida's wetland agency. Florida views this as a significant improvement over the federal process as the USFWS does not have a time deadline to respond to the Corps, and an untimely response delays the Corps' permit process.

To gain EPA's approval of a State program, DEC will need to develop an MOA with the federal ESA agencies or use another mechanism to ensure adequate protections for federally listed threatened and endangered species. The MOA may provide benefits to Alaska by ensuring strict time requirements, using the local expertise of the Alaska Department of Fish and Game (DF&G) in the process, or by some other mechanism.

3.3.3 National Historic Preservation Act

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires federal agencies to consider the effects of their undertakings on historic properties, and to give the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. Formal consultation under the National Historic Preservation Act is not required under an assumed program. However, Alaska has a State Historic Preservation Office (SHPO) within DNR. SHPO currently has the ability to comment on State permit actions. It will perform the historic preservation role under an assumed wetland program. DEC should commit to working with SHPO and could choose to develop an MOA with SHPO to ensure protection of cultural resources. Using the State rather than federal agencies to protect our important cultural resources is another method of moving responsibility for the development and protection of the State resources from the federal government to the State.

3.4 EPA Oversight

EPA Region 10 has a history of close oversight over state programs implementing the CWA. Since no Region 10 states have assumed the 404 Program, DEC can expect EPA to apply its current program resources to oversight of DEC's implementation of 404. DEC has an opportunity to "fence" EPA involvement by negotiation through the MOU to limit their routine oversight of

DEC 404 permit actions to only those that are required by federal regulation.[35] Under this regulation, EPA cannot waive review of:

> (1) Draft General Permits;
> (2) Discharges with reasonable potential for affecting endangered or threatened species as determined by FWS;
> (3) Discharges with reasonable potential for adverse impacts on waters of another State;
> (4) Discharges known or suspected to contain toxic pollutants in toxic amounts (Section 101(a)(3) of the Act) or hazardous substances in reportable quantities (Section 311 of the Act);
> (5) Discharges located in proximity of a public water supply intake;
> (6) Discharges within critical areas established under State or Federal law, including but not limited to National and State parks, fish and wildlife sanctuaries and refuges, National and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.

The shorter the list of routine EPA reviews, the faster the State can issue permits. Note, however, that EPA will likely retain authority to review most State permits. A formal objection to a State permit under CWA Section 404(j) is likely to cause a delay in permit issuance as the State cannot issue the permit until the objection is resolved. Even with this additional scrutiny, when DEC took over the 402 Program, EPA only objected to one State permit action, and the issue was eventually resolved in DEC's favor (the State agency decision was sound). EPA has objected to 17 wetlands permits in Florida's two years of operating the program (just over 1% of all GP authorizations and IPs) and only federalized one permit. New Jersey has only had 1 EPA objection.

The MOU can also be used as a vehicle to ensure EPA review is done in conjunction with the State's permitting timeframe and process to avoid permitting delays.

3.5 Tribal involvement in assumed program

Tribal governments enjoy a government-to-government relationship with federal agencies, offering them a robust and early "seat at the table" than the public review process for proposed projects. This is a special relationship between the federal and tribal governments. During the DEC process, to assume 402 primacy, tribes expressed concern about the lack of formal government-to-government consultation with the State where Tribes provide traditional ecological knowledge and comment on the impact of the projects on subsistence resources before the public comment period. To address those concerns, DEC developed a website[36] to assist tribes with 402 permitting, which includes a guidance document, "APDES Guidance for Local and Tribal Governments."[37] This same concern should be anticipated in the 404 assumption process and can be addressed by developing similar program guidance. It will be critical for Alaska's wetlands program to ensure strong communications protocols with tribes. Notably, the

[35] 30 CFR § 233.51 Waiver of review.
[36] APDES Information for Tribes (alaska.gov)
[37] https://dec.alaska.gov/media/6836/apdes-guidance-for-local-and-tribal-governments-final.pdf

Corps retains permitting authority for 404 projects located within "Indian country."[38] In Alaska, that includes the Annette Islands Reserve.

[38] In this context "Indian country" is defined in 18 U.S.C. § 1151, i.e., "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

4. SCOPE OF THE STATE PROGRAM – ACTIONS, ACTIVITIES, ASSUMABLE WATERS

4.1 Where a Dredge and Fill Permit is required: *WOTUS*

The CWA Section 404, authorizes the Corps to require permits for discharge of dredged or fill material into all Waters of the United States (WOTUS), including wetlands. Because wetlands are so abundant in Alaska, the requirement for a permit for the discharge of dredged or fill material in wetlands is an important and common permit for many development projects in the state. The timely and efficient processing of these authorization is important for the economy and well-being of Alaska.

Examples of activities that may require a permit include:

- Access dredging
- Boat ramp construction
- Bridge construction
- Channel relocation
- Commercial construction projects
- Culvert installation
- Dock construction
- Utility installation (e.g., fiber optics)
- Erosion control
- Housing pad installation
- Mining operations
- Oil and gas drilling pads installations
- Piling placement
- Pipeline construction
- Removal or filling activities
- Road construction
- Wetland enhancement

While 43% of Alaska is wetlands, all wetlands are not under the jurisdiction of the Corps. Only the discharge of dredged or fill material into those wetlands that meet the federal definition of WOTUS are subject to Corps' jurisdiction. [39] Wetlands that do not meet the federal definition of

[39] On December 30, 2022, EPA and the Corps announced a final revised definition of "waters of the United States" which takes effect 60 days following the announcement. The new definition can be found at Title 33 Section 328.3 for the Corps and Title 40 Section 120.2 for EPA). It reads:

"(a) Waters of the United States means: (1) Waters which are:
(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(ii) The territorial seas; or
(iii) Interstate waters, including interstate wetlands;
(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;
(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section:
(i) That are relatively permanent, standing or continuously flowing bodies of water; or
(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;
(4) Wetlands adjacent to the following waters: (i) Waters identified in paragraph (a)(1) of this section; or (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters; or

WOTUS do not need a Corps' permit but may still be waters and wetlands. The State has an expansive definition of public waters and wetlands, rivers, and lakes that includes both WOTUS and non-WOTUS, and are referred to as Waters of the State (WOTS).[40, 41]

4.2 The Regulation Defining Assumable Waters

CWA Section 404(g) authorizes states, with approval from EPA, to assume authority to administer the CWA 404 Program in some, but not all, WOTUS.

CWA Section 404(g)(1) states:

> "The Governor of any State desiring to administer its own individual and general permit program for the ***discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto)*** [emphasis added] within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. . . ".

The CWA does not define state-assumable waters; rather, it describes waters that a state *cannot* assume: waters for which jurisdiction must remain with the Corps (i.e., retained waters or non-

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(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;

(5) Intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of this section:

(i) That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)(i) of this section; or

(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section."

[40] The CWA definition of WOTUS has been controversial, and the last three federal administrations, have amended the regulatory definition. These amendments have expanded and contracted the definition of wetlands and therefore the Corps' jurisdiction. On December 30, 2022, EPA adopted changes to the definition. However, on October 3, 2022, the U.S. Supreme Court heard arguments in a case that is expected to provide the Court's interpretation of the allowable definition of WOTUS under the Clean Water Act (*Sackett v. Environmental Protection Agency*, (2022)). The Court's ruling could affect the legality of EPA's recently adopted regulation. The Supreme Court is expected to rule in spring 2023. See Appendix 5 for State of Alaska comments on the rule when it was proposed, and Appendix 6 for a description of the frequent changes in the WOTUS definition.

[41] The State definition is significantly broader than the current definition of WOTUS. To address this discrepancy, for purposes of the 402 Program, DEC adopted a regulatory definition of "waters of the U.S." that tracks the federal definition. The State definition of "waters" at AS 46.03.900 states "(37) "waters" includes lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, straits, passages, canals, the Pacific Ocean, Gulf of Alaska, Bering Sea, and Arctic Ocean, in the territorial limits of the state, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially in or bordering the state or under jurisdiction of the state."

assumable waters). State-assumed waters (or assumable waters), then, are all waters of the United States that are *not* retained waters. Project proponents within retained waters will continue to apply to the Corps for processing, and projects within State-assumed waters will go to the State for processing.

The Corps will likely retain permitting authority over:

- Marine waters (waters subject to the ebb and flow of the tide) and their adjacent wetlands.
- Waters in Alaska that the Corps has listed pursuant to Section 10 of the Rivers and Harbors Act of 1899 (RHA) and their adjacent wetlands, minus those waters listed solely based on historical use.[42] The Corps has listed 47 Alaska Section 10 waters (see Appendix 7. Corps Identified Section 10 Waters) out of Alaska's more than 12,000 rivers and three million lakes greater than five acres.
- WOTUS within tribal lands. In Alaska, the Corps would retain permitting authority for the Annette Islands Reserve in Southeast, the only Native Reservation in Alaska where the Metlakatla Indian Community resides.
- Denali National Park and Preserve. EPA has previously taken the position (during Alaska's 402 Program assumption) that, pursuant to Section 11 of the Alaska Statehood Act, the United States has "exclusive jurisdiction" within the park, including for purposes of NPDES permits. 73 Fed. Reg. 66243, 66244 (Nov. 7, 2008) (notice of approval of Alaska NPDES delegation). Section 11 of the Alaska Statehood Act provides that "exclusive jurisdiction, in all cases, shall be exercised by the United States for the national park, as now or hereafter constituted." Given that, DEC should expect the Corps to retain WOTUS in Denali National Park and Preserve.

If the State assumes responsibility for the Corps' 404 assumable waters, it must assume responsibility for all parts of the Corps' program.[43] Partial program assumption is not permitted under the current regulations so states must assume permitting authority over all WOTUS other than those retained by the Corps. EPA has drafted regulations revisions that could include partial program assumption, but those regulations are not scheduled for completion until October 2024.

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[42] This is the approach that a committee composed of a representatives from federal, state, and tribal governments, NGOs, and the regulated community agreed upon in *Final Report of the Assumable Waters Subcommittee (May 2017)*, available at https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf. This report's majority opinion was adopted by USACE in a Memorandum issued by the Corps in 2018, available at 525981.pdf (army.mil).

[43] Current federal law requires an assuming state to take on the full 404 Program – partial program assumption is not allowed. This has been seen as a major drawback by states that are prepared to take on some, but not all, of the program. EPA proposed draft regulations in 2021 that would create a process for partial program assumption. Those regulations were supposed to be completed by December 2022. EPA has since delayed the regulations project until at least 2024. Therefore, at the current time, if DEC wants to assume the 404 Program, it must develop an application for the full program.

4.3 Experience of Other States

The experience of other states provide insights into how the assumable waters could be interpreted for Alaska, especially with respect to "adjacent wetlands:"

- Florida: Florida assumed the 404 Program in 2020. The administrative boundary demarcating the adjacent wetlands over which jurisdiction is retained by the Corps is a 300-foot guideline established from the ordinary high-water mark or mean high tide line of the retained water. Florida selected the 300-foot guideline based on negotiations with the USACE.[44] This approach also reflected EPA's Final Report of the Assumable Waters Subcommittee that is described in Section 4.4.

- Michigan: Michigan assumed the 404 Program in 1984. The Corps' MOA delineates assumed and retained waters simply by stating that all waters within the State are assumed other than waters identified by the language in 404(g)(1) as identified by the RHA Section 10 list maintained by the Corps.[45] According to EPA, the list has been refined over time with the addition of some small tributaries and wetlands that are influenced by the water level of the Great Lakes.[46]

  Michigan appears to use a case-by-case approach where the State consults with the Corps if a "proposed project is in one of the Great Lakes, a tributary to a Great Lake, or in adjacent wetlands."[47] The extent of included adjacent wetlands is determined by the Corps on a case-by-case basis – generally including wetlands in close proximity to Section 10 waters, and having a direct surface water connection to and within the influence of the ordinary high water mark of those waters.[48]

- New Jersey: New Jersey assumed the 404 Program in 1994. The Corps' MOA delineates retained waters as wetlands that are "partially or entirely located within 1000 feet of the ordinary high-water mark or mean high tide of the Delaware River, Greenwood Lake, and all water bodies which are subject to the ebb and flow of the tide."[49] This buffer is measured by superimposing head of tide data on the State's freshwater wetlands quarter quadrangles that are at a scale of one-inch equals 1000 feet. A line was established parallel to and 1000 feet from the ordinary high-water mark or mean high tide of the waters and the Corps retains permitting authority over all wetlands that are waterward of, or intersected by, the administrative line.

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[44] See FDEP, November 2, 2020 Letter from Noah Valenstein to the Honorable David P. Ross on Florida's Request to Assume Administration of a Clean Water Act Section 404 Program (Nov. 2, 2020). Negotiations generally focused on the factors outlined in the Final Report of the Assumable Waters Subcommittee (May 2017), available here.
[45] EPA, *Final Report of the Assumable Waters Subcommittee* (May, 2017).
[46] *Id.*
[47] USACE, *Jurisdiction, Wetland Delineations and Datasheets* (Oct. 26, 2016).
[48] EPA, Final Report of the Assumable Waters Subcommittee (May, 2017).
[49] NJDEP, The United States Environmental Protection Agency and its relationship with the New Jersey Department of Environmental Protection & The Division of Land Use Regulation.

4.4 Assumable Waters Subcommittee's Recommendation to EPA

In June 2015, EPA convened a workgroup to provide advice and develop recommendations for how EPA can clarify the waters for which a state may assume CWA 404 permitting responsibilities.[50] In the final 2017 report of the Assumable Waters Subcommittee, the report recommended an approach based on the waters regulated under Section 10 of the Rivers and Harbors Act (RHA). Specifically, the Subcommittee recommended that the Corps retain RHA waters plus all wetlands landward to a default 300-foot administrative boundary. The boundary may be adjustable to accommodate the unique regulatory, typographical, and hydrological needs of the state. In recommending this approach, the Subcommittee agreed that a distance of 300 feet is "fully adequate to protect federal navigation interests" and allows the state to protect wetlands and water quality as required by the CWA.[51] On July 30, 2018, the Assistant Secretary of the Army for Civil Works accepted the Subcommittee's recommendations via memorandum.[52]

The Subcommittee's Final Report provided other options for establishing the administrative boundary. Particularly, the Final Report provided that

> "The actual boundary could be established to account for the expertise and comprehensive programs of a state or tribe, planning and regulatory authorities, regional or geographic differences, and other local conditions that may affect or complement the CWA Section 404 Program. *For example, the 300 foot National Administrative Boundary could be moved up to as close as 75 feet to match up with established building setback requirements, or as far away as 1,000 feet to match up with a broad state shoreland boundary.* [emphasis added] In the event that negotiations to establish an administrative boundary specific to that state or tribe are unsuccessful, the extent of USACE-retained wetlands default to the 300 foot National Administrative Boundary.[53]"

The committee recommended against a case-by-case approach because it has the potential to cause greater confusion for permittees and delays caused by the time to make individual determinations via consultation between the state and the Corps. In addition, DEC should consider, in consultation with stakeholders, whether in certain areas of the state the

[50] See Final Report of the Assumable Waters Subcommittee (May 2017).

[51] *See id*. at 27 and 33.

[52] USACE, Memorandum for Commanding General, Clean Water Act Section 404(g), Non-Assumable Waters (Jul. 30, 2018), available here (noting that the report "provides considerations that may be useful to the state or tribe and the Corps as they evaluate the appropriate administrative boundary suited to the particular circumstances of the state or tribe, including state or tribal regulatory authority, topography, and hydrology."

[53] *Id*. at 28 (emphasis added).

administrative boundary for "adjacent wetlands" should be moved landward or waterward from the 300-foot default boundary to accommodate unique geographic/hydrologic features.[54]

Note that there may be waters within the retained areas that do not fall under the definition of WOTUS but do fall under the definition of WOTS. Waters within the retained areas must also meet the definition of WOTUS for a Corps 404 permit to be required.

4.5 The Extent of Assumable Waters in Alaska.

The exact extent of waters assumed by the State of Alaska under a CWA 404-program and retained waters that remain under the jurisdiction of the Corps will not be clear until the State makes an application to the EPA and negotiates provisions of the assumed program. Nevertheless, an approximate division can be estimated. Figure 2. Map of Potential Corps-Retained Waters in Alaska is a map of Alaska showing marine waters, Section 10 RHA rivers, those in Denali National Park, and those in the Annette Islands Reserve. These waters are likely to be waters retained by the Corps. Because of the scale of the map, it does not show waters and wetlands adjacent to these waters that would likely be retained by the Corps.

Figure 3. Example of a Corps-Retained Water and Adjacent Wetlands – Coastal shows a small portion of a coastal area to illustrate a 300-foot buffer in which marine waters and WOTUS adjacent wetlands are likely to remain under Corps' jurisdiction. Figure 4. Example of a Corps-Retained Water and Adjacent Wetlands – Lake is a similar example on a lake and Figure 5. Example of a Corps-Retained Water and Adjacent Wetlands – River is an example on a river. Note that these are estimates. Other sections of this report have provided reasons why waters of some Section 10 Rivers and some waters within the 300-foot buffer could be assumed. Further, it is possible that there could be some areas where other waters may be retained.

The areal extent of assumable waters is only one way to measure the effect of State assumption of the program. Section 5 of this report provides another method to estimate the effect. The Section estimates that 75% of the Corps' workload would be assumed by the State. This would be a significant change of control over economic activity within Alaska.

4.6 Options for Projects that Cross the Boundary Between Assumable and Retained Waters.

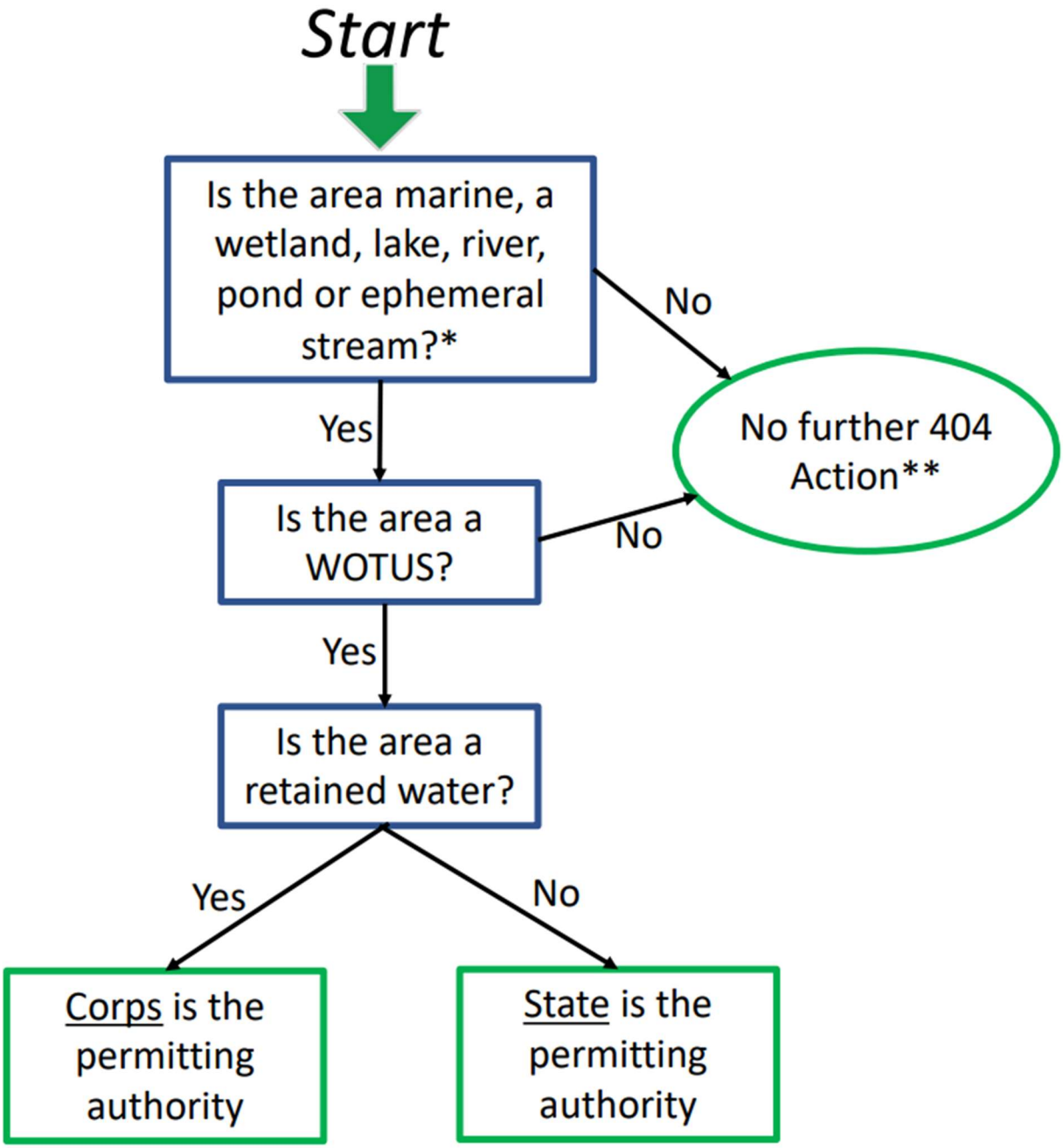
A permittee with an activity that cannot avoid a dredge or fill effect on a wetland or other water (including areas with ephemeral water), is confronted with this decision tree:

1. Is the area to be impacted marine, a wetland, lake, river, or pond (or similar water)?
2. If yes, does it meet the definition of WOTUS (i.e., federal jurisdiction). If so:
    a. Is the area within the Corps' retained jurisdiction and regulation by the Corps.

[54] There may waters within the 300-foot boundary that do not meet the definition of WOTUS because they are isolated wetlands or for another reason. Placement of dredged or fill material into these locations, because they do not meet the WOTUS definition, would not need a 404 permit from the Corps.

b. If the area meets the WOTUS definition but is not within the Corps' retained waters area, then the area is assumed by the State and regulated by DEC.

3. If the area to be impacted is not within the definition of WOTUS, it remains Waters of the State (WOTS). It is not regulated by DEC's assumed 404 Program (other rules, may, of course, apply).



*This step may require a jurisdictional determination.
**Other regulations and authorities may apply.

Some projects will inevitably cross the boundary between assumable and retained waters, and involve both wetlands under authority assumed by the State and wetlands that remain under the authority of the Corps. This will be the case for a project that involves discharges of dredged or fill material both waterward and landward of the 300-foot guideline. In this case, options for the State to consider include:

- the Corps retains jurisdiction to the landward boundary of the project for the purposes of that project only (approach adopted by Florida)[55]
- the permittee is given a choice – they can request the entire project be permitted by the Corps or that the Corps' permit activities in retained area (waterward of the administrative boundary) and State issues the permit in assumed area (landward of the administrative boundary)
- a single permit is issued, signed by both the Corps and the State
- for clearly defined types of projects that straddle the administrative boundary, a General Permit (RGP) is developed by the Corps and the State, and the State issues authorizations under the General Permit

[55] FDEP, State 404 Program Applicant's Handbook at Section 2; *see also* Fla. Admin. Code R. 62-331.030 ("Terms used in this chapter are defined in section 2.0 of the 404 Handbook"). For purposes of the "300-foot guide line," the Corps world retain 404 permitting authority for projects that straddle both sides of the "guide line." However, a separate Environmental Resource Program permit would also be required.

5. RESOURCE NEEDS

5.1 Corps Alaska District – Permit/Activity Workload analysis

Alaska can expect to take on approximately 75% of the Corps' permitting workload under program assumption. The percentage may vary some depending on the outcome of negotiations with the Corps and EPA delineating retained and assumable waters.

An in-depth analysis was conducted on a five-year span (2018 to 2022) of the Alaska District regulatory permitting and related actions workload based on their Operations and Maintenance Business Information Link Regulatory Mode (ORM-2) database. The database identifies Corps' "actions" such as Jurisdictional Determination or Standard Permit and each action is tied to the federal authority for that action – Section 10 of the RHA, Section 404 of the CWA, or Section 10/404 (both). Numbers of actions were also identified that were not tied to federal authority, "No Authority Data."

To determine how many actions are attributed to Section 404 authority, all Section 10 authority actions were removed from the data-set since Section 10 permits will remain with the Corps. Section 10/404 authority actions were then removed, assuming if the action was in a Section 10 water the wetlands will be within the correct distance to be considered adjacent and will remain with the Corps. The "No Authority Data" actions (which represent about 30% of the actions) were also removed from the dataset. The remaining actions are likely assumable by the State and represent 83% of the Corps' workload. This doesn't account for the missing data – the actions where the authority was not identified. All but one action type can apply to section 10 or Section 10/404 so it was assumed that the same percentage of the "No Authority Data" actions would be assumable by the State (83%). When those actions are added to the State assumable workload, the overall State assumable workload is about 75% of the current Corps' workload.

Appendix 8. Corps' Data Workload Review, Methodology and Results provides a description of the Corps' actions tracked in ORM-2 and how the data was sorted and organized. The number of Section 404 actions rather than number of permits issued was used at it represents a more accurate predictor of workload. A summary and conclusions reached from reviewing the data are detailed in Appendix 9. Methodology to Evaluate Corps' Workload and State Workload under 404 Program Assumption. The full data set is available in the 404 Master Workbook and found in word tables and was provided to DEC.

The Alaska District data has limitations, since it only covers action types related to JDs and steps in permit issuance completed by the Alaska District. Information on other program areas such as compensatory mitigation and compensatory mitigation monitoring, development of General Permits, complexity of JDs, EIS workload, and enforcement is not available through ORM-2 data supplied by the Corps. That workload, however, is captured via the 48 Corps' staff focused on implementation of the full program.

Additionally, the data analysis does not provide a 100% accurate estimate of potential State permitting/decision workload because:

- A shoreward boundary for wetlands considered adjacent to retained waters has not yet been established,
- gaps in the Corps data system (primarily where the authority (Section 404 or Section 10) are not identified), and
- the time spent issuing GP authorizations does not include the time/effort to develop and renew the GP every five years.

The permit/activity workload analysis was based on the assumption that Alaska would assume all waters upland of a 300-foot administrative boundary from the mean higher high tide line for waters subject to the ebb and flow of the tide and the mean high water mark for the 47 Corps' Section 10 retained waters. Those geographic areas could change during MOA negotiations with the Corps and EPA. The analysis indicates the DEC would assume approximately 75% of the Corps' permitting (and related actions) workload (see Appendix 9. Methodology to Evaluate Corps' Workload and State Workload under 404 Program Assumption).

The analysis then compared potential State workload from the most recent 5-year period to the data set from the 2014 Cost Analysis for Operating a State-Assumed 404 Program[56] for the 2005-2013 timeframe. Both analyses arrived at a similar estimate -- that the State would assume approximately 75% of the Corps' workload.

5.2 Staffing Analysis

A comparison of the permit issuance data from the 2014 report and the 2018-2022 datasets indicate that the Corps now issues about 16% more permits/year than in 2005, with two fewer full time equivalent (FTE) staff. This is likely a reflection of greater use of GP authorizations, which are less time-consuming than issuing Standard Permits (SPs). This time "savings" has been used up by completing fewer, but more time-consuming actions. When looking at overall actions/year, there are actually fewer actions/year, but those actions have become more complex over time, requiring more time per action by the Corps. (See Appendix 10. Analysis of Changing Nature of Corps' Workload).

The data summarized in Appendix 10 indicates the overall annual Corps' workload has changed little since the 2014 analysis. This report assumes that the estimated necessary DEC staffing would remain about the same – 32 FTE, a little less than 75% of the current Corps' staffing level. We assume that this approximate level of staffing should be sufficient since the State will assume approximately 75% of the Corps' workload and the State already has more automations available for an assumed program and greater opportunity and incentive to operate a more streamlined program. See Table 2 Comparison of Corps Program Staffing Size to Proposed Alaska Program Staffing.

Current EPA staffing dedicated to work in Alaska is approximately 8 FTE. The split between workload is approximately 0.2 FTE for JDs, 0.5 FTE for enforcement, and 7.3 FTE for permit review. After 404 Program assumption by the State, EPA would continue to have 404 staff

[56] Cost Analysis for Operating a State-Assumed 404 Program, Alaska Department of Environmental Conservation, 2014.

dedicated to Alaska. Staffing now is distributed approximately 3 FTE in Alaska, 4 in Seattle, and 1 at EPA Headquarters.

5.3 State Program Position Summary and Projected Costs

The projected need for 32 staff for a State-assumed 404 Program can be "ramped up" over a two-year timeframe (see Section 8. Assumption Process and Timeline). Program and staff development, including the application for assumption, can begin in the first year (FY 24) with 28 staff and $5.0 million. Full staffing, completing the assumption application and program/staff development, will be complete in FY 25 with 32 staff and $4.8 million[57]. Ongoing program implementation, beginning in FY 26 will continue with 32 staff and $4.8 million. Budget details are shown in Table 3. DEC Budget Summary FY 24-FY 26+. The overall staffing and costs may need to be adjusted as DEC negotiates retained/assumed waters with the Corps.

5.4 Program Funding and Fee Structure Options

An ongoing barrier to state assumption is that there are no federal grant funds available to a state that assumes the 404 Program, even though it results in a cost savings to the federal government. There are small Wetland Program Development grants that can help support improvements to the state's wetlands management, but they are not available for 404 permitting implementation. As such, the State should assume the use of 100% General Funds (GF) will be necessary during program application, development, and the first year of implementation (approximately three years). GF can be partially offset by fees in out years and there are several potential approaches to fees.

The Corps does not charge fees for transferring a permit from one property owner to another, for Letters of Permission, or for any activities authorized by a general permit or for permits to governmental agencies. The Corps charges nominal fees, but only for two actions -- $10 for non-commercial Standard Permit (SP or "Individual Permit") applicants and $100 for commercial SP applicants. Neither of these fees contribute appreciably to the costs of running the program. Alaskan permittees would need to recognize the value of a State-assumed program if DEC were to consider a fee structure to cover a portion of the program. DEC faced a similar challenge when taking on the 402 permitting program but gained support for primacy when it became clear that the State could issue more timely permits, rely upon Alaska-specific guidance, and provide local knowledge value including ready access by permittees to State staff. DEC could gain support for a partially fee-supported 404 Program by including stakeholders in development of the program, program regulations, and the Program Description portion of the assumption application. The Alaska program will be 100% GF funded during the program development/application phase and while a permit fee structure can be instituted, the program over time may remain largely GF-funded as permitted projects support economic development in the State and the permits serve to protect water resources on behalf of all Alaskans.

[57] The State budget system accounts for one-time costs for each new employee during the first year (desk, computer, and related equipment). Those costs are backed out of the budget in the following year. Hence, FY 25, with four new staff is slightly smaller than FY24, as the one-time costs for the 28 positions hired in FY 24 are eliminated.

The states with 404 Programs or plans to assume the program have addressed funding in different ways. Nebraska conducted a funding analysis based on 75% and 100% fee support. Their legislature recently approved State 404 assumption with broad support, likely because their program will not rely on any General Funds, and permittees recognize the benefits of a State run program over the federal program. The recently approved Florida program is 100% fee supported.

Rather than to solely rely long term on State General Funds, the State should consider partially funding the program with fees or a combination of fee approaches. For reference, the 402 (wastewater discharge) permitting program operated by EPA did not charge permit fees. When the State took over the 402 Program, it began with a mix of approximately one-third General Funds, one-third federal grant funds (not available for 404), and one-third fees. DEC had "buy-in" for a partially fee-based program by establishing reasonable fees and clearly articulating the benefits of a State-managed program. Permittees supported the effort after deciding that paying for a State-issued permit had more value to them than a "free" permit from EPA. Different fee approaches to support a 404 Program are described below.

5.4.1 Impact fees

Alaska could consider an approach to charge a permit fee based on acres or lineal feet affected. This would be similar to emission fees in the Air Program which are designed to fully cover the program's costs. For an assumed 404 Program, this could potentially work for a partially fee-supported program. Permit fee "income" could vary significantly from year to year (unlike the fairly stable annual fees generated in the Air Program) and as such, is not a recommended approach. Additionally, permitted projects would vary greatly in their actual impact to wetlands/waters functions, even for projects that "affect" the same areal or lineal footage. Finally, some projects can be authorized under a General Permit which is less "expensive" to issue per permit, while others may have a similar impact but require a more costly IP. The State could not rely upon this approach for stable funding year to year.

5.4.2 Hourly Fees

Alaska could also consider an hourly fee which would be more equitable in that permittees are charged based upon the actual work conducted. More complicated projects, with greater environmental review and increased interest by other agencies and the public, would be charged commensurate with the State's level of effort. Downsides include a permittee not knowing, or being able, to plan for their permit fee as it would be unknown until the permit is issued. It also does not account for new, inexperienced staff, or staff unfamiliar with waters/wetlands in a geographic region taking longer to issue a permit than more experienced staff. Feedback from other agencies (or lack thereof) can also cause costs to vary, even for what appear to be similar projects. The hourly rate would be dependent upon the percentage of the program the fee is designed to support.

5.4.3 Fee for Specific State Actions

DEC could establish a fee for each specific service (JD, LOP, SP, GP authorization, etc.). The benefit is that this averages a cost over similar permittees which eliminates the problem

associated with a less experienced permit writer being assigned to a project (a problem with the hourly fee approach).

5.4.4 Recommendation

DEC should consider establishing a fee approach based on existing statutory authority at AS 44.46.025. Fees for Services[58] using a hybrid approach, similar to the fee structure already implemented for the CWA Section 402 Program which involves a flat fee for specific types of actions and authorizations under specific General Permits (with a published fee schedule) and a base fee for SPs with an hourly fee for time spent over the base fee. DEC could choose to start with lower fees for specific actions while it gains expertise, then revise the fees over time (as with Section 402 permits) to better reflect actual State costs (again, recognizing that State General Funds should continue to cover a significant portion of the program into the future).

[58] Note that DEC may need specific statutory authority (or regulations) to apply the fee structure at AS 44.46.025 (or a different fee structure) to dredge and fill permits. Section 404 permittee stakeholders may have similar interests as the Section 402 stakeholders: From the 402 Program stakeholder report: "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 employees 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." Alaska Department of Environmental Conservation (2005, February 4). *National Pollutant Discharge Elimination System Primacy Workgroup Report*. Retrieved December 29, 2023, from https://dec.alaska.gov/water/apdes-history/npdes-primacy-work-group

6. PROPOSED STATE PROGRAM STRUCTURE

6.1 DEC Section 402 Structure/Recommended 404 Structure

The 404 Program structure will start with a significant policy group dedicated to the program assumption application and program development tools. Over time, most of those positions will transfer into program implementation. There will be a long term need to have 1-2 people remain in the 404 policy group to track changes in federal law that may affect the State's program and to guide regulations amendments and develop additional policy/procedures for the program.

The DEC structure in the Division of Water for the 402 Program is well thought out and readily scalable to accommodate 404 Program assumption. The most important aspect of this organizational structure is that program development (statutes, regulations, program policy, guidance development, and training) and program implementation (permitting, compliance, and enforcement) are housed within a single Division, reporting into the Director.[59] The Director's office prepares the annual budget and workplans, performance measures and reports, works with the Department of Law to draft legislation, reviews federal initiatives affecting the Division, promulgates regulations, approves program's implementation policies, and makes decisions on informal reviews of staff decisions (first step in the appeals process).

It makes sense to centralize staff in Anchorage or Juneau during early program development, assumption application development, technical staff training and capacity development, and program implementation during the first year or two. Based upon the geographic locations identified in the Corps' workload analysis, DEC program staffing should eventually be distributed statewide with primary staff located in Juneau, Anchorage and Fairbanks. (Table 4. Geographic Distribution of Workload and Staff (Corps' Actions)). Centralizing ongoing program development and management may mean retaining a higher percentage in either Anchorage or Juneau, based on DEC's selected approach. In the out years, DEC could move a few positions to the Soldotna and Wasilla offices to be more accessible to permittees as those areas have significant 404 permitting needs.

The current organizational structure at DEC ensures consistent program implementation and allows the Program Manager to assign work from one region to staff in another region as workload fluctuates between regions of the state. This flexibility ensures timely permitting and continues strong customer service across the state.

Based upon the success of other state 404 Programs and DEC's success with the 402 Program, the recommended organizational approach is to include pre-permit consultations and permittee technical assistance, JDs, GP development and authorizations, SPs (including mitigation plan

[59] In the past, DEC had three "regional offices" located in Anchorage, Fairbanks and Juneau with Regional Directors that reported separately to the commissioner's office and operated independently from the headquarters program development sections. This approach led to inconsistencies in program priorities and implementation across the regions, to the extent that permittees could "shop" between DEC offices to get a more favorable answer to their permit needs. The current structure where program development and implementation are housed within a division can lead to less communication across Divisions, but DEC has routine communications mechanisms in place to temper that.

approval), and data entry/permit management in the DEC Environmental Data Management System (EDMS) system in the existing Division of Water Permit program that already has significant experience permitting (see Figure 6. Division of Water Proposed Organization Charts). Alternatively, DEC could establish a separate 404 permitting program.

The inspection/compliance/enforcement work and compliance data entry in EDMS should be integrated into the Division of Water Compliance Program (Figure 6). The main advantages to this approach are synergy between staff with similar training and duties; cost savings – for example, a 402 inspector can review 404-permitted sites when travelling to remote locations; and most importantly, significant enforcement cases will be handled by staff who are not also assigned permitting responsibilities, ensuring the permitting program can continue to timely issue permits while complex compliance work is conducted by other staff, which maintains permit schedule predictability. Permitting and compliance priorities can be considered jointly and established and managed separately. Each program's permitting and compliance program staff will need to coordinate closely on policies impacting both areas and on specific permits during the permitting process.

Both the permitting group and the compliance groups should include a mix of Environmental Protection Specialists 1-4, Environmental Engineers, and Environmental Program Managers. This allows DEC to "grow its own experts" and provides a career ladder for staff.

Any Water Quality Standards or anti-degradation requirements related to the 404 Program should continue to be addressed by the Water Quality Standards Program. The increased need for administrative support for the 404 Program should be integrated into the existing Administrative Support program that will handle federal grant applications, budget and spending plans, accounting, and administrative and human resources support. DEC should include one additional Analyst Programmer in the existing Water and Information Programs to incorporate updates to the EDMS system to support the 404 Program with maintenance of the data system.

6.2 Other State agencies

The level of effort (and internal organization) for permit review and comment functions by SHPO should not change with 404 assumption. The only change is that permits to be reviewed will still come from the Corps for projects in retained waters and from DEC for projects in State assumed waters.

DEC is likely to negotiate an MOU with U.S Fish and Wildlife Service (USFWS) for their review of projects with potential impacts to endangered or threatened species (including time limits for their review). DEC may want to engage the DF&G when USFWS expresses concerns with a project to ensure local knowledge and expertise is considered.

Both DNR and USFWS have completed some wetlands mapping for Alaska but there remains a significant need for wetlands mapping and funding for mapping. This current gap in data/mapping does not prevent State 404 Program assumption, but improvements to the mapping could assist a State program.

Finally, other State agencies may be involved in the environmental review for permits under the State's version of the 404(b)(1) guidelines. As this work would likely be funded by permit applicants, more work will be required, but the financial cost on the State will be small.

7. STATE PROGRAM CAPACITY DEVELOPMENT

DEC has extensive experience reviewing 404 permit applications and issuing 401 certifications for 404 permits but lacks technical expertise in many of the 404 Program activities (JDs, mitigation banks). DEC will need to hire and train most staff for the program and should, early during the first year, develop a programmatic training plan that describes the necessary knowledge and skills for entry level, mid-level, and experienced staff/managers. Every employee should have a position-specific training plan that should start with time set aside for onboarding new employees – introduction to the agency and time established to read the relevant parts of the CWA and federal regulations. Training plans should include wetlands program specific formal technical training, supervisory training (as appropriate) and specific training for subject matter experts. With a mostly new staff, DEC does not have institutional knowledge with the program or prior projects. To help alleviate this, the programmatic training plan should include development of a staff sharing agreement with the Corps, including Intergovernmental Personnel Agreement (IPA) staff to be loaned from the Corps to DEC as well as DEC staff loaned to the Corps via MOA. DEC staff working temporarily at the Corps can fill the staffing gap left by a Corps' employee coming to DEC and can learn the Corps' permitting process (temporary staff trades).

While the normal hiring process would be to select the managers first and have them hire the new staff under them, DEC's 2-year schedule to program assumption will necessitate simultaneous hiring efforts for managers and staff. DEC should also make use of single recruitments (advertising and interviewing) for multiple positions at the same time. Employees should initially be based in Anchorage/Fairbanks/Juneau while the program is young to ensure consistency in staff training and program implementation. By 2025 positions could migrate to the Wasilla and Soldotna offices, commensurate with regional workload.

DEC may wish to consider the establishment of term contractors (on board before/at program assumption) who can be tasked in the early years to assist with compliance reviews, JD reviews, and mapping accuracy. That approach could potentially provide additional technical capacity early on, while DEC is continuing internal capacity development.

8. ASSUMPTION PROCESS AND TIMELINE

Current federal law requires an assuming state to take on the full 404 Program – partial program assumption is not allowed. This has been seen as a major drawback by states that are prepared to take on some, but not all, of the program. EPA proposed draft regulations in 2021 that would create a process for partial program assumption. Those regulations were scheduled to be completed by December 2022. EPA has since delayed the rulemaking with a proposed rule now estimated to be issued in September 2023 and final rule issued in October 2024. Therefore, at the current time, if DEC wants to assume the 404 Program, it must develop an application for the full program.[60] Development of a State program assumption application and program implementation should stay continually focused on streamlining.

A 404 Program assumption application must contain a letter from the Governor, a complete program description, an Attorney General's Statement, an MOA with the EPA Regional Administrator, and MOA with the Secretary of the Army, and copies of all applicable State statutes and regulations. See Table 5. Required Elements of a 404 Program Assumption Application for a list of application elements and Appendix 11. Required Components of a State Assumption Application for a detailed description of each element. Appendix 12. Program Description Outline for 404 Program Assumption contains an outline for a major component of the assumption application, the Program Description. See also Appendix 13. Outline for MOA with the EPA Regional Administrator and Appendix 14 Outline for MOA with the Secretary of the Army.

The State assumption process and timeline are directly linked to program cost projections, legislative approval of the DEC budget request, and the DEC level of focus on hiring, training, and overall program and staff capacity development. The shortest possible timeframe would be two years to achieve program approval, but some states have spent many years working up to a program assumption application. The first 18 months will be two-fold: 1) focused on hiring staff and developing program tools; and 2) developing the 404 Program assumption application in close coordination with EPA. The following six months would primarily focus on: 1) building staff capacity in all disciplines necessary to implement the program; and 2) continuing to work with EPA on the application process to ensure a complete and thorough application for their timely review. Upon receipt of the final program assumption application, EPA will make a completeness determination within 30 days and a program approval decision within 120 days of submittal of the complete application (unless extended by the State).[61]

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[60] Federal Section 404 regulations are silent on whether a state could apply to assume the full program but take on implementation over a period of several years – a "phased" approach. Under this scenario, EPA would approve the State to take on the full 404 Program (required), but phase it in over several years (for example, implement the program for a specific region of the State the first year; add another region during the second year; and add the final region in the third year. The State could evaluate this as a potential option during development of the MOA with EPA.

[61] See CWA Section 404(h)(3) "If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved . . . "

When analyzing 402 primacy, DEC conducted a series of meetings with a stakeholder workgroup. The workgroup helped define what a State-led program should look like (program characteristics) and many of their observations and recommendations are applicable to 404 assumption and have been incorporated into this Feasibility Study. There are unique attributes to the 404 Program (dissimilar to other types of permits) and DEC could benefit from establishing a 404-stakeholder workgroup that could provide input on specific issues, as determined by DEC. Examples could include mitigation flexibility or establishment of ecoregions/areas of the state where the administrative boundary between State-assumed and Corps- retained waters is moved shoreward or further inland. DEC could also consider developing a list-serve, as Nebraska has done, to keep interested parties updated on the assumption progress.

The assumption timeline assumes full funding beginning in FY 24 (or sooner if a supplemental budget is sought) and that there is no litigation on the EPA approval of the State program. There is some probability that any EPA decision to approve State assumption, no matter how well supported, could be challenged in federal court. Such proceedings have the potential to delay program approval. The potential areas of vulnerability to program approval appeal could include any issue associated with the "challenges" identified in Section 3. The timeline also assumes some tasks will begin during the second half of FY 23. A list of tasks and timeframes is shown in Table 6. Tasks and Timeline for 404 Program Assumption.

9. CONCLUSION AND RECOMMENDATIONS

Alaska is 43% wetlands.[62] In many Alaska locations, it is impossible to construct anything from a driveway to an oil platform without placing dredged or fill material into wetlands. How these activities are permitted greatly affects how Alaska is developed: how its citizens and industries both protect the environment and develop the state.

The imperative to affect dredge and fill policies is much less in other states. Within the lower 48 states, the average state is 5% wetlands.[63] At that small percentage, the need to influence permitting policies in these states is much less important than it is for Alaska.

It is often said that Alaska is different, and this is especially true for wetland management. Alaska's wetlands are different. From the forested wetlands of Southeast Alaska to the permafrost wetlands of the North Slope, wetlands in Alaska have ecological characteristics which are greatly different from those elsewhere in the U.S. Further, the lower 48 states have lost over half their original endowment of wetlands, where Alaska has lost 0.1%.[64] For these reasons, protection and mitigation policies that are appropriate elsewhere in the U.S. may not be suitable for Alaska. Policies that must fit the country nationally need to be tailored to protect Alaska ecosystems and benefit Alaska communities.

This feasibility study has described the advantages, challenges, administrative structure, cost of assuming 404 permitting in Alaska, and a path forward. The analysis leads to the conclusion that Alaska will have much greater say in schedules, priorities, and policies that protect the environment and allow responsible development of resources and communities if Alaska can work as a partner with EPA and the Corps by assuming the 404 Program rather than by remaining on the sidelines and relinquishing control to the federal government. Given the state's rights under cooperative federalism, the importance of the natural environment and natural resources to the people and economy of Alaska, the importance of wetland permitting in Alaska, and the potential for influencing resource protection and development policies, the recommended course of action is for the State of Alaska to assume the 404 Program over assumable WOTUS.

[62] Status of Alaska Wetlands, U.S. Fish and Wildlife Service. 1994
[63] Dahl, T.E. 1990. Report to Congress: Wetlands Losses in the United States 1780's to 1980's. U.S. Department of Interior, Fish and Wildlife Service, Washington D.C., 13 pp. Table 1, page 6.
[64] Ibid.

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Table 1. Historic Wetland Loss/Gain by State – Table and Graphs

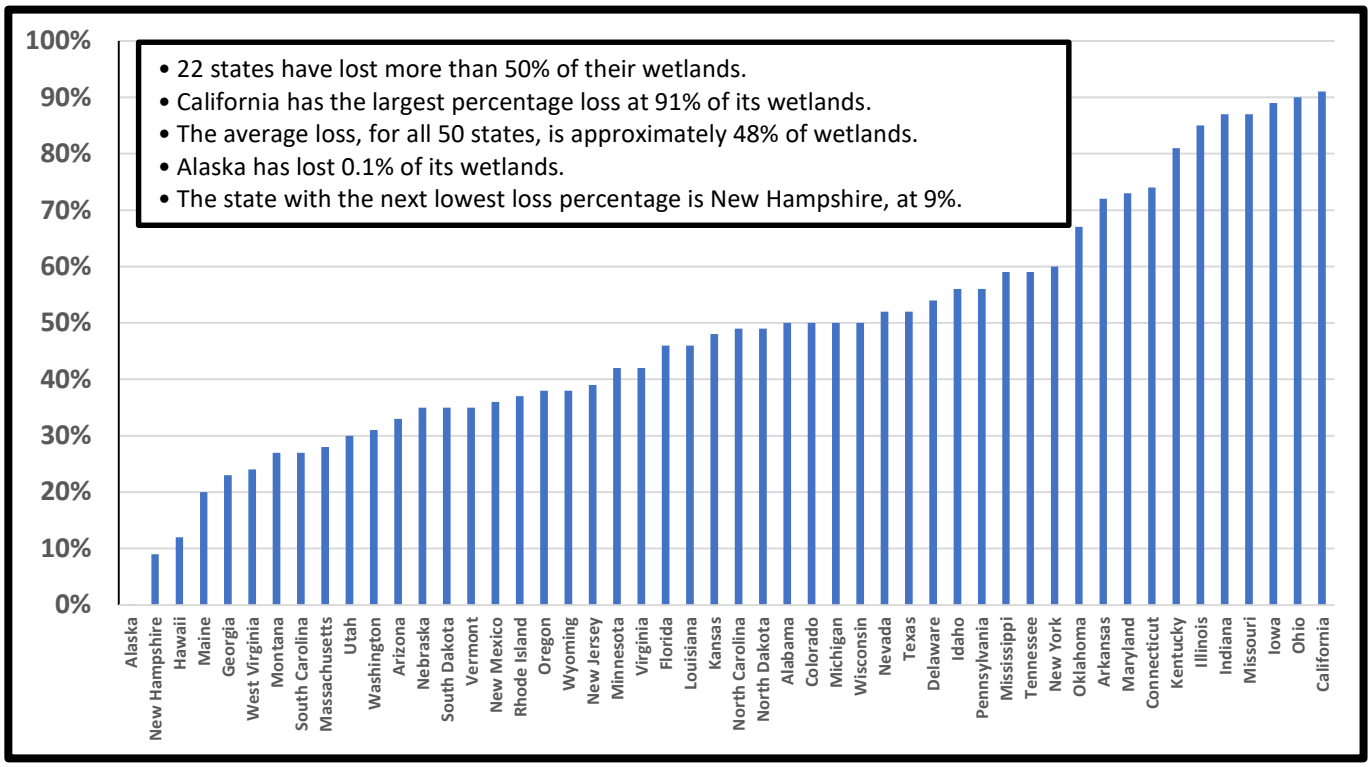
The table and the graphs on the following pages were taken from a 1990 report to Congress by the U.S. Fish and Wildlife Service. There are minor differences between the wetland acres in this report and those of more modern publications. This is due to better information and differences in how wetlands are counted. For example, this publication lists Alaska's wetland percentage at 45.3% whereas the percentage listed in the main body of the report is 43%, based on a more detailed 1994 report by the U.S. Fish and Wildlife Service.

Wetland Acreage, Surface Percentage, and Loss by State

	% of Surface Area		Wetland Acrage		% of Surface Area		Wetland Acrage
State	**1980s**	**% Lost**	**1980s**	**State**	**1980s**	**% Lost**	**1980s**
Alabama	11.5%	50%	3,783,800	Montana	0.9%	27%	840,300
Alaska	**45.3%**	**0.1%**	**170,000,000**	Nebraska	3.9%	35%	1,905,500
Arizona	0.8%	36%	600,000	Nevada	0.3%	52%	236,350
Arkansas	8.1%	72%	2,763,600	New Hampshire	3.4%	9%	200,000
California	0.4%	91%	454,000	New Jersey	18.3%	39%	915,960
Colorado	1.5%	50%	1,000,000	New Mexico	0.6%	33%	481,900
Connecticut	5.4%	74%	172,500	New York	3.2%	60%	1,025,000
Delaware	16.9%	54%	223,000	North Carolina	16.9%	49%	5,698,500
Florida	29.5%	46%	11,038,300	North Dakota	5.5%	49%	2,490,000
Georgia	14.1%	23%	5,298,200	Ohio	1.8%	90%	482,800
Hawaii	1.3%	12%	51,800	Oklahoma	2.1%	67%	949,700
Idaho	0.7%	56%	385,700	Oregon	2.2%	38%	1,393,900
Illinois	3.5%	85%	1,254,500	Pennsylvania	1.7%	56%	499,014
Indiana	3.2%	87%	750,633	Rhode Island	8.4%	37%	65,154
Iowa	1.2%	89%	421,900	South Carolina	23.4%	27%	4,659,000
Kansas	0.8%	48%	435,400	South Dakota	3.6%	35%	1,780,000
Kentucky	1.2%	81%	300,000	Tennessee	2.9%	59%	787,000
Louisiana	28.3%	46%	8,784,200	Texas	4.4%	52%	7,612,412
Maine	24.5%	20%	5,199,200	Utah	1.0%	30%	558,000
Maryland	6.5%	73%	440,000	Vermont	3.6%	35%	220,000
Massachusetts	11.1%	28%	588,486	Virginia	4.1%	42%	1,074,613
Michigan	15.0%	50%	5,585,400	Washington	2.1%	31%	938,000
Minnesota	16.2%	42%	8,700,000	West Virginia	0.7%	24%	102,000
Mississippi	13.3%	59%	4,067,000	Wisconsin	14.8%	46%	15,331,392
Missouri	1.4%	87%	643,000	Wyoming	2.0%	38%	1,250,000

Source: Dahl, T.E. 1990. *Wetlands Losses in the United States 1780s to 1980s.* U.S. Department of Interior, Fish and Wildlife Service. Washington D.C. 13 pp. Report to Congress

Wetland Loss by State



Source: Dahl, T.E. 1990. *Wetlands Losses in the United States 1780s to 1980s.* U.S. Department of Interior, Fish and Wildlife Service. Washington D.C. 13 pp. Report to Congress

Percentage of Wetland Surface Area by State

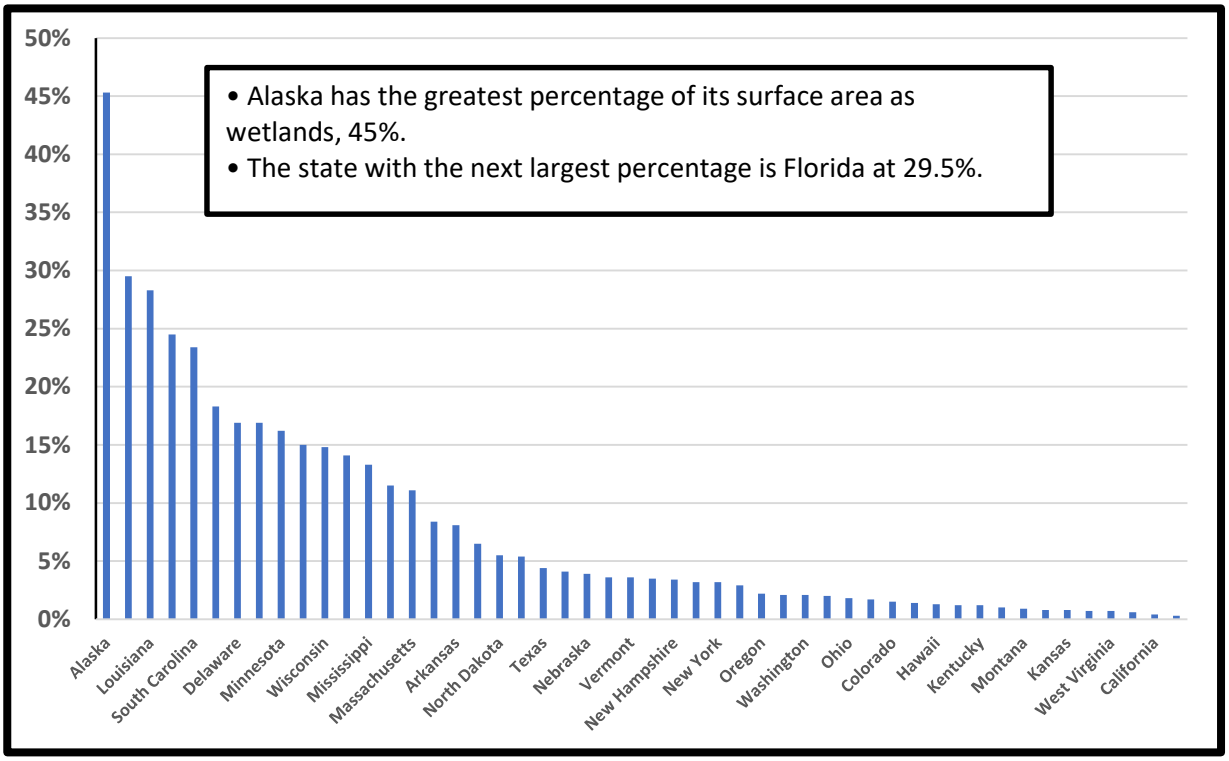


Table 2 Comparison of Corps Program Staffing Size to Proposed Alaska Program Staffing

It is challenging to provide a direct comparison between states regarding the number of permits issued/FTE, as a 404 program includes many types of actions associated with issuing permits, including jurisdictional decisions, permit modifications and transfers, and compliance and enforcement work. Some states may rely more on GPs (faster to issue), while others may issue a higher percentage of IPs (more complex permits). Some states include in their 404 permits, authorization under other (non-404) regulatory requirements. For these reasons, a comparison with staffing levels in other states is not provided. This table provides information that demonstrates that Alaska's proposed staffing level is generally similar to staffing in the Alaska District of the Corps.

Permit Actions/Year*	**Corps in Alaska**	**Alaska - assumed program (75% of Corps work)**
PJD - Preliminary Jurisdictional Determinations	197	148
AJD - Approved Jurisdictional Determinations	17	13
Operating Mitigation Banks	3	2
EIS - Environmental Impact Statements	2.4	2
NWP - Nationwide Permit Authorizations	283	212
Permit Modifications	98	74
Permit Transfers	40	30
RGP - Regional General Permit Authorizations	42	32
SP - Standard Permits	55	41
Enforcement - Unauthorized Actions	39	29
Enforcement - Noncompliance	9	7
Appeals	<1	0
No Data or Not Corps' Jurisdiction	168	126
TOTAL ACTIONS	**775**	**581**
Program FTE	**48**	**32**
Actions/FTE	16	18

*Based on a five-year average. Note that the Corps data system does not distinguish between permittee industry types.

Table 3. DEC Budget Summary FY 24-FY 26+

FY2024				
1000 - Personal Services				
Anchorage Step D	**Range**	**Cost**	**Quantity**	**Totals**
PX or Environmental Program Manager 3 - SS	23	$160,997	1	$ 160,997
Environmental Program Manager 2 – SS	22	$151,852	1	$ 151,852
Environmental Program Specialist 3/4 (budget at 4) – GP	20	$126,802	2	$ 253,604
Environmental Program Manager 2 – SS	22	$151,852	3	$ 455,556
Environmental Program Specialist 3/4 (budget at 4) – GP	20	$126,802	14	$ 1,775,228
Environmental Program Specialist 2 - GP	16	$101,724	3	$ 305,172
Administrative Officer I - SS	17	$114,562	1	$ 114,562
Administrative Assistant 2 - GP	14	$90,160	3	$ 270,480
Total Personal Services			**28**	**$ 3,487,451**
2000 - Travel for technical staff				
Travel for management and technical staff		$ 5,200.00	24	$ 124,800
Total Travel				**$ 124,800**
3000 - Contractual				
Allocated costs 6% of personal services			6%	$ 209,247
Training for new techncial staff		$ 5,200.00	24	$ 124,800
Contractors				$ 250,000
RSA to Law				$ 175,000
RSA to Department of Fish and Game				$ 250,000
RSA to Department of Natural Resources				$ 120,000
Total Contractual				**$ 1,129,047**
4000 - Commodities				
1st year new employee costs		$ 7,500.00	28	$ 210,000
Office supplies		$ 500.00	28	$ 14,000
Total Commodities				**$ 224,000**
FY2024 Total				**$ 4,965,298**
FY2025				
1000 - Personal Services				
FY2024 Positions			28	$ 3,487,451
New Positions Anchorage Step D	**Range**	**Cost**	**Quantity**	**Totals**
Environmental Program Manager 2 – SS	22	$151,852	1	$ 151,852
Environmental Program Specialist 4 – GP	20	$126,802	3	$ 380,406
Total New			**4**	**$ 532,258**
Total Personal Services			**32**	**$ 4,019,709**
2000 - Travel for new technical staff				
Travel for management and technical staff		$ 5,200.00	4	$ 20,800
Total Travel				**$ 20,800**
3000 - Contractual				
Allocated costs 6% of personal services			6%	$ 241,183
Training for new technical staff		$ 5,200.00	4	$ 20,800
RSA to Law				$ 175,000
RSA to Department of Fish and Game				$ 120,000
RSA to Department of Natural Resources				$ 120,000
Total Contractual				**$ 676,983**
4000 - Commodities				
1st year new employee costs		$ 7,500.00	4	$ 30,000
Office supplies		$ 500.00	32	$ 16,000
Total Commodities				**$ 46,000**
FY2025 Total				**$ 4,763,492**
FY2026 +				
FY2026 and Beyond				**$ 4,763,492**

Table 4. Geographic Distribution of Workload and Staff (Corps' Actions)

Table 4 shows Corps' actions by borough for a five-year period. It demonstrates the location of projects for Corps' actions. It is not representative of the number of actions the State will assume but can be used to estimate overall workload by three main geographic areas, and DEC's main office locations. It provides a general distribution of the 32 staff needed to operate the State assumed 404 Program – 14 FTE in Anchorage, 12 FTE in Fairbanks, and six FTE in Juneau. This analysis can also be used as the State program matures to determine staffing for Wasilla and Soldotna.

Total Number of Actions in Each Borough/Census Area with Begin Dates from 2018-2022

Borough/Census Area	Section 10	Section 10/404	Section 404	No Authority Data	Grand Total	General DEC Geographic Area	Staff Distribution (32 total FTE)
Aleutians East Borough	14	5	1	19	39	Anc	
Aleutians West Census Area	8	11	11	67	97	Anc	
Anchorage Municipality	13	38	187	335	573	Anc	
Bristol Bay Borough	3	1	5	10	19	Anc	
Dillingham Census Area	8	14	13	29	64	Anc	
Kenai Peninsula Borough	315	84	381	682	1462	Anc	
Lake and Peninsula Borough	3	7	11	43	64	Anc	
Matanuska-Susitna Borough	21	39	274	276	610	Anc	
Valdez-Cordova Census Area	41	37	108	198	384	Anc	
Blank	1	7	20	222	250	Anc	
Kodiak Island Borough	14	17	26	87	144	Anc	
Total Corps' Actions, Percentage of Anchorage-based work, and total FTE					**3706**	**46%**	**14**
Bethel Census Area	1	9	154	165	329	Fbx	
Denali Borough	2	4	45	46	97	Fbx	
Fairbanks North Star Borough	8	40	253	339	640	Fbx	
Kusilvak Census Area		5	51	32	88	Fbx	
Nome Census Area	4	27	90	140	261	Fbx	
North Slope Borough	8	67	345	363	783	Fbx	
Northwest Arctic Borough	4	9	42	72	127	Fbx	
Southeast Fairbanks Census Area		6	68	112	186	Fbx	
Yukon-Koyukuk Census Area	9	19	169	265	462	Fbx	

Total Corps' Actions, Percentage of Fairbanks-based work, and total FTE					**2973**	**37%**	**12**
Haines Borough	3	17	13	26	59	Jnu	
Hoonah-Angoon Census Area	18	18	29	27	92	Jnu	
Juneau City and Borough	19	61	103	104	287	Jnu	
Ketchikan Gateway Borough	69	36	60	205	370	Jnu	
Petersburg Borough	5	13	34	60	112	Jnu	
Prince of Wales-Hyder Census Area	53	20	57	133	263	Jnu	
Sitka City and Borough	25	31	29	24	109	Jnu	
Skagway Municipality	3	3	5	4	15	Jnu	
Yakutat City and Borough	3	5	5	4	17	Jnu	
Wrangell City and Borough	21	14	34	70	139	Jnu	
Total Corps' Actions, Percentage of Juneau-based work, and total FTE					**1463**	**18%**	**6**
Grand Total	**696**	**664**	**2623**	**4159**	**8142**		**32**

Table 5. Required Elements of a 404 Program Assumption Application

404 Program Application		
Element	40 CFR Section	Element Description
A		Governor letter requesting program approval
B	§233.11	Complete program description
	a	Scope and structure of state program
	b	Permitting, administration, & judicial review procedures
	c	State agency organization
	d	Funding and staffing description
	e	Estimated workload
	f	Permit application form, permit template, & reporting forms
	g	Description of compliance & enforcement & Coordination with EPA & Corps
	h	Description of waters in State vs. Corps jurisdiction
	i	BMPs for exempt provisions in 404(f)(1)(E)
C	§233.12	Attorney General's Statement
	a	Laws & Regulations provide proper authority
	b	Acknowledgement that tribal land is not a state assumption option
	c	Legal analysis of prohibition of taking private property without just compensation
	d	Multiple agency responsibility and authorities
D	§233.13	MOA with EPA Regional Administrator
	a	Identify permit applications which EPA will waive federal review
	b	Reports & files to be submitted to EPA
	c	Roles & coordination for compliance monitoring & enforcement
E	§233.14	MOA with Secretary of the Army
	a	Description of waters the Corps maintains jurisdiction over
	b	Procedures to transfer pending permit applications upon program approval
	c	Existing Corps general permits & how the state will administer them
F		Copies of all applicable state statutes and regulations

Table 1: Required Elements of a 404 Program Application

Table 6. Tasks and Timeline for 404 Program Assumption

Assumption process and timeline (tasks, task order, and timeline to be refined during program planning)

Task	Suggested Assignment	Start Date	Completion Date	Notes
Remainder of FY 23		**2/1/2023**	**6/30/2023**	
Develop and defend program budget	Director			
Update Wetland Management Plan	PM, Contractor			
Develop hiring plan and Position Descriptions for each position level	PM, PS, HR			
Initiate recruitment	PS, HR		Ongoing until complete	Recruitment can begin; positions can't start until 7-1
Draft RSA to DOLaw to develop regulations gap analysis, draft regulations, draft regulatory crosswalk with federal regulations (for assumption application AG Statement)	DEC AAG			Identify statutory gaps, if any
Prepare outline for PD	Contractor			
Develop outreach plan to include general public, stakeholders, tribes and rural governments; draft program assumption web page (live upon budget approval) include sign up for listserve	PM, IS			
Select stakeholder workgroup members	CO, Director			
FY 24		**7/1/2023**	**6/30/2024**	
Hiring; develop and initiate program and position specific training plans	PM			
Prepare initial draft regulations to meet all federal requirements	DOL/DEC			

Task	Suggested Assignment	Start Date	Completion Date	Notes
PD - Develop permit review criteria (404(b)(1) guidelines or equivalent	PM, DOL, PS			
PD - Draft rural and tribal participation plan guidance (similar to 402); update when permit process is refined	PS, Division of Water Local and Tribal Government Coordinator			
PD - Scope and organizational structure of State program including other agencies if appropriate; funding description	PM, PS			
PD - Define scope of regulated activities	PM, PS			
Stakeholder initial meeting - brief on 404 Program	PM			After initial "training" meeting, hold issue-specific meetings with stakeholder workgroup
Stakeholder meeting on mitigation	PM			
Develop mitigation approach/regulations compliant with 2008 rule - mitigation bank, ILF, functional assessment tools, credits	PM, DOL			
Develop procedures for compliance with (or alternatives to) project impacts, ESA, NHPA and any necessary MOA's	PM, PS			
Stakeholder meeting on specific issue - assumable waters	PM			
PD - Initiate discussion with the Corps; determine extent of State's jurisdiction and waters retained by the Corps, including a comparison of the State and Federal definitions of wetlands	Director, PM			

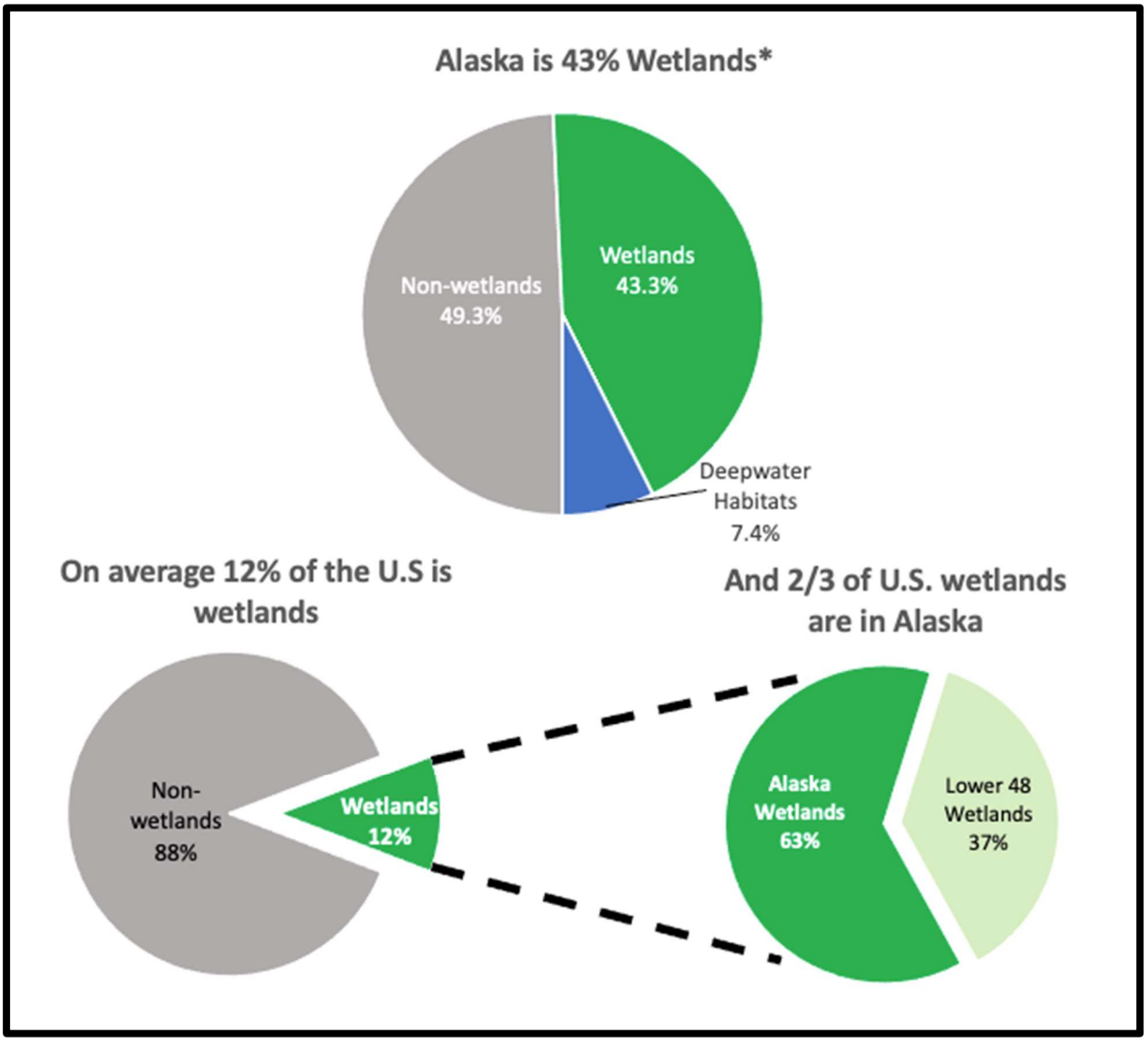
Task	Suggested Assignment	Start Date	Completion Date	Notes
Stakeholder meeting on regulations development	PM			
PD - Permitting procedures and administrative review/appeal process	PM, DOL			
PD - Interagency coordination	PM, PS			
PD - Anticipated workload - JDs, GPs and authorizations, SPs, mitigation, inspection and compliance	PS			
Develop and brief legislature on progress and any budget changes (the additional four staff)	Director			
PD - compliance evaluation and enforcement program, including coordination with Corps/EPA	PM, Compliance PM			
Draft and negotiate MOA with USFWS re: permit review/ESA	PM			
Regulations public notice	PS			
Develop SPGP(s) to gain program experience	PS			In coordination with Corps
Begin operating a JD program and issuing SPGP(s) authorizations	PS			
FY 25		**7/1/2024**	**6/30/2025**	
Hire remaining staff; continue training all staff	PS		ongoing	
PD - Develop program forms (permit applications, permit templates, standard letter templates i.e. JD decisions) and program into EDMS	PS, IS			
PD -Description of data management system and copies of all forms and model documents (JD's, permits, LOP)	IS			

Task	Suggested Assignment	Start Date	Completion Date	Notes
Draft and negotiate MOA with Corps; include retained waters; all GPs the State intends to administer; transfer of documents procedures	PM, PS			
Draft and negotiate MOA with EPA	PM, PS			
RSA to DNR for mapping assistance and mitigation bank development	PM, Contractor to do workplan			
Compile all applicable State statutes and regulations for program, including administrative procedures and appeals procedures	DOL			
Attorney General's Statement that State laws and regulations provide adequate authority to implement the program; must include takings analysis	DOL			
Draft Governor's cover letter	PM, CO			
Submit draft assumption package	Director		9/1/24	
Work with EPA and the Corps on their comments on the assumption application	PM, PS			
Prepare DEC webpages for assumed program (post upon approval)	PS, IS			
Begin issuing State authorizations under SPGP(s)	PS			
Compliance staff begin reviews/inspections of DEC certified permittees an SPGP-authorized projects; initiate enforcement as needed	PS			
Submit final assumption package	Director, CO		2/1/2025	
Convert/enter existing GPs into EDMS	PS			

Task	Suggested Assignment	Start Date	Completion Date	Notes
Public outreach on the final program/assist EPA with public review and comment period	PM, PS			
Outreach on State program for permittees/public	PM, PS			
FY 26		**7/1/2025**	**6/30/2026**	
Program Approval			7/1/2025	
Assign lower-level staff to GP approvals	PS			
Assign senior staff to SPs already in progress by Corps	PS			
Continue staff development and training	PM, PS			

CO - Commissioner's office
Director - DEC Water Division Director
PM -Dredge and Fill Program Manager
DOL - Department of Law
C - Contractor
PS - Program staff, as assigned
IS - Division of Water, Information Systems
HR – Human Resources

Figure 1. Alaska Wetlands Compared to Lower 48 Wetlands



Source: U.S. Fish and Wildlife Service. Status of Alaska Wetlands 1994. Note that deepwater habitats are below tidal levels in enclosed marine areas such as inlets and fjords, or in deep areas of freshwater lakes.

Figure 2. Map of Potential Corps-Retained Waters in Alaska

Figure 3. Example of a Corps-Retained Water and Adjacent Wetlands – Coastal

Figure 4. Example of a Corps-Retained Water and Adjacent Wetlands – Lake

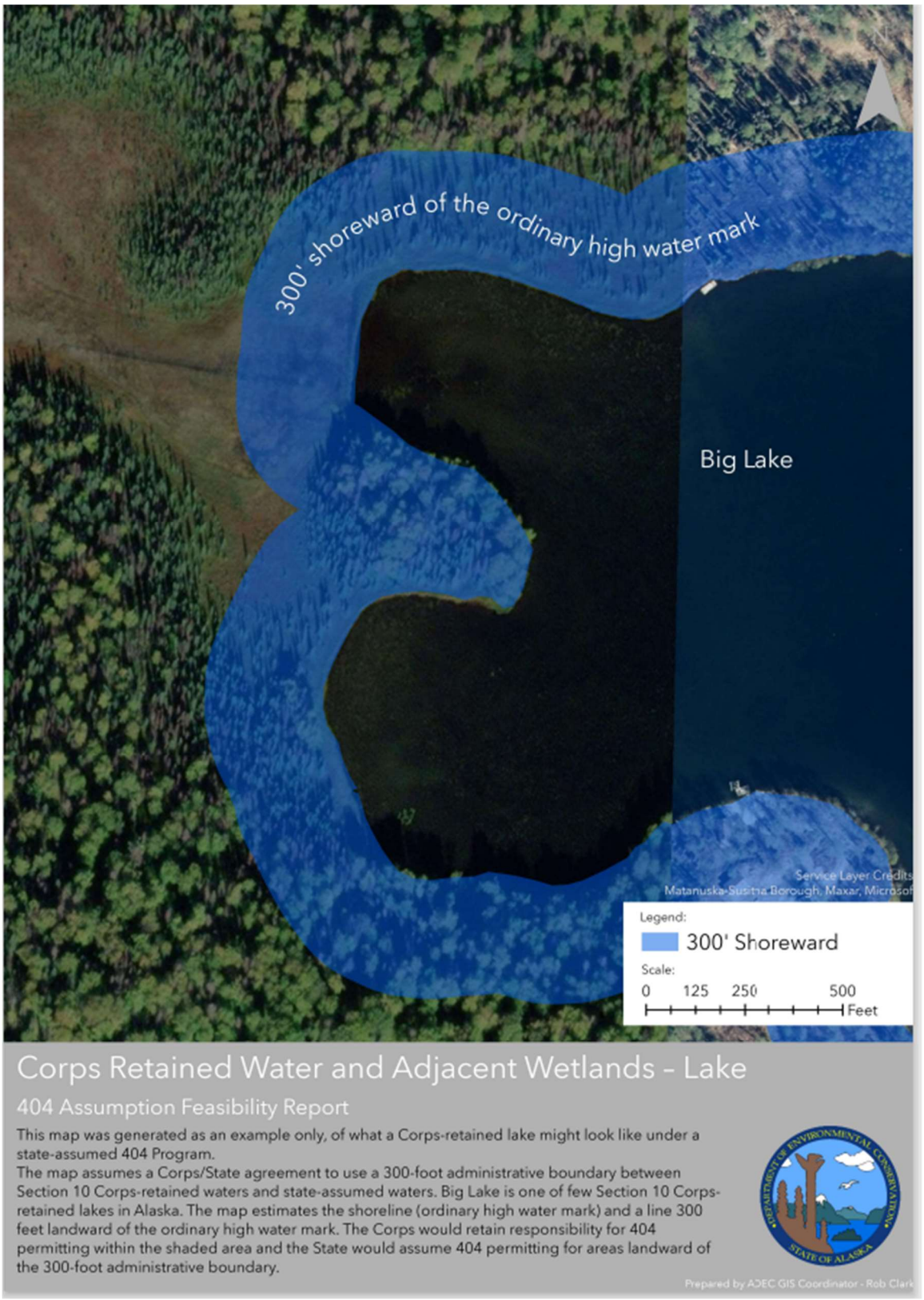
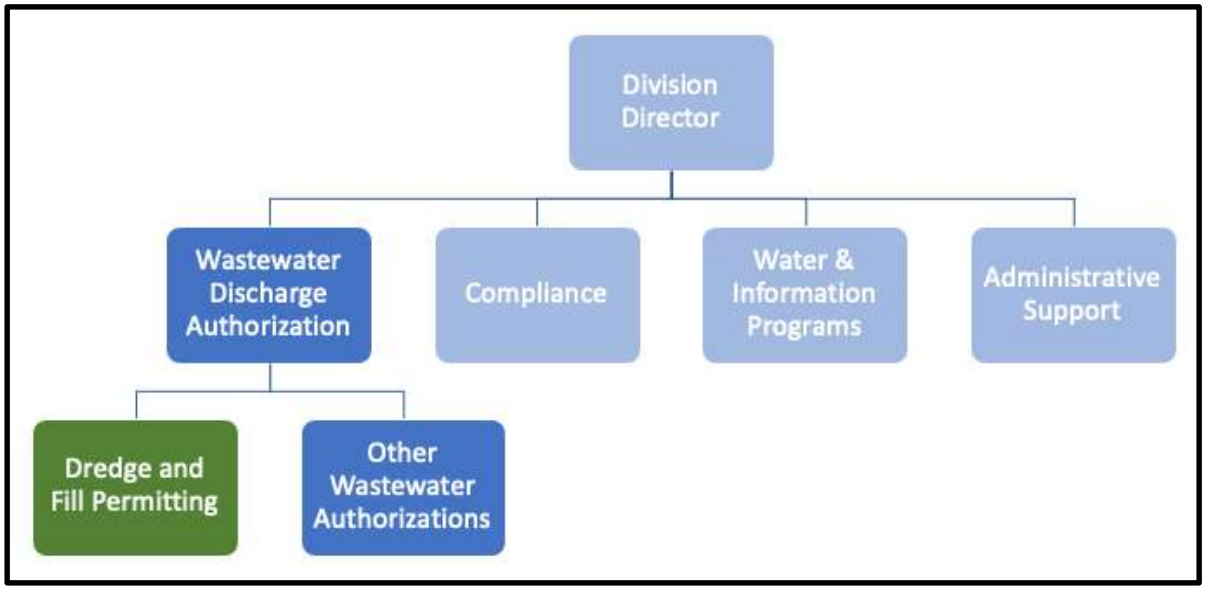


Figure 5. Example of a Corps-Retained Water and Adjacent Wetlands – River

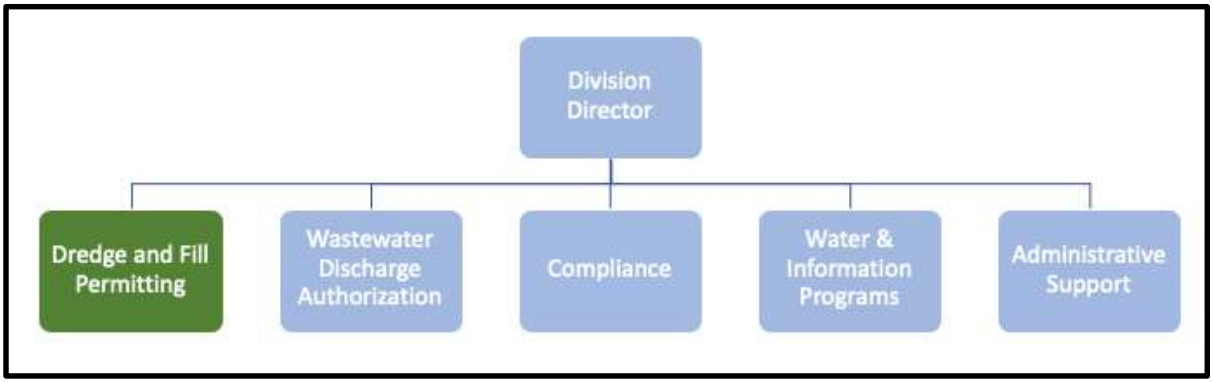
Figure 6. Division of Water Proposed Organization Charts

There are two practical options for locating the dredge and fill permitting authorities within the Division of Water. Option 1 includes a Dredge and Fill Permitting Section within the existing Wastewater Discharge Authorization Program, greatly expanding the span of control for the current manager. Option 2 makes the Dredge and Fill Permitting work a separate Program under the Water Division Director (expanding the Director's immediate span of control) and is preferable since this new program would be managed at a higher and more focused level.

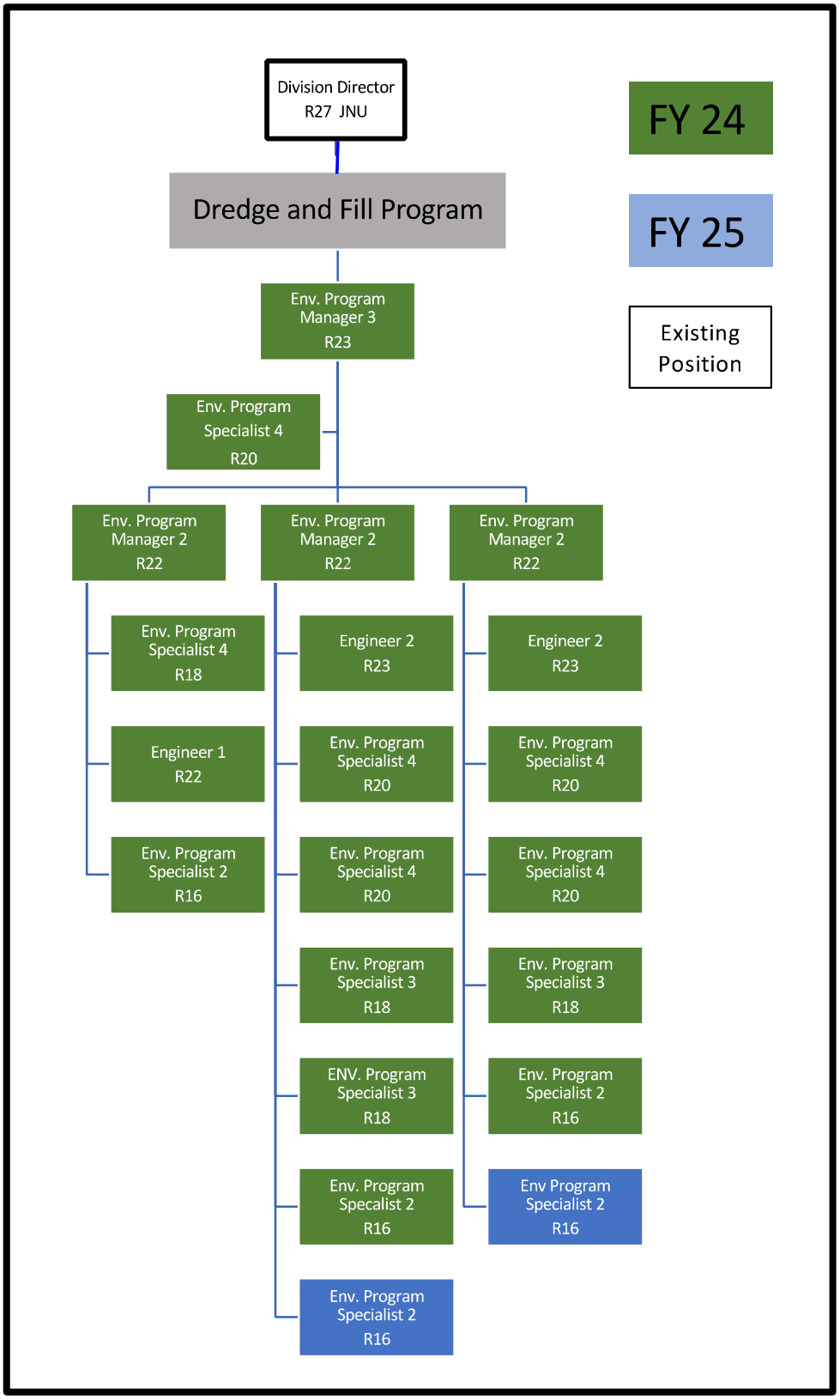
Option 1. As a Section within the Wastewater Discharge Program



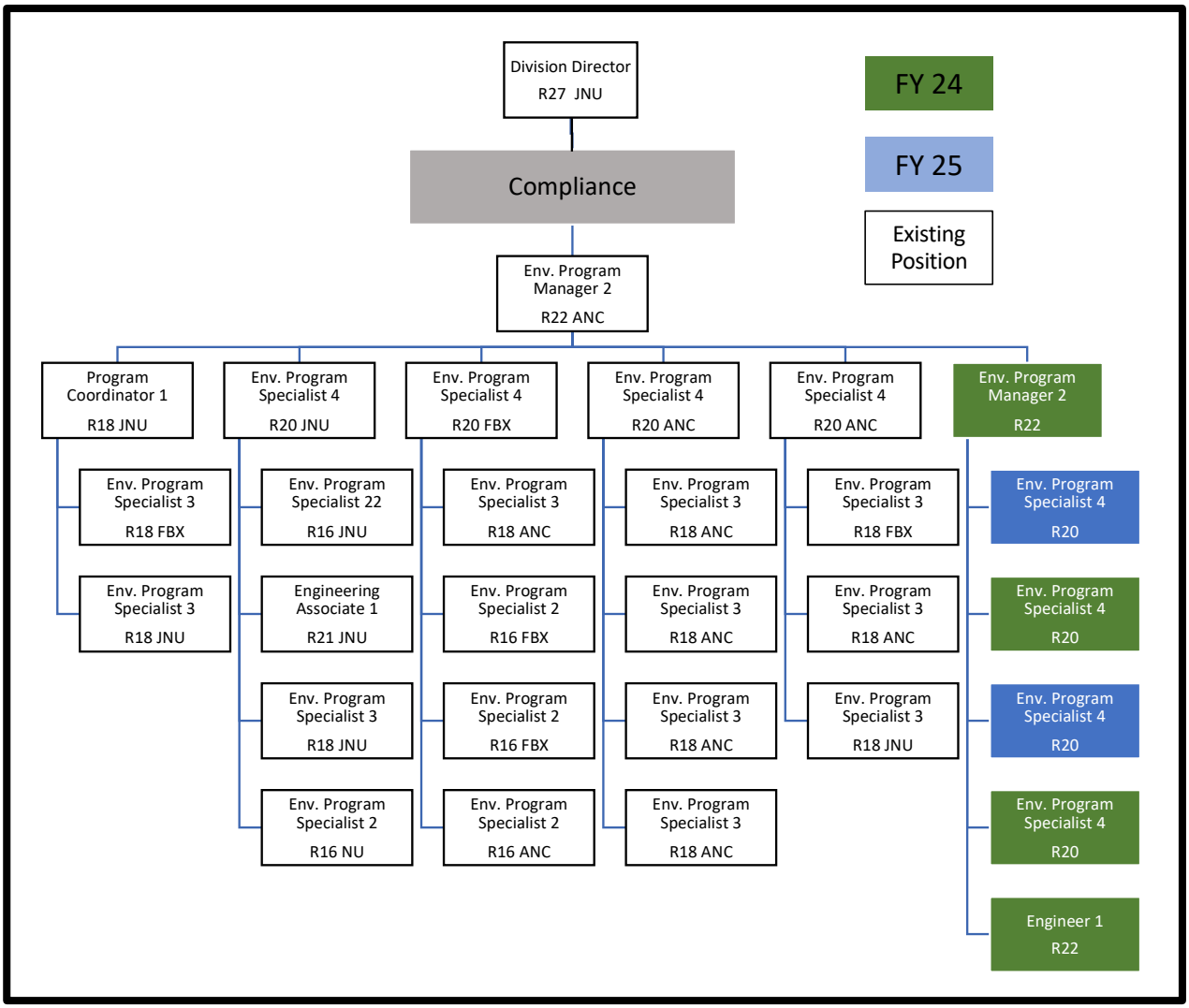
Option 2. As a separate Program within the Division of Water



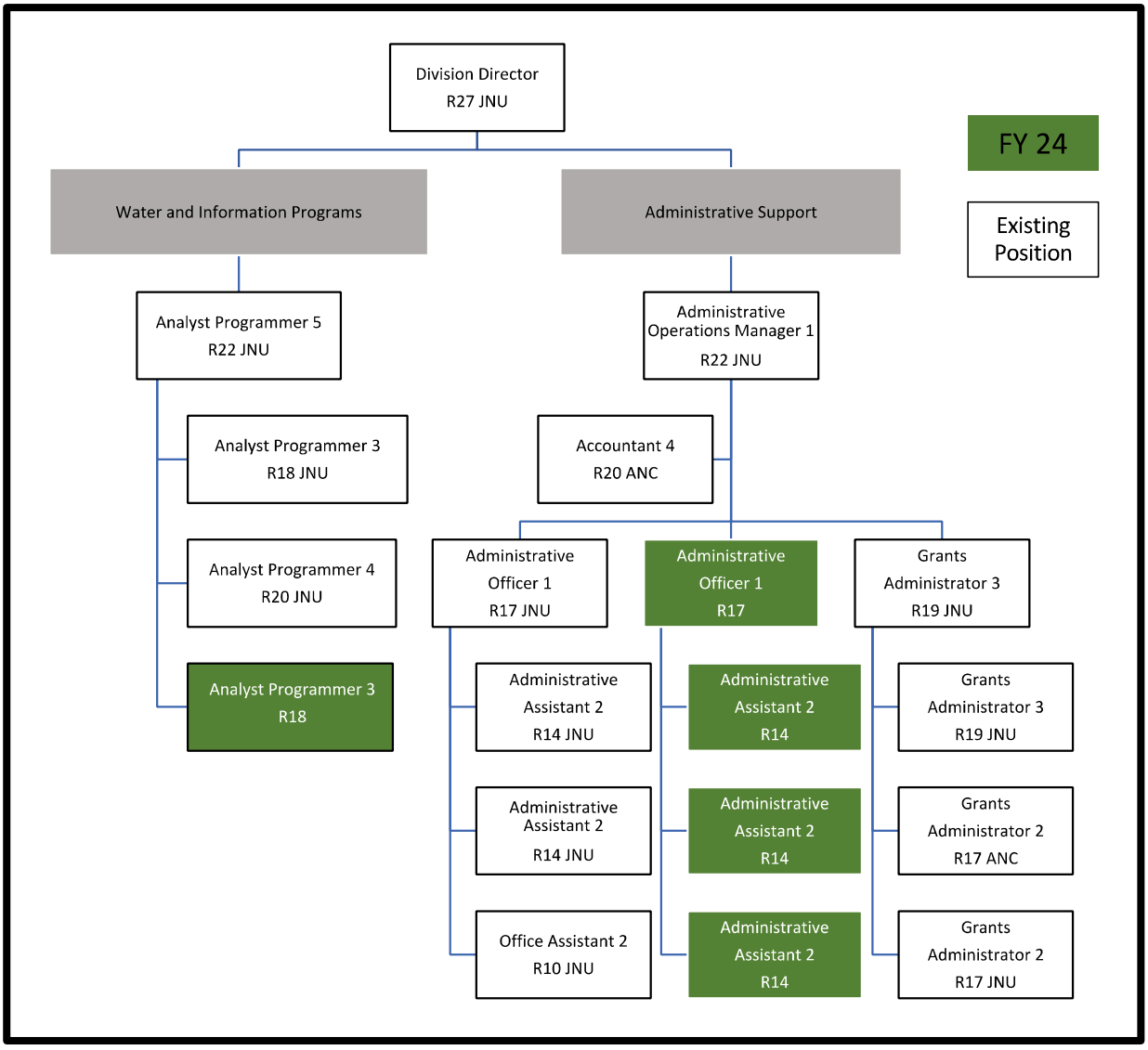
Proposed Staffing Chart for a Dredge and Fill Program within the Division of Water



Proposed staffing additions to the Compliance Program within the Division of Water



Proposed staffing additions to the Administrative Support Section and the Water and Information Programs within the Division of Water



Appendix 1. 2018 MOA Between Corps and EPA Regarding Mitigation Sequence in Alaska

Document begins on next page.

MEMORANDUM OF AGREEMENT

BETWEEN
The Department of the Army AND The Environmental Protection Agency CONCERNING
Mitigation Sequence for Wetlands in Alaska under Section 404 of the Clean Water Act

I. PURPOSE AND SCOPE

The United States Department of the Army ("Army") and the United States Environmental Protection Agency ("EPA") (together, the "agencies") hereby provide guidance regarding flexibilities that exist in the mitigation requirements for Clean Water Act Section 404 permits, and how those flexibilities can be applied in the state of Alaska given the abundance of wetlands and unique circumstances involved with Section 404 permitting in the state. This Memorandum of Agreement **("MOA")** clarifies how existing national policies regarding practicability determinations and regulatory flexibility can be implemented in Alaska while ensuring sound environmental stewardship of the State's ecologically important wetland resources. This MOA updates and replaces the EPA and Army Memoranda entitled Clarification of the Clean Water Act Section 404 Memorandum of Agreement on Mitigation, dated January 24, 1992, and Statements on the Mitigation Sequence and No Net Loss of Wetlands in Alaska, dated May 13, 1994.

II. POLICY

A. Authority

This guidance is consistent with the agencies' regulations and policies including, but not limited to:

- Section 404 of the Clean Water Act (33 U.S.C. § 1344);
- Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 CFR Part 230) ("Guidelines");
- Compensatory Mitigation for Losses of Aquatic Resources, dated April 10, 2008 (33 CFR Part 332/40 CFR Part 230) ("2008 Mitigation Rule");
- MOA between the Army and the EPA Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, dated February 8, 1990 ("1990 Mitigation MOA"); and
- The EPA and the Army Memorandum to the Field, entitled Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements, dated August 23, 1993 ("1993 Memorandum to the Field").

The Clean Water Act Section 404 regulatory program provides that the United States Army Corps of Engineers ("Corps") evaluates permit applications for the discharge of dredged or fill material into waters of the United States, including jurisdictional wetlands, in accordance with the Guidelines. The Guidelines are the substantive environmental criteria used in evaluating discharges of dredged or fill material into waters of the United States. The 2008 Mitigation Rule, which amended the Guidelines, revised and clarified requirements regarding compensatory mitigation for losses of aquatic resources (see 33 CFR Part 332 and 40 CFR Part 230, Subpart J). The 2008 Mitigation Rule did not alter the circumstances under which compensatory mitigation is required for Section 404 permits (see 33 CFR Part 332.1(b) and 40 CFR Part 230.91(b)). This rule did not alter the Corps' general policy that, for individual permits, all compensatory mitigation will be for significant resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment (see 33 CFR Part 320.4(r)).[1] For activities authorized by general permits, mitigation may be required to reduce the adverse impacts so that they are no more than minimal (see 33 CFR Part 330.1(e)(3)). The 1993 Memorandum to the Field clarified the appropriate level of analysis required for evaluating compliance with the Guidelines. The 1990 Mitigation MOA contains the policy and procedures that the agencies use in determining the type and level of mitigation necessary to demonstrate compliance with the Guidelines. The portions of the 1990 Mitigation MOA concerning the amount, type, and location of compensatory mitigation were superseded by the 2008 Mitigation Rule.

B. Guiding Principles

In this MOA, the agencies recognize that specific to the state of Alaska:

a) Avoiding wetlands may not be practicable where there is a high proportion of land in a watershed or region which is jurisdictional wetlands;

b) Restoring, enhancing, or establishing wetlands for compensatory mitigation may not be practicable due to limited availability of sites and/or technical or logistical limitations;

c) Compensatory mitigation options over a larger watershed scale may be appropriate given that compensation options are frequently limited at a smaller watershed scale;

d) Where a large proportion of land is under public ownership, compensatory mitigation opportunities may be available on public land;

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[1]This general policy is not a substitute for the mitigation requirements necessary to ensure that a Section 404 permit action complies with the Guidelines (see 33 CFR Part 320.4(r) n.1).

e) Out-of-kind compensatory mitigation may be appropriate when it better serves the aquatic resource needs of the watershed; and

f) Applying a less rigorous permit review for small projects with minor environmental impacts is consistent with the Section 404 program regulations.

III. Discussion - Mitigation Sequence

The Guidelines' mitigation sequence established a consistent approach to ensure that all practicable measures have been taken to reduce potential adverse impacts associated with proposed projects in wetlands and other aquatic systems (see 40 CFR Part 230.10(a), (d)). The Guidelines define the term "practicable" as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes" (see 40 CFR Part 230.3(1)). The first step in the mitigation sequence requires the evaluation of potential alternative sites to locate the proposed project so that aquatic impacts are avoided to the extent practicable. As the next step in the mitigation sequence, remaining impacts are to be minimized, by making changes in project design or construction methods that reduce overall project impacts. Last, after all practicable steps have been taken to avoid and minimize potential adverse effects, compensation for remaining unavoidable impacts may be required through such measures as wetlands or other aquatic resource restoration, establishment, enhancement, or, in certain circumstances, preservation in order to replace lost aquatic functions and values. Compensatory mitigation is required only to the extent that it is appropriate and practicable.

Given the unique climatological and physiographic circumstances found in Alaska, it is appropriate to apply the inherent flexibility provided by the Guidelines to proposed projects in Alaska. Applying this flexibility in a reasoned, common-sense approach will lead to effective decision-making and sound environmental protection in Alaska.

A. Avoidance

Avoiding impacts to wetlands may not be practicable in areas where there is a high proportion of land which is jurisdictional wetlands. Moreover, in some cases, the overwhelming majority of lands within a community's municipal boundary are considered jurisdictional wetlands, and the remaining non-wetlands areas may be undevelopable. As another example, on the North Slope, upland alternatives for siting oil and gas development are extremely rare given the abundance of wetlands in the area.

B. Minimization

Where wetlands have been avoided to the extent practicable, emphasis is placed on minimizing project impacts to wetlands by reducing the footprint of the project, using co-location of facilities whenever possible, implementation of best management practicesto reduce environmental impacts, seeking to locate the project in wetlands with lower functions and values, or other appropriate measures. With respect to the mitigation sequence, where neither avoidance nor compensatory mitigation is practicable, minimizing impacts will be the primary means of satisfying compliance with the Guidelines. In Alaska,

minimization of impacts has been in many circumstances the only mitigation required.

C. Compensatory Mitigation

Compensatory mitigation is provided in the Guidelines in order to offset unavoidable losses of aquatic functions and values associated with the permitted destruction and/or degradation of wetlands and other aquatic resources under the Section 404 regulatory program. It is also the primary means of the Section 404 regulatory program's contribution to the national goal of no overall net loss of wetlands. However, the Guidelines and the 1990 Mitigation MOA recognize that compensatory mitigation may not be appropriate and practicable for every authorized discharge.

Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a Section 404 permit complies with the Guidelines (see 33 CFR Part 332.1(c)(2) and 40 CFR Part 230.91(c)(2)). For example, compensatory mitigation may be required to ensure that discharges do not cause or contribute to a violation of water quality standards or jeopardize a threatened or endangered species or result in the destruction or adverse modification of critical habitat under the Endangered Species Act (see 40 CFR Part 230.10(b)). Compensatory mitigation may be required to ensure that discharges do not cause or contribute to significant degradation (see 40 CFR Part 230.10(c)). The Guidelines also require compensatory mitigation measures when appropriate and practicable (see 40 CFR Parts 230.10(d) and 230.12; 33 CFR Parts 332.1 and 332.3(a)(1); and 40 CFR Parts 230.91 and 230.93(a)(1)).[2]

For the purposes of issuing Section 404 permits, the Corps is responsible for determining whether a proposed activity complies with the Guidelines (see 40 CFR Part 230.5; 33 CFR Part 332.1(c)(2) and 40 CFR 230.91(c)(2)), including whether compensatory mitigation is required for that Section 404 permit. The Corps determines the compensatory mitigation requirements for Section 404 permits, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity (see 33 CFR Part 332.3(a)(1) and 40 CFR Part 230.93(a)(1)). Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular Section 404 permit (see 33 CFR Part 332.3(a)(1) and 40 CFR Part 230.93(a)(1)).

1) **Considering Compensatory Mitigation Options in Alaska.** In general, required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully

[2] During the 404(b)(1) Guidelines compliance analysis, the Corps may determine that a Section 404 permit for a proposed discharge cannot be issued because of a lack of appropriate and practicable compensatory mitigation options (see 33 CFR Part 332.1(c)(3) and 40 CFR Part 230.91(c)(3)).

replace lost aquatic resource functions and values. The Corps considers compensatory mitigation options in the following order: (1) purchase of credits from an approved mitigation bank; (2) purchase of credits from an approved in- lieu fee program; and (3) completion of a permittee-responsible mitigation project. However, the Corps has discretion to override this preferential order (see 33 CFR Part 332.3(b)(2) and 40 CFR Part 230.93(b)(2)). In many parts of Alaska, the first two options may not be available or may not provide the appropriate number or resource type of credits to offset the proposed project impacts. In this case, some form of permittee-responsible mitigation is the only option and permittee-responsible mitigation developed using a watershed approach is preferred (see 33 CFR Part 332.3(b) and 40 CFR Part 230.93(b)).

a. **Watershed Approach.** The goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites. If an appropriate watershed plan is available, the watershed approach should be based on that plan. In the absence of an appropriate watershed plan, the Corps uses a watershed approach based on analysis of information regarding watershed conditions and needs (see 33 CFR Part 332.3(c)(3) and 40 CFR Part 230.93(c)(3)).

b. **Watershed Scale.** Certain environmental factors in Alaska suggest that larger watershed scales than are commonly used in the lower 48 states may be appropriate. These factors include, but are not limited to: (1) large areas where wetlands remain relatively free from human alteration and opportunities for wetland restoration and enhancement are limited; and (2) large wetland dominated areas where there is a lack of upland sites appropriate for establishing wetlands. The size of watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by Section 404 permits. The Corps considers relevant environmental factors and appropriate locally developed standards and criteria when determining the appropriate watershed scale in guiding compensation activities (see 33 CFR Part 332.3(c)(4) and 40 CFR Part 230.93(c)(4); see also 33 CFR Part 332.3(d) and 40 CFR Part 230.93(d) for compensation site selection considerations).

2) **Compensatory Mitigation on Public Lands.** An additional factor in the evaluation of appropriate and practicable compensation sites is whether they occur on private or public lands. In Alaska, where a large proportion of land is under public ownership, compensatory mitigation opportunities may be available on public land. Compensatory mitigation projects may be conducted on private or public land. However, compensatory mitigation credit for such projects on public land must be based solely on aquatic resource functions provided by compensatory mitigation projects that are over and above the aquatic resource functions already being provided by the public land in accordance with how that land is currently being

managed by the responsible land management entity (see 33 CFR Part 332.3(a)(3) and 40 CFR Part 230.93(a)(3)). For example, compensation credit could be generated by implementing aquatic resource restoration or enhancement projects on public lands that are not currently being planned for or by providing additional levels of protection to publicly held sites.

3) **Technical Feasibility.** In determining whether compensatory mitigation is practicable, issues associated with the technical feasibility of restoring, enhancing, or establishing wetlands and other aquatic resources are also relevant. In spite of significant advances in restoration science, the technical challenges associated with establishing and re-establishing certain difficult-to- replace aquatic resources, such as permafrost wetlands, remains high. Compensation for impacts to these types of resources should be provided, if practicable, through in-kind rehabilitation, enhancement, or preservation since there is greater certainty that these methods of compensation will successfully offset permitted impacts (see 33 CFR Part 332.3(e)(3) and 40 CFR Part 230.93(e)(3)). The Corps has determined in many cases that establishing or re- establishing wetlands underlain by permafrost was not practicable, and therefore in-kind wetland establishment or re-establishment has generally not been required as compensatory mitigation under the Guidelines. If the permafrost layer has not been substantially altered, in-kind wetland rehabilitation or enhancement may be a practicable wetland compensatory mitigation option. As a general matter, in cases where wetland restoration is practicable, it should generally be the first option considered because the likelihood of successful ecological outcomes is greater and the impacts to ecologically important uplands are reduced compared to wetland establishment, and the potential gains in terms of aquatic resource functions are greater, compared to wetland enhancement and preservation (see 33 CFR Part 332.3(a)(2) and 40 CFR Part 230.93(a)(2)). When in-kind mitigation is determined to be technically infeasible, out-of-kind mitigation should be considered.

4) **Out-of-Kind Compensatory Mitigation.** In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services lost at the impact site (see 33 CFR Part 332.3(e)(1) and 40 CFR Part 230.93(e)(1)). However, when the Corps determines that compensatory mitigation is necessary to ensure compliance with the Guidelines, out-of-kind compensatory mitigation may be an appropriate, practicable, and, in Alaska, an environmentally preferable alternative to wetland restoration, enhancement, establishment, or preservation. If the Corps determines, using the watershed approach described in 33 CFR Part 332.3(c) and 40 CFR Part 230.93(c), that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed, the Corps can require that compensatory mitigation. For example, in Alaska, restoring or enhancing streams and their riparian areas impacted by mining and other activities to improve fish habitat and other stream functions, or removing barriers in streams (e.g., perched or undersized culverts) to improve connectivity and other aquatic functions may, in certain circumstances, be environmentally preferable to wetland restoration, enhancement, establishment, or preservation. If out-of-kind compensatory mitigation is required for the Section 404 permit, the Corps must document the reason(s) for that requirement in the

administrative record for the permit action (see 33 CFR Part 332.3(e)(2) and 40 CFR Part 230.93(e)(2)).

5) **Preservation.** Consistent with the 2008 Mitigation Rule, compensatory mitigation provided through preservation should be, to the extent appropriate and practicable, conducted in conjunction with aquatic resource restoration, establishment, and/or enhancement activities (see 33 CFR Part 332.3(h)(2) and 40 CFR Part 230.93(h)(2)). This requirement may be waived by the Corps in cases where preservation has been identified as a high priority using a watershed approach. In those cases, the compensation ratios shall be higher. Lands that are already provided a high level of protection (e.g., state and national parks, wildlife refuges, and designated wilderness) would not be eligible for preservation credit given the requirement in the 2008 Mitigation Rule that the resources being considered for preservation must be under threat of destruction or adverse modifications (see 33 CFR Part 332.3(h)(1)(iv) and 40 CFR Part 230.93(h)(1)(iv)).

IV. Flexibility in the Review of Small Projects with Minor Impacts

The Guidelines also afford flexibility in the review of Section 404 permit applications based on the relative severity of the environmental impact of proposed discharges of dredged or fill material. In particular, the amount of information and the level of scrutiny needed to determine compliance with the Guidelines is commensurate with the severity of the environmental impact (as determined by the functions of the aquatic resource and the nature of the proposed activity) and the scope/cost of the project (see, e.g., 40 CFR Parts 230.6 and 230.10, and the 1993 Memorandum to the Field).

While Section 404 permit reviews are associated with a wide variety of activities, ranging from those with large, complex impacts on the aquatic environment to those for which the impacts are likely to be innocuous (e.g., de minimis), it is unlikely that the Guidelines will apply in their entirety to any one activity, no matter how complex.
Moreover, substantial numbers of permit applications are for minor, routine activities that have little, if any, potential for adverse effects on the aquatic environment. It generally is not intended or expected that extensive evaluation or analysis will be needed to make findings of compliance with the Guidelines in such routine cases.

In determining whether a proposed discharge would have minor impacts, and consequently, the appropriate level of analysis, the permitting authority should consider whether the proposed project meets the following considerations:

a) located in aquatic resources of limited natural function;

b) small in size and causes little direct impact; and

c) limited potential for secondary or cumulative impacts; or causes only temporary impacts (i.e., short-term and reversible impacts).

It is important to recognize, however, that in some circumstances even small or temporary fills result in substantial impacts, and that in such cases a more detailed evaluation is necessary. In particular, where high value coastal wetlands may be adversely affected or

marine, estuarine, or anadromous fish habitat may be harmed, it is likely that a more detailed Guidelines analysis will be necessary. Moreover, it is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will cause only minor impacts for the purposes of the Guidelines' alternatives analysis.

The Guidelines require that the Corps can only authorize discharges that are the least environmentally damaging practicable alternative ("LEDPA"), which is the practicable alternative with the least amount of adverse impact on the aquatic ecosystem so long as the alternative does not have other significant adverse environmental consequences[3] (see 40 CFR Part 230.10(a)). Part of this analysis is overcoming the presumption that for projects that do not require siting in special aquatic sites (e.g., wetlands) to fulfill their basic purpose, practicable alternatives that do not include discharges to special aquatic sites are available and would have less adverse impact, unless demonstrated otherwise. However, in reviewing projects that have the potential for only minor impacts on the aquatic environment, the Guidelines would not necessarily require an elaborate search for practicable alternatives if it is reasonable to anticipate that there are only minor differences between the environmental impacts of the proposed activity and other potentially practicable alternatives. Moreover, when it is determined that there is no identifiable or discernible difference in adverse impacts on the environment between the applicant's proposed alternative and all other practicable alternatives, then the applicant's alternative is generally considered as satisfying the Guidelines' alternatives analysis requirements.

Even where a practicable alternative exists that would have less adverse impact on the aquatic ecosystem, the Guidelines allow it to be rejected if it would have other significant adverse environmental consequences (see 40 CFR Part 230.10(a)). This flexibility allows for the consideration of adverse impacts to other ecosystems in deciding whether there is a less environmentally damaging practicable alternative. For example, in some areas of Alaska, impacts to certain uplands, such as moose calving areas or important riparian habitat next to rivers and streams inhabited by anadromous fish should be considered as part of such an analysis. Hence, in applying the alternatives analysis required by the Guidelines, it is not appropriate to select an alternative where minor impacts on the aquatic environment are avoided at the cost of substantial impacts to other natural environmental values.

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[3] Except as provided under 33 U.S.C. § 1344(b)(2).

Where proposed activities result in negligible impacts, it may be possible to conclude that no alternative location could result in less adverse impact on the aquatic environment within the meaning of the Guidelines. In such cases, it is not necessary to conduct an offsite alternatives analysis; instead, on-site minimization may be more appropriate. However, if applicable, the requirements of 40 CFR Part 230.10(a)(3) still apply to proposed activities that would result in negligible impacts.

V. Conclusion

The Clean Water Act Section 404 program provides a significant degree of flexibility in making permit decisions to reflect circumstances throughout the Nation, including Alaska. This MOA is consistent with EPA and Army regulations and policies for the Section 404 program as it relates to determination of appropriate mitigation. For Alaska:

- Avoiding wetlands may not be practicable where there is a high proportion of land in a watershed or region which is jurisdictional wetlands;

- Restoring, enhancing, or establishing wetlands for compensatory mitigation may not be practicable due to limited availability of sites and/or technical or logistical limitations;

- Compensatory mitigation options over a larger watershed scale may be appropriate given that compensation options are frequently limited at a smaller watershed scale;

- Where a large proportion of land is under public ownership, compensatory mitigation opportunities may be available on public land;

- Out-of-kind compensatory mitigation may be appropriate when it better serves the aquatic resource needs of the watershed; and

- Applying a less rigorous permit review for small projects with minor environmental impacts is consistent with the Section 404 program regulations.

Given this flexibility, Alaskans should be assured that discharges of dredged or fill material into waters of the United States will be evaluated in a reasonable manner, consistent with the agencies' goal of fair, flexible, and effective protection of the Nation's wetlands resources.

VI. Limitations

This MOA is a voluntary agreement between the EPA and the Army that expresses the policies of the parties, does not create any contractual obligations, and is not enforceable by any party. This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity against the Army or the EPA, their officers or employees, or any other person. The parties reserve the right to modify this agreement in accordance with its terms without public notice.

The Clean Water Act provisions and regulations described in this document contain legally binding requirements. This document does not substitute for those provisions or regulations, does not create legally binding requirements, nor is it a regulation itself. It does not impose legally binding requirements on the EPA, the Army, or the regulated community, and may not apply to a particular situation depending on the circumstances. The EPA and the Army retain the discretion to adopt approaches on a case-by-case • basis that differ from those provided in this document as appropriate and consistent with statutory and regulatory requirements

JUN 15 2018

E. Scott Pruitt (Date)
Administrator

Environmental Protection Agency

R.D. James (Da)
Assist Secretary for Civil Works

Department of the Army

Appendix 2. Timeframe for Corps' Actions

The following data is from the 2018-2022 Corps' dataset. "Average number of days old" refers to the entire timeframe from an application being determined to be complete until permit issuance or withdrawal.

All Corps' Actions

The first analysis below includes all Corps' actions – identified in the ORM-2 database as AJD, APPEAL, COMPCERT, CONGRINQA, DANGERZON, DEVESAEFH, DEVINLIEUA, DEVMBA, DEVRPSS, EIS, EMERGA, FOIAA, LOP, NONCOMPLY, NPR, NWP, PERMITMOD, PERMTRANS, PGP, PJD, PREAPPCONS, PUBMEETA, RGP, SP, STRMOD, UNAUTHACT

Average Number of Days to Issue Public Notice: 14.99
- Section 10: 14.36
- **Section 404: 13.29**
- **Section 10/404: 32.06**

Average Number of Days in Review: 53.64
- Section 10: 51.58
- **Section 404: 44.81**
- **Section 10/404: 80.15**
- No Authority Data: 93.24

Average Number of Days Old: 68.86
- Section 10: 62.47
- **Section 404: 74.88**
- **Section 10/404: 112.42**
- No Authority Data: 84.19

Standard Permits (SP):

Average Number of Days to Issue Public Notice: 20.48
- Section 10: 14.36
- **Section 404: 13.30**
- **Section 10/404: 32.06**
- No Authority Data: 26.33

Average Number of Days in Review: 153.30
- Section 10: 143.07
- **Section 404: 132.21**
- **Section 10/404: 194.27**
- No Authority Data: 119.56

Average Number of Days Old:
- Section 10: 162.40
- **Section 404: 158.15**
- **Section 10/404: 267.52**
- No Authority Data: 93.63

Letters of Permission (LOP):
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: 79.52
Section 10: 78.71
No Authority Data: 121.00
Average Number of Days Old: 90.35
Section 10: 92.35
No Authority Data: 62.81

Permit Modifications (MODs):
Average Number of Days to Issue Public Notice: 11.50
No Authority Data: 11.50
Average Number of Days in Review: 78.80
No Authority Data: 78.80
Average Number of Days Old: 54.43
No Authority Data: 54.43

Nationwide Permits (NWPs):
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: 37.82
Section 10: 57.29
Section 404: 33.39
Section 10/404: 39.40
No Authority Data: 50.88
Average Number of Days Old: 50.26
Section 10: 69.20
Section 404: 46.37
Section 10/404: 55.40
No Authority Data: 32.86

Regional General Permits (RGPs):
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: 22.91
Section 10: 16.16
Section 404: 30.00
Section 10/404: 5.00
No Authority Data: 9.15
Average Number of Days Old: 32.43
Section 10: 17.12
Section 404: 43.88
Section 10/404: 22.00
No Authority Data: 41.27

Environmental Impact Statements (EISs):
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: N/A
Average Number of Days Old: 1331.08
No Authority Data: 1331.08

Appeals:
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: 1
Average Number of Days Old: 23.00
No Authority Data: 23.00

Unauthorized Actions:
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: N/A
Average Number of Days Old: 194.74
Section 10: 126.46
Section 404: 247.74
Section 10/404: 122.91
No Authority Data: 135.01

Non-Compliance:
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: N/A
Average Number of Days Old: 131.27
Section 10: 24.67
Section 404: 141.21
Section 10/404: 78.75
No Authority Data: 168.67

Compliance:
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: N/A
Average Number of Days Old: 23.92
No Authority Data: 23.92

Emergency Actions:
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: N/A
Average Number of Days Old: 19.5
No Authority Data: 19.5

In-Lieu Fees (ILFs):
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: N/A
Average Number of Days Old: 518.5
No Authority Data: 518.5

Mitigation Banks:
Average Number of Days to Issue Public Notice: N/A
Average Number of Days in Review: 503.67
No Authority Data: 503.67
Average Number of Days Old: 968.92
No Authority Data: 968.92

Preliminary Jurisdictional Determinations (PJDs): No Data

Approved Jurisdictional Determinations (AJDs): No Data

Appendix 3. Recommendations for Related Program Coordination to Improve Alaska Permitting Efficiency

The State may be able to realize additional program efficiencies associated with 404 Program assumption by taking advantage of opportunities to merge with other existing permits/authorizations.

Section 10 permitting

The State could develop and seek Corps' approval for an SPGP for Section 10 permitting in waters where the Corps retains 404 jurisdiction. A 404 SPGP combined with at Section 10 SPGP for specific types of projects could allow the State to become the sole permitting authority for projects in waters otherwise retained by the Corps.

Permit Application Coordination with the Corps

The State could develop an MOU with the Corps that allows a permittee to submit a single, electronic permit application to DEC. DEC could then review the application to determine if 1. the project is in a WOTUS in State-assumed waters (and inform the permittee that the State will handle the permitting) or, 2. the project is in a Corps-retained water (and inform the permittee that the Corps will handle the permitting). This allows a single "point of entry" for permittees and reduces confusion on which agency they apply to.

Combine Permit Authorizations Under Multiple Regulatory Programs Using a Single Permit

404 and 402 Permit for Certain Projects: Some projects require both a 404 permit for dredge and fill activities and a 402 permit for stormwater management for the same project. After program assumption and any phase-in period, DEC could consider developing a single permit application that covers both the 404 and the 402 stormwater permits and a permit that covers both, further streamlining permitting for project proponents. This approach might make the most sense for projects that include long-term earthwork such as mines.

Combine State 404 permit with DNR gravel permit application: Once the State assumes the 404 Program, it could combine the permit application and permit for 404 and the DNR gravel extraction authorization – streamlining for both the applicant and two State agencies.

Application for Permits to Mine in Alaska: Alaska already has a nearly one-stop shop within DNR for mining project proponents to apply for multi-agency permits necessary for operation. The Application for Permits to Mine in Alaska covers DNR's TWUP, DF&Gs Title 16 authorization, APDES permitting under CWA Section 402, and some (GP) authorizations by the Corps. All permits/authorizations are currently under State authorities, except for the 404 permit. Via State program assumption of the 404 Program, all authorizations necessary for mining, unless operating on BLM lands, will fall under

the State, further streamlining permitting and encouraging responsible resource development.

Use of DNR Large Project Coordination

The DNR Office of Project Management and Permitting coordinates project timelines and permit applications, permits issuance, and scheduling for large projects, at the request of the applicant. Over the years, they have learned that it is easy to take the lead on project coordination between State agencies and more challenging to engage the federal permitting authorities into the process. State assumption of 404 brings one more permit under the State umbrella and permitting can be easily coordinated with the rest of the project.

In addition to coordinating agency permitting and regulatory activity, OPMP also coordinates agency billing to the applicant for the reimbursement of State agency costs incurred during permitting and inspection activities.

University of Alaska Coordination

DEC and sister agencies DNR and DF&G have the ability to work with the University of Alaska (a State University) to help design programs and produce graduates with environmental and natural resource permitting and compliance training before they ever hit the job market - a "permitology" degree, tailored to Alaska resource needs that would include courses on Alaska's main industry sectors (mining, construction, fisheries, tourism, oil and gas, and forestry), State and federal laws and regulations that support careers in Alaska's resource agencies, along with specific technical courses. The curriculum could include Alaska wetlands specific courses – regulation, jurisdiction, and permitting.

Multi-agency Mapping Cooperation

Mapping of Alaska is still in its infancy – there is no single source for the mean higher high water mark on the coastline or showing wetlands throughout the state. The Natural Resource Conservation Service (NRCS) and the US Fish and Wildlife Service (USFWS), create and maintain maps of soil, vegetation, and wetlands throughout the nation. The NRCS and USFWS are part of the inter-agency team coordinated by the Alaska Geospatial Office, that is in the process of creating accurate mapping coverages of Alaska’s wetlands, hydrography, vegetation, and coastlines. This interagency team also includes numerous other federal (including BLM, ACCOE, USFS, NOAA NPS, USGS), state (including DNR, DEC, DFG) and local agencies, Native corporations, NGOs, and private sector businesses. These coverages will all be critical to an efficient. State 404 Program, and collaboration with the NRCS will be important. See the "Alaska Wetland Technical Working Group, Statewide Wetland Inventory, Ten Year Strategic Plan, 2019-2029" found at Alaska Wetlands Mapping Strategy WTWG Final Web 20191115 | Alaska Geospatial Council.

Compliance and Enforcement Synergy

As the State already implements the 402 Program, DEC could realize cost savings by cross-training staff in the Compliance and Enforcement section. Travel to remote areas of Alaska is

very expensive, but staff travelling off the road system could inspect both 402 and 404 permitted facilities in a single trip. DEC has a fledgling drone program that could also be recruited to conduct cost-effective wetlands and JD determinations and compliance inspections.

For projects that are coordinated under the OPMP umbrella, the coordination is maintained "from cradle to grave." For example, mining projects get OPMP coordination for inspection and compliance during operations, where to the extent practicable, inspections are usually multi-agency. A State-assumed 404 Program should leverage this synergy.

Appendix 4. Other Programmatic Recommendations

Enforcement authority: A State assumed program must have sufficient authority to enforce permit violations and activities undertaken without an appropriate permit. Currently, most DEC enforcement actions require the involvement of the Department of Law and settlement negotiations with the offender. The State could realize additional streamlining (operate the program at lower cost) if DEC seeks and receives administrative penalty authority for minor violations. There has been past public and legislative concern about providing administrative penalty authority to DEC which could be alleviated by requiring Director-level (administration-appointed position) approval of any fines levied using the administrative penalty authority. The State can also realize improved follow-through on monitoring and enforcement under an assumed program where permitting/monitoring/enforcement are housed within a single State agency, rather than the current model where the Corps issues the permit and EPA enforces it. A State program can provide robust enforcement and compliance assistance programs providing consistent protection of Waters of the United States (WOTUS) while encouraging good corporate environmental stewardship.

Statewide Programmatic General Permits (SPGPs): Statewide Programmatic General Permits (SPGPs) are a type of permit that is issued by the Corps and administered by a state agency. They are designed to eliminate duplication of effort between Corps' districts and states, as well as to make the permitting process more efficient with flexibility as to the geographic region covered. SPGPs are issued by the District Engineer for a general category of activities when the following conditions are met:

- The activities are similar in nature and cause minimal environmental impact (both individually and cumulatively), and
- The Regional Permit reduces duplication of regulatory control by state and Federal agencies.

DEC could work with the Corps to develop SPGPs that are issued by the Corps for State implementation in non-assumable waters – waters retained by the Corps (marine waters and fresh waters retained by the Corps due to their link to interstate or foreign commerce – see Section 4). These permits would bring more permitting under the State umbrella and have similar benefits as State-issued permits – less confusion on who the permitting authority is, local understanding, timely, and predictable.

While SPGPs can be done without formal state program assumption, SPGPs are not easier than assumption, as they rely on trust between the Corps and the State, whereas, under assumption, if a state meets the specific program assumption standards, EPA must approve the program. One way to build that trust is to conduct joint field work. DEC could consider one or more SPGPs to help develop program capacity while working towards full program assumption.

Regional General Permits (RGPs): A state with an assumed 404 Program can issue Regional General Permits (RGPs). An RGP operates similar to an SPGP, except they are issued by the state (after program assumption) to a local government to cover specific types of local projects.

The local government then issues project approvals under the RGP, with DEC oversight. The local government must first have a local wetlands conservation plan with land use specified, and once approved can be used to guide development of an RGP to streamline permitting for projects that meet specified requirements to protect waterbodies. States have more interest in reducing the permitting burden than the Corps, so DEC would have more incentive to issue RGPs for local implementation.

Stakeholder engagement: DEC should develop a strong stakeholder engagement process during development of the assumption application. It should include representatives of the major industries in Alaska, local government, and the public. The group will need an overview of 404 (a 404 "101 course") first, and then DEC should take very specific issues/recommendations (that may be developed with subject matter experts) to the group for discussion and feedback to be incorporated into program design. For examples:

- Novel projects that could potentially be considered for mitigation
- Area-specific adjustments to the administrative boundary between assumed and retained waters

404 Permit Process Timeline: The Corps issues a public notice that they have received a permit application and they make the application available to the public for comment. Under this approach, the public does not have an understanding of what conditions the Corps might place on the permittee, making it difficult to submit meaningful comments. Florida has solved that problem with their permitting schedule:

- Florida provides the permit application to agencies for a 30-day internal review (including FWS, SHPO, etc.). The timeframes are established via MOU with the other agencies
- Florida has up to 30 days to use the information submitted by the other agencies to produce a draft permit for public review
- The public review period is 30 days
- Florida considers public input then issues a Notice to Issue the permit. The permittee and public have 21 days in which to appeal.
- The entire process takes up to 111 days. The timeframe can be reduced when the other agencies reply in less than 30 days and preparation of the draft permit takes less than 30 days. Florida has indicated that their average permit issuance time is 61 days.

DEC should adopt a similar approach that is more user-friendly to the public and allows them to review the draft Department decision on a permit application (the draft permit), not just the application.

Regulations: As DEC develops 404 Program regulations, there should be a tie between the permitting procedures and the Chapter 15 appeals process (if DEC intends to use the existing

appeals process) and an update to Chapter 70 to allow "short term variances" to cover the project duration.

Appendix 5. State of Alaska Comments to the Proposed Rule Redefining WOTUS

Document begins on next page.

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Governor Mike Dunleavy
STATE OF ALASKA

February 7, 2022

Mr. Damaris Christensen
Oceans, Wetlands and Communities Division
Office of Water (4504–T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Stacey Jensen
Office of the Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: State of Alaska's Comments in Response to the Revised Definition of "Waters of the United States" under the Clean Water Act ("Proposed Rule"); Docket # EPA-HQ-OW-2021-0602

Dear Mr. Christensen and Ms. Jensen,

Thank you for the opportunity to comment on the proposed definition of "Waters of the United States" ("WOTUS"), which establishes the scope of federal jurisdiction under the Clean Water Act ("CWA"). Because of its unique characteristics, Alaska stands to be disproportionately affected by the Proposed Rule, and particularly, by the vast expansion of federal jurisdiction it will inflict on states. As the Supreme Court has noted, expanded CWA jurisdiction has high costs and lengthy delays resulting from the federal government's heavy hand with Army Corps permitting. "The average applicant for an individual permit spends 788 days and $271,596 in completing the process not counting costs of mitigation. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits. These costs cannot be avoided because the Clean Water Act imposes criminal liability as well as steep civil fines on a broad range of ordinary industrial and commercial activities."[1]

Alaska's climate and geography are incredibly hydrologically diverse. We have areas receiving less than five inches of annual precipitation, areas experiencing over 150 inches of annual precipitation, areas that are semi or permanently frozen, and areas somewhere in between. By any metric, Alaska has significantly more water than all other states: Alaska has roughly 900,000 miles of navigable rivers and streams; 22,000 square miles of lakes; nearly 27,000 miles of coastline; and more wetlands than every other state *combined*.[2] A large percentage of Alaska's lands are potential wetlands, 43 percent, compared to other states, which average less than five percent.[3] Alaska needs regulations

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[1] *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality op.) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74–76, 81 (2002)).

[2] Alaska has 63% of the Nation's total wetlands. Hall, Jonathan V, W.F. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, available at https://www.fws.gov/wetlands/documents/status-of-alaska-wetlands.pdf. Every other state clocks in well below the numbers listed above. *See* U.S. Geological Survey, *Land Area and Water Area of Each State*, accessible at https://www.usgs.gov/special-topics/water-science-school/science/how-wet-your-state-water-area-each-state (numbers based on U.S. Census Bureau, *Geography: State Area Measurements* (2010)); *see also* Bureau of Land Mgmt., *National Hydrography Dataset Information* (2014) (lake count).

[3] Hall, Jonathan V, W.F. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, at 3, available at https://www.fws.gov/wetlands/documents/status-of-alaska-wetlands.pdf.

tailored to the diversity and abundance of its waters, not a one-size-fits-all rule imposing excessive federal requirements.

Alaska cannot stand behind the Proposed Rule. First, the Proposed Rule would expand WOTUS to cover more ground than under any previous administration. Legally stretching the definition to such broad proportions also highlights the failure of Congress to adequately define WOTUS in statute. An argument could be made that the lack of an adequate statutory definition causes WOTUS to be unconstitutionally vague. As one justice has noted, "[t]he Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice."[4] Such an expansion is legally unjustifiable and precludes any possibility of a partnership between states and the federal government.

Second, the science underpinning the Proposed Rule is insufficient to support its application to several Alaska-specific categories of waters. Third, the Proposed Rule impedes Alaska in carrying out its constitutionally imposed responsibility to manage its own natural resources[5] and impinges on Alaska's right to manage its own wetlands in contravention of § 6(m) of the Alaska Statehood Act, which recognizes Alaska's title to submerged navigable lands within its boundaries and further grants by incorporation "the right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable [s]tate law."[6] Fourth, the Proposed Rule flouts § 101(b) of the Clean Water Act, which "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of [s]tates" to manage and protect water resources.[7]

Accordingly, Alaska requests four exclusions from the WOTUS definition: (1) Alaska permafrost wetlands, (2) Alaska forested wetlands, (3) Alaska wetland mosaics, and (4) Alaska waters and lands falling under the "other waters" category. These exclusions are carefully tailored to mirror the data gaps in the science underpinning the Proposed Rule.

Rather than continuing to utterly ignore Alaska and neglect its interests (or worse, treat Alaska as subservient), the agencies must work with, and respect, Alaska. This will involve relinquishing power that was never the agencies' to begin with. This will involve accepting that states will make decisions with which the agencies may disagree. Most fundamentally, this will involve recognizing the states as co-equal sovereigns.

Rest assured my Administration will stand up for the rights of Alaska and of Alaskan property owners. This cover letter and its attachment should be considered part of our official comments for the record.

Sincerely,

Mike Dunleavy
Governor

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[4] Oral Argument Transcript, Justice Kennedy p.18, *Hawkes v. United States*, 136 U.S. 1807 (2016).
[5] *See* Alaska Constitution, Article VIII: Natural Resources.
[6] Alaska Statehood Act § 6(m); Submerged Lands Act of 1953, 43 U.S.C. § 1311(a).
[7] Clean Water Act § 102(b).

Enclosure: Alaska Department of Environmental Conservation Comments to Proposed Rule

cc: The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Don Young, Unites States House of Representatives
The Honorable Jason W. Brune, Commissioner, Department of Environmental Conservation
The Honorable Doug Vincent-Lang, Commissioner, Department of Fish and Game
The Honorable Corri A. Feige, Commissioner, Department of Natural Resources
The Honorable Ryan Anderson, Commissioner, Department of Transportation and Public Facilities
The Honorable Treg R. Taylor, Attorney General, Department of Law
Ms. Tami Fordham, Director, Environmental Protection Agency, Anchorage Operations Office
Ms. Michelle Pirzadeh, Acting Regional Administrator, Environmental Protection Agency Region 10

State of Alaska Comments
To the Proposed Rule redefining WOTUS

February 9, 2022

Table of Contents

Introduction

Thank you for the opportunity to comment on the proposed definition of "Waters of the United States" ("WOTUS"), which establishes the scope of federal jurisdiction under the Clean Water Act ("CWA"). Due to its unique characteristics, Alaska stands to be disproportionately affected by the new WOTUS definition proposed by EPA and the Department of the Army (the "agencies"), and particularly, by its thinly veiled expansion of federal jurisdiction.[1]

Alaska's climate and geography are incredibly hydrologically diverse. We have areas receiving less than 5 inches of annual precipitation, areas experiencing over 150 inches of annual precipitation, areas that are semi or permanently frozen, and areas somewhere in between. By any metric, Alaska has significantly more water than all other states: Alaska has roughly 900,000 miles of navigable rivers and streams; 22,000 square miles of lakes; nearly 27,000 miles of coastline; and more wetlands than every other state *combined*.[2] A large percentage of Alaska's lands are potentially wetlands—43%—as compared to other states, which average less than 5%.[3] Alaska needs regulations tailored to the diversity and abundance of its waters, not a one-size-fits-all rule imposing excessive federal requirements.

Alaska has reviewed the Proposed Rule and cannot stand behind several of the Rule's provisions. Most fundamentally, they expand federal WOTUS jurisdiction over more Alaska lands and waters than ever before. This expansion, which takes a sledgehammer to principles of cooperative federalism, is all the more alarming for its masked nature.

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[1] As several Supreme Court justices have alluded to, a WOTUS definition expanding regulatory authority under the CWA will heavily impact the State of Alaska. *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) (recognizing that the "federal regulation of land use . . . under the Clean Water Act" has undergone an "immense expansion" as illustrated by its coverage extending over "half of Alaska").

[2] Alaska has 63% of the Nation's total wetlands. Hall, Jonathan V, W.F. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, available at https://www.fws.gov/wetlands/documents/status-of-alaska-wetlands.pdf. Every other state clocks in well below the numbers listed above. *See* U.S. Geological Survey, *Land Area and Water Area of Each State*, accessible at https://www.usgs.gov/special-topics/water-science-school/science/how-wet-your-state-water-area-each-state (numbers based on U.S. Census Bureau, *Geography: State Area Measurements* (2010)); *see also* Bureau of Land Mgmt., *National Hydrography Dataset Information* (2014) (lake count).

[3] Hall, Jonathan V, W.F. Frayer and Bill O. Wilen, *Status of Alaska Wetlands*, 1994, at 3, available at https://www.fws.gov/wetlands/documents/status-of-alaska-wetlands.pdf.

Tracking the gaps in the scientific data underpinning the Proposed Rule's application to Alaska, Alaska requests four exclusions: (1) Alaska permafrost wetlands; (2) Alaska forested wetlands; (3) Alaska's wetland mosaics; and (4) Alaska waters and lands falling under the "other waters" category. Each exclusion is carefully crafted to mirror these data gaps. Due to the lack of sufficient scientific support, these exclusions are necessary.

Rather than continuing to utterly ignore Alaska and neglect its interests (or worse, treat Alaska as subservient) the agencies must work with Alaska. This will involve, among other things, relinquishing power that was never the agencies' in the first place.[4] Only then can we, together, protect our Nation's waters under a scheme of cooperative federalism.

1. *Alaska objects to the Proposed Rule's extension of WOTUS to cover more land and water than under any definition before.*

The agencies claim the Proposed Rule is a "return [of] the definition of 'waters of the United States' to its longstanding and familiar definition reflected in the 1986 regulations[,]" amended only for consistency with intervening Supreme Court decisions.[5] This "return," the agencies allege, will "quickly" and "durably" protect national waters by "provid[ing] a known and familiar framework for co-regulators and stakeholders" that will be easy to implement.[6]

To this end, the Proposed Rule begins with the 1986 definitions and adds two standards from U.S. Supreme Court caselaw: the "relatively permanent standard," which comes from Justice Scalia's plurality opinion in *Rapanos v. United States*, and the "significant nexus standard," which comes from Justice Kennedy's concurring opinion in the same case.[7] The Proposed Rule also changes the 1986 definition of the phrase "other waters" to cover waters meeting either the relatively permanent or significant nexus standards, replacing the older definition of waters whose use "could affect interstate or foreign commerce."[8]

As explained below, the Proposed Rule stretches federal WOTUS power to cover more ground than that under any previous administration. First, the decision to adopt the 1986 regulations and both *Rapanos* standards ensures greater WOTUS coverage than either the 1986 regulations alone or the Kennedy test alone. Second, the agencies mis-recite both *Rapanos* standards: the "relatively permanent" standard is articulated differently in different sections of the Rule packet, creating a muddled picture of its applicability; and the "significant nexus" standard misdefines "significant" while quietly altering a key word. Third, the agencies change the 1986 definition of "other waters"

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[4] The agencies' decision to stretch the WOTUS definition to such broad proportions highlights Congress' failure to adequately define WOTUS in statute. An argument could be made that the lack of an adequate statutory definition causes WOTUS to be unconstitutionally vague. *See* Oral Argument Transcript, Justice Kennedy p.18, *Hawkes v. United States*, 136 U.S. 1807 (2016) ("The Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice.").
[5] 86 FR 69406; "1986 regulations" as used in the Proposed Rule is synonymous with "pre-2015 regulations." 86 FR 69373.
[6] 86 FR 69375, 69385.
[7] 547 U.S. 715 (2006); 86 FR 69379–69380 (explaining that these two standards were "established in *Rapanos*").
[8] 86 FR 69418.

to create an entirely new, and unconstitutionally broad, catch-all provision. These distortions and engorgements create more WOTUS coverage than ever before.

Alaska cannot endorse such a decimation of states' rights. This expansion violates Alaska's rights to manage our own wetlands under § 6(m) of the Alaska Statehood Act, which vests title of submerged navigable lands to states and further grants by incorporation "the right and power to manage, administer, lease, develop, and use said lands and natural resources all in accordance with applicable [s]tate law."[9] This expansion impedes Alaska's ability to carry out its constitutional responsibility to carefully manage its own natural resources.[10] And this expansion defies § 101(b) of the Clean Water Act, which "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of [s]tates" in carrying out the Act.[11]

a. The agencies' decision to return to the expansive 1986 WOTUS regulatory definition and adopt both Rapanos *tests is a decision to expand federal power.*

A return to the 1986 regulations is a return to a time of heightened[12] federal WOTUS jurisdiction, when the agencies created regulations like the "Migratory Bird Rule," which extended jurisdiction to any intrastate waters "[w]hich are or would be used as habitat" by migratory birds.[13] Under the 1986 regulations, WOTUS included "traditional navigable waters, interstate waters, and territorial seas; impoundments of jurisdictional waters; intrastate waters and wetlands, the 'use, degradation, or destruction of which could affect interstate or foreign commerce;' tributaries of jurisdictional waters; and wetlands adjacent to jurisdictional waters that are not themselves jurisdictional."[14] An "[o]ther waters" provision added "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce."[15]

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[9] Alaska Statehood Act § 6(m); Submerged Lands Act of 1953, codified at 43 U.S.C. §§ 1301–1356b. The relevant provision provides in full:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof[.]

43 U.S.C. § 1311(a).

[10] Alaska Constitution, Article VIII Natural Resources.

[11] 33 U.S.C. § 1251(b).

[12] *Rapanos*, 547 U.S. at 722 (plurality op.).

[13] 51 Fed.Reg. 41217. The Migratory Bird Rule was later invalidated—in 2001. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANNC*").

[14] *United States v. Mashni*, -- F. Supp.3d --, 2021 WL 2719247, at *3 (D.S.C. July 1, 2021) (quoting 33 C.F.R. § 328.3(a)(1)–(7) (1986)); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg 41,206 (Nov. 13, 1986). EPA promulgated identical regulations two years later. *See* Clean Water Act Section 404 Program Definitions and Permit Exemptions – Section 404 State Program Regulations, 53 Fed. Reg. 20,764 (June 6, 1988).

[15] 33 C.F.R. § 328.3(a) (1986); 40 C.F.R. § 230.3(s)(3) (1988).

Two United States Supreme Court cases subsequently limited this power. In *SWANCC v. U.S. Army Corps of Engineers*, the Supreme Court invalidated the Migratory Bird Rule, holding that "nonnavigable, isolated, intrastate waters" cannot be WOTUS.[16] In *Rapanos v. United States*, the Scalia plurality opinion and Kennedy concurrence endeavored to further limit this power.[17] While Justices Scalia and Kennedy differed in their tests—Scalia created a "relatively permanent" standard while Kennedy created a "significant nexus" standard—five justices agreed that the Corps' interpretation of its own power, in that case, was untenable.[18]

> *b. The agencies depart from this history by employing the Rapanos tests in a way that expands, not limits, their power. The agencies achieve this by adopting both Rapanos tests and by wielding them as independent sources of jurisdiction. This decision, combined with the agencies' decision to recodify the expansive 1986 rules, sets the stage for an unprecedented expansion of federal WOTUS power. If the 1986 rules extended the WOTUS definition "to the outer limits of Congress' commerce power[,]"[19] this new definition blasts right through them.[20] The reach of the "relatively permanent" standard is unclear.*

The Proposed Rule offers conflicting statements as to how the relatively permanent standard will apply. On the one hand, the preamble states that this standard will simply create "a subset of waters that will virtually always have the requisite nexus" under the significant nexus standard.[21] This view finds some degree of support in one of the definitions articulated in the Proposed Rule, which is that

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[16] *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (*SWANCC*).
[17] *Rapanos*, 547 U.S. at 734 (plurality op.) (stating that plurality opinion's "interpretation of the phrase "the waters of the United States" "confirms th[e] limitation of its scope"); *id.* at 767 (Kennedy, J., concurring) ("Absent a significant nexus, jurisdiction under the Act is lacking.").
[18] *Rapanos*, 547 U.S. at 739 (plurality op.) (concluding that "[t]he Corps' expansive interpretation of 'the waters of the United States' is thus not 'based on a permissible construction of the statute'"); *id.* at 786 (Kennedy, J., concurring) (concluding that the Corps' conclusion that "mere adjacency to a tributary" suffices to establish WOTUS "is insufficient" and elaborating that "a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow toward it. A more specific inquiry, based on the significant nexus standard, is therefore necessary."). *Rapanos* considered whether four Michigan wetlands, each located near ditches or man-made drains that eventually emptied into traditional navigable waters, constituted WOTUS. *Id.* at 729 (plurality op.). The factual record was insufficiently developed for the justices to apply their tests to these facts, so the Court remanded. *Id.*
[19] *Rapanos*, 547 U.S. at 724 (plurality op.). Implicitly acknowledging this, the agencies state that they "are proposing to replace the Commerce Clause-based standard" with this new rule. 86 FR at 69419.
[20] For over 100 years, Congress' invocation of its Commerce Clause power to protect the country's waterways used navigability as the touchstone for the exercise of this power. *See* Rivers and Harbors Act of 1899, § 13, 33 U.S.C. § 407 (prohibiting the unpermitted discharge of "refuse matter" "into any navigable water of the United States" or any tributary thereof). In the Clean Water Act, Congress similarly couched its delegation of jurisdiction to the Agencies in terms of "navigable waters." 33 U.S.C. § 1362(7) (defining "navigable waters" to mean "the waters of the United States, including the territorial seas"). While the Commerce Clause power has since been more expansively defined, the Proposed Rule violates both the traditional and modern scope of this power. *See Lopez v. United States*, 514 U.S. 549, 559 (1995) (holding that Commerce Clause power extends only over regulated activity that "substantially affects interstate commerce").
[21] 86 FR 69395.

> [u]nder the relatively permanent standard, relatively permanent tributaries and adjacent wetlands that have a continuous surface connection to such tributaries are jurisdictional[.][22]

On the other hand, the agencies elsewhere state that they "are not reaching any conclusions, categorical or otherwise, about which tributaries, adjacent wetlands (other than those adjacent to traditional navigable waters, interstate waters, or the territorial seas) or 'other waters' meet either the relatively permanent or the significant nexus standard."[23] And in the Executive Summary of the Proposed Rule, a very different definition is articulated:

> The "relatively permanent standard" means waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters.[24]

This definition, which was the one articulated at the WOTUS Roundtable Discussion,[25] would appear to create two categories: (1) waters that are themselves relatively permanent; and (2) waters that have a surface connection to group (1). Group (1) waters seem to contain *no* requirement of connection to a foundational water[26]—in other words, "nonnavigable, isolated, intrastate waters" would seem to qualify. Such a result would, of course, run afoul of *SWANCC*.[27]

When, at the WOTUS Roundtable Discussion, Alaska asked the agencies for clarification on this standard,[28] the agencies did not give a clear answer. Clarity is needed because, in practice, ambiguity in the WOTUS definition has become a tool for expanding federal jurisdiction.[29]

Alaska does not oppose use of the relatively permanent standard, as it is articulated in Scalia's plurality opinion, to determine WOTUS jurisdiction. But it is exceedingly difficult to provide meaningful comment on a standard that has not been clearly articulated.

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[22] 86 FR 69434. "Relatively permanent" is further defined as "waters where the waters typically (e.g., except due to drought) flow year-round or have a continuous flow at least seasonally (e.g., typically three months)." 86 FR 69434 (citing *Rapanos* Guidance at 67).
[23] 86 FR 69390.
[24] 86 FR 69373.
[25] The agencies held a "State and Local Government Roundtable Discussion on the Proposed Revised Definition of 'Waters of the United States'" from 10:00 AM to 1:00 PM EST on January 27, 2022.
[26] The Proposed Rule defines "foundational waters" as "traditional navigable waters, interstate waters, or the territorial seas." 86 FR 69373. These waters are also sometimes called "jurisdictional waters."
[27] 531 U.S. at 171 (holding that "nonnavigable, isolated, intrastate waters" cannot be covered under WOTUS).
[28] We posed the question: "How do the relatively permanent standard and the significant nexus standard interact under the Proposed Rule?"
[29] In the face of uncertainty and the costs associated with delaying a project for a formal jurisdictional determination, many regulated entities rationally select the more project-efficient route of moving forward with the permitting process despite doubtful grounds for federal jurisdiction. Particularly in a region where short construction seasons mean that a small delay can quickly turn into a much longer delay and escalate project costs, the delay involved with conducting necessary field work and debating jurisdiction with federal regulators becomes a major hurdle. Such a delay also conflicts with Congress' directive at 33 U.S.C. § 1251 to implement the CWA in a manner that avoids unnecessary delays. The regulated public should be able to easily discern what rules apply to a given activity so they can avoid preparing and submitting unnecessary permit applications.

c. The significant nexus standard, as articulated by the Proposed Rule, impermissibly expands federal power.

The Proposed Rule's "significant nexus" standard extends jurisdiction over any water having "'more than speculative or insubstantial effects on the chemical, physical, or biological integrity of' a traditional navigable water, interstate water, or the territorial seas."[30] The significant nexus standard applies to "the 'other waters,' tributary, and adjacent wetland categories[.]"[31]

As a preliminary matter, the agencies' articulation of this standard has two glaring problems. First, this definition distorts the test actually articulated by Justice Kennedy. Justice Kennedy used the connector "and" between the terms "physical" and "biological."[32] This is the difference between having to prove the requisite effect on *each* of the three types of integrity, versus having to prove an effect on only one. Swapping "and" with "or" triggers the broader of the two requirements, which, of course, results in an expansion of federal jurisdiction beyond even what Justice Kennedy intended. Alaska cannot support this.

Second, this definition misdefines "significant." As Justice Kennedy only offered a circular definition,[33] the agencies had to craft their own. Regrettably, the agencies' definition of "significant" as "more than speculative or insubstantial" does not fairly reflect the term's plain meaning. Dictionaries define "significant" as: "large enough to be noticed or have an effect,"[34] "very important,"[35] "having great effect or influence,"[36] "[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential,"[37] and "noticeable, substantial, considerable, large."[38] The common denominator here is that to be "significant," the thing described must meet or surpass some threshold degree of importance.[39] "More than speculative" or "insubstantial" falls far short of this threshold.[40] Lowering this threshold—as the agencies have done—results, unsurprisingly, in expanded WOTUS jurisdiction. Alaska cannot support this.

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[30] 86 FR 69373, 69430.
[31] 86 FR at 69436.
[32] *Rapanos*, 547 U.S. at 780 (Kennedy, J. concurring) ("[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" (emphasis added)).
[33] Under Justice Kennedy's concurrence, a water has a "significant nexus" with a jurisdictional water if it "significantly affects" the chemical, physical, "and" biological integrity of that other water. *Id.*
[34] Significant, Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/significant?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.
[35] *Id.*
[36] Significant, Cambridge Dictionary Online, available at https://dictionary.cambridge.org/us/dictionary/english/significant.
[37] Significant, Oxford English Dictionary (2d ed. 1989).
[38] *Id.*
[39] *Accord Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 157 (3d Cir. 2009) ("The word 'significant' is defined as 'important, notable.'" (quoting *Oxford English Dictionary* (2d ed.1989)).
[40] The agencies' choice to define "significant" as "more than insignificant" or "insubstantial" reflects the agencies' erroneous understanding that something that is "not significant" is therefore "insignificant." This is like saying that if water is not hot, it is cold; and concluding that, to be hot, water must simply not be cold. But water that is not "hot" is not necessarily "cold"—"lukewarm" is the left-out category in between. Ignoring that left-out category leads to the

Precisely how this standard would apply to wetlands, which of are particular importance to Alaska, is unclear.[41] The Proposed Rule extends federal jurisdiction over those wetlands that are "adjacent to" certain specified waters.[42] Invoking the 1986 regulations, the Proposed Rule defines "adjacent" as "bordering, contiguous, or neighboring."[43] The Proposed Rule then "add[s] the significant nexus standard to the . . . adjacent wetland categor[y]."[44] Left unspecified is how the definition and the standard interact: Is determining a wetland's coverage now a two-step inquiry (i.e., the wetland must first be deemed "bordering, contiguous, or neighboring," and, second, must have a significant nexus)? Or does the significant nexus standard replace the definition of "adjacent" (i.e., a wetland is "adjacent" if it has a significant nexus)? Or perhaps the standard informs only a portion of the "adjacent" definition (i.e., whether a wetland is "neighboring")?[45] As written, the significant nexus standard risks supplanting entirely the "bordering, contiguous, or neighboring" definition. If that is the intent, it should be clearly stated so it may be fully critiqued.

Alaska opposes the inclusion of this standard. Its infidelity to the Kennedy standard reflects either a lack of integrity or downright carelessness. Its definition of "significant" tips the scales toward the former. Far worse, however, is its vast expansion of the definition of WOTUS and consequent federalism violations. But worst yet? Its applicability to Alaska's wetlands is clear as mud.[46]

d. The "other waters" catch-all is an unjustified expansion of federal power:

The Proposed Rule extends jurisdiction over "the 'other waters' category from the 1986 regulations"—but "with changes informed by relevant Supreme Court precedent."[47] In 1986, the "other waters" category covered non-foundational waters whose "use, degradation, or destruction . . . could affect interstate or foreign commerce."[48] The Proposed Rule "delete[s] all of the provisions referring to "authority over activities that could 'affect interstate commerce'" and "replace[s] them with the relatively permanent and significant nexus standards[.]"[49] In other words, waters whose activities involve no use, degradation, or destruction now qualify as WOTUS if only they are

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incorrect conclusion that "hot" means "not-cold." Similarly, a connection that is not "significant" is not, for that reason, "insignificant"—there is a left-out category separating these terms that is glossed over by the Proposed Rule. The Proposed Rule's definition of "significant" as "not-insignificant" sweeps up that lukewarm category of connections which neither rise to the level of significant nor sink to the level of insignificance. This definition is, accordingly, wrong.

[41] The Proposed Rule codifies an ostensibly more restrictive "relatively permanent" standard, but fails to acknowledge that this standard, in practice, would cover only a subset of waters *also* covered under the "significant nexus" standard.

[42] 86 FR 69422. The specified waters are: (a) "traditional navigable waters, interstate waters, or the territorial sea"; (b) "relatively permanent, standing, or continuously flowing impoundments or tributaries [] that have a continuous surface connection to such waters"; and (3) "impoundments or tributaries that meet the significant nexus standard when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of foundational waters." *Id.*

[43] 86 FR 69449.

[44] 86 FR 69436, 68422.

[45] After all, what need is there to further define "contiguous"?

[46] As explained *supra* n.23, in practice, ambiguity in the WOTUS definition has become a tool for expanding federal jurisdiction.

[47] 86 FR 69418.

[48] 86 FR 69418.

[49] 86 FR 69418.

relatively permanent or have a "more than speculative or insubstantial" nexus with a foundational water.

The agencies explain this change as a shift away from the outer bounds of the commerce clause power, which the agencies acknowledge was "pushe[d]" by the 1986 "other waters" definition.[50] Alaska agrees with the agencies that the 1986 definition was too broad. But Alaska disagrees that the agencies' change *narrows* the 1986 "other waters" category. First, this change extends WOTUS jurisdiction to cover non-foundational waters that need only have more than "speculative" or "insubstantial" effects on the chemical, physical, "or" biological integrity of foundational waters. As explained above, this is an exceedingly broad standard. Second, this change applies *irrespective* of whether these waters are being used.[51] The latter is the consequence of the agencies' deletion. The agencies' myopic focus on the addition of the *Rapanos* standards obscures this important deletion.

As if to emphasize this provision's catch-all nature, the agencies state that "other waters" can include "wetlands that are located too far from other jurisdictional waters to be considered 'adjacent.'"[52] In other words: wetlands covered by the Proposed Rule are not, in fact, limited to "adjacent," i.e., "bordering, contiguous, or neighboring" wetlands, but include *any* wetland that has a "significant nexus" to a jurisdictional water. The agencies may as well have deleted the definition of "adjacent" and been done with it. This catch-all is an underhanded way of achieving the same result.

To a state like Alaska, which has great quantities of unused waters—that are also not being degraded or destroyed, because our state laws protect against that[53]—this change works to greatly expand WOTUS coverage. Following this change, non-foundational waters are covered if they merely have the requisite (low) connection, regardless of whether they are being used.[54] This will cover vastly more waters in Alaska than were the 1986 "other waters" category to remain unaltered. Perhaps the agencies simply did not have Alaska in mind when making this change. Or perhaps the agencies are intentionally flouting principles of federalism. Whatever the intent, the effect is to impinge on states' rights and to force Alaska and Alaskan property owners to bear the high costs of compliance.[55]

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[50] 86 FR 69420.
[51] 86 FR 69430.
[52] 86 FR 69393.
[53] Alaska has previously provided a sample summary of state laws and programs that protect water resources. *See* State of Alaska Recommendations on a Refined Definition of WOTUS (Sept. 3, 2021) at 3 (citing (1) State of Alaska Comments on Proposed Revision of Federal Regulations Defining WOTUS under the CWA (June 19, 2018) *and* (2) State of Alaska Letter re: Step 2 of WOTUS Rule Revision at n.3 (Nov. 28, 2017) and noting errata).
[54] This provision is especially alarming in its total about-face from the NWPR, which contained a catch-all provision stating that if a water does not fall into a jurisdictional category, it does not constitute WOTUS. 85 FR 22317, 22318. In a complete reversal of this provision, the Proposed Rule's catch-all now expressly sweep *up* waters that cannot qualify under a specific listed category.
[55] "The average applicant for an individual permit spends 788 days and $271,596 in completing the process . . . not counting costs of mitigation . . . . Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits . . . . These costs cannot be avoided because the Clean Water Act imposes criminal liability as well as steep civil fines on a broad range of ordinary industrial and commercial activities." *Rapanos*, 547 U.S. at 721 (2006) (plurality op.) (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 74–76, 81 (2002)).

The Proposed Rule is demonstrably not a return to the "known and familiar framework" of the 1986 regulatory definition of WOTUS, but an unjustified and costly expansion of it. This expansion is all the more serious for its masked nature.

e. Expanded federal authority will not further the CWA's objectives in Alaska.

A water that is not a WOTUS is not, for that reason, unprotected. It is simply protected by State instead of federal law. Alaska has a comprehensive, robust, and rigorous set of environmental laws that should serve as the model for the Nation.[56] The Alaska Department of Environmental Conservation has the authority to manage all waters—WOTUS and non-WOTUS.[57] Alaska water quality standards apply equally to surface water, wetlands, and groundwater waters—WOTUS and non-WOTUS.[58] The Alaska Department of Fish and Game has permitting authority over activities potentially impacting fishery resources—a unique authority for a state fish and game agency to have. This permitting authority covers all activities that occur in anadromous streams across Alaska and operates to help us ensure that projects potentially affecting these waterbodies are completed in manner that protects our fisheries. Unlike other states, Alaska has a constitutional mandate to manage our natural resources for their sustained yield. It provides that "[f]ish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses."[59] Also unlike other states, Alaska is constitutionally required to carefully balance competing interests in managing its natural resources.[60] Alaska needs the flexibility that the Clean Water Act provides for, in § 101(b), in order to carry out our constitutional mandates.[61]

Alaska is also working bilaterally with Canada to address water quality issues in our transboundary rivers from mining activity in Canada. As a result of our efforts, all our waters originating from Canada meet our rigorous water quality guidelines.

Alaska has previously used its authority to fill voids left by the CWA: Alaska regulations, for example, prohibit municipal solid waste landfills from "caus[ing] or contribut[ing] to the degradation of wetlands" and expressly requires the owner or operator of such a facility to "demonstrate the integrity of the [facility] and its ability to protect ecological resources" by evaluating many factors related to the integrity of wetlands.[62]

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[56] *See supra* n.52.
[57] *See* Alaska Statute ("A.S.") 46.03.020.
[58] 18 AAC 70.
[59] Alaska Constitution, Article VIII, § 4.
[60] Alaska Constitution, Article VIII, § 1.
[61] 33 U.S.C. § 1251(b).
[62] 18 AAC 60.315(3)(A)–(E) (factors that must be addressed include the erosion, stability, and migration potential of the soils and materials used to support the facilities; the volume and chemical nature of the waste managed in the facility; effects on fish, wildlife, and other aquatic resources and their habitat from release of the solid waste; potential effects of catastrophic release of waste to the wetland and resulting environmental impacts; and other factors "necessary to demonstrate that ecological resources in the wetland are sufficiently protected").

Greater State authority would not undermine the CWA's objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[63] It would simply allow a different governmental body to further this objective—States.[64] As the CWA states, States share in the responsibility of maintaining the integrity of their own waters.[65] The responsibility is on States to ensure that their own waters are clean, and to ensure they have the proper authority and infrastructure to do this. States lacking this authority should pursue it through their legislatures, not through a federal program that sets the bar for all States, including those, like Alaska, that do not need it. Emasculating all States, in service of a few, is no solution.

But this is precisely what the Proposed Rule does. Citing § 101(b), which "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of [s]tates" to manage and protect water resources,[66] the agencies unabashedly state that they believe the "better reading" of § 101(b) is that it is the states' role to provide "support" for the agencies—as the agencies *themselves* "advance the objective of the Act."[67] This could not be more backward. The federal government should be supporting the *states*—who, after all, are vested with the "primary" responsibility to manage their own water resources—as we manage our *own* waters and land as our Constitution requires us to. The agencies' explicit rewriting of § 101(b)—and the audacity to even *attempt* such a thing—is profoundly disturbing.

Alaska cares deeply about our lands and waters. Our robust and rigorous environmental laws are more than sufficient to ensure their protection. We need the flexibility § 101(b) promises in order to follow our Constitution. Alaska opposes the Proposed Rule's relegation of states to a "support" rule and its failure to create anything resembling a framework of cooperative federalism.

2. The Proposed Rule is scientifically unsupportable as to Alaska.

The agencies were directed by Executive Order to "listen to the science" in crafting this Rule.[68] The agencies claim the Proposed Rule is "supported by the best available science on the functions provided by upstream waters, including wetlands, that are important for the chemical, physical, and biological integrity of foundational waters."[69] The agencies trumpet the "wealth of scientific knowledge" supporting their conclusions and further tout the "scientific literature" that "extensively illustrates the effects [that] tributaries, wetlands adjacent to impoundments and tributaries, and 'other waters' can and do have" on the integrity of foundational waters.[70] This wealth of scientific knowledge and literature is summarized in two key documents supporting the Proposed Rule—the

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[63] 33 U.S.C. § 1251(a).
[64] 33 U.S.C. § 1251(a).
[65] The CWA states that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b).
[66] 33 U.S.C. § 1251(b).
[67] 86 FR 69400 (emphasis added).
[68] 86 FR 69382.
[69] 86 FR 69390.
[70] 86 FR 69390.

2015 Connectivity Report[71] and Sections II and IV of the Technical Support Document.[72] As the agencies explain, a rule so firmly rooted in science ensures that determinations made under that rule are "science-informed."[73] But what if the science informing a rule omits studies pertaining to a state whose concerns are distinct from every other state? It would be difficult to justify—scientifically—imposing the rule on that state.

This is precisely the situation Alaska finds itself in. Neither of the two main technical documents supporting the Proposed Rule meaningfully engage with Alaska's unique geographical and climatic characteristics. In the 2015 Connectivity Report, little of the referenced research was conducted in Alaska.[74] The body of the Report, which spans 226 pages of discussion of scientific studies and literature, mentions "Alaska" or "Alaskan" nine times; "permafrost" three times, and "wetland mosaics" zero times.[75] And at least one of these references supports the *lack* of the possibility of a significant connection.[76] The wetland types on which the 2015 Connectivity Report does focus are not representative of the wetlands found in Alaska.[77] Perhaps most offensively, the maps and illustrations in the Study do not even *depict* Alaska.[78]

The Technical Guidance Document is no more relevant to Alaska. Alaska is rarely mentioned. The mentions Alaska *does* receive include noting Alaska's exclusion from a statistic,[79] or noting that a

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[71] The agencies describe the 2015 Connectivity Report as "[a] comprehensive report prepared by EPA's Office of Research and Development" fully entitled *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. 86 FR 69390. The Proposed Rule calls this the "Science Report." 86 FR 69390. This Comment calls it the "2015 Connectivity Report."

[72] 86 FR 69382. The Technical Support Document is available at https:/ / www.epa.gov/ system/ files/ documents/ 2021-12/ tsd-proposedrule_508.pdf. It states that "[t]he Preamble, the Science Report, this Technical Support Document, and the rest of the administrative record provide the basis for the definition of "waters of the United States" established in the [P]roposed [R]ule."

[73] 86 FR 69390.

[74] *See* 2015 Connectivity Rpt. at Ch. 7 [References].

[75] *See* 2015 Connectivity Rpt. Forested wetlands are discussed largely in the context of places with distinct climactic conditions, like Florida. *E.g*, 2015 Connectivity Rpt. at ES-10 (discussing study where "sewage wastewaters were applied to forested wetlands in Florida . . .").

[76] As the 2015 Connectivity Report provides:

> Ford and Bedford (1987) note that in permafrost-dominated areas of Alaska, wetland soils tend to be frozen during snowmelt events, resulting in a significant proportion of these floodwaters running directly to streams, thus rendering these wetlands unimportant in streamflow regulation. Likewise, Roulet and Woo (1986) found that wetlands in the Continuous Permafrost Region of Canada tended to be unimportant for either long-term water storage or streamflow regulation.

2015 Connectivity Rpt. at 4-24 (emphasis added).

[77] The 2015 Connectivity Report focuses on Riparian/ Floodplain Wetlands and Non-Floodplain Wetlands. 2015 Connectivity Rpt. at iii–v.

[78] 2015 Connectivity Rpt. at 2-1 ("characteristics of U.S. streams by watershed"), 2-32 (map of annual runoff), 2-46 ("percent of wetlands lost, 1780s-1980s" and "artificially drained agricultural land, 1985").

[79] Technical Support Doc. at 166 ("[A]pproximately 59% of streams across the United States (excluding Alaska) flow intermittently or ephemerally . . . .").

specific Alaskan wetland was found *not* to be a WOTUS,[80] or stating that Alaska contains too many wetlands to fit on a map.[81]

This is hardly sound science. This is *certainly* not "best available science."[82] The Proposed Rule may be scientifically supportable as to waters in the States that were studied and meaningfully considered in its supporting documents. But a rule based on this science cannot be applied with a straight face to a State whose unique features were hardly *mentioned*, never mind *studied*. To align the Rule with the *science* (as opposed to the *silence*) exclusions must be crafted to mirror the gaps in the underlying science. Only with these exclusions can the Rule fairly be considered scientifically supported.

3. Alaska requests four Alaska-specific exceptions.

Alaska believes the Proposed Rule contains several legal, logical, and scientific flaws, detailed above, and suggests that the agencies fix the legal and logical flaws in the finalized version. At this late stage, however, the scientific flaws can only be fixed with the incorporation of Alaska-specific exclusions, carefully tailored to mirror the gaps in the science underlying the Proposed Rule. Specifically, Alaska requests the exclusion of the following categories of wetlands from WOTUS coverage: (1) Alaska permafrost wetlands; (2) Alaska forested wetlands; and (3) Alaska's wetland mosaics. Alaska further requests (4) that Alaska waters be excluded from the "other waters" category.

This Section assumes that the relatively permanent standard will create only a subset of waters otherwise covered under the significant nexus standard. Accordingly, whether wetlands in Alaska are subject to federal jurisdiction will ultimately be determined by the significant nexus standard. The agencies define "significant nexus" to mean "'more than speculative or insubstantial effects on the chemical, physical, or biological integrity of' a traditional navigable water, interstate water, or the territorial seas."'[83] The existence of such a connection turns "on the function the evaluated waters perform."[84] Relevant factors include distance, hydrologic metrics, and climatological metrics.[85]

As explained above, neither the 2015 Connectivity Report nor the Technical Support Document even attempt to specify how these factors apply to the wetlands and other waters unique to Alaska.[86] As explained below, several types of Alaska wetlands fall squarely within these data gaps. Accordingly, they must be excluded from the final rule.

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[80] Technical Support Doc. at 223 ("Other wetlands determined not meet the significant nexus standard include an emergent wetland in Alaska surrounded by development that severed any hydrologic connections between the wetland and a nearby wetland complex and lake . . . .").
[81] Technical Support Doc. at 245 ("[A]t Klatt Bog, one of the prominent patterned ground bogs in Anchorage, Alaska, the plant communities (and thus the wetland and nonwetland areas) intersperse more than can be mapped.").
[82] 86 FR 69390.
[83] 86 FR 69430.
[84] 86 FR 69430.
[85] 86 FR 69430.
[86] A good starting point might have been to include Alaska in their maps of the United States.

a. Alaska Permafrost Wetlands

Permafrost is soil that has a temperature continuously below 32 degrees Fahrenheit for two years or more.[87] Permafrost contributes to wetland formation by retarding the downward movement of soil water, and holding water in the surface of the soil, which creates an environment conducive to hydrophytic vegetation. This captured water can take on the properties of a wetland. The impact of this captured water on downstream jurisdictional waters is not fully understood because of the very short growing season characteristic of permafrost wetlands, the fact that hydric soils in these wetlands typically hover around a "biological zero" temperature, and the significant temporal lag in hydrology caused by the freeze-thaw cycle and lack of slope. Due to these climatic and geophysical limitations, any connection to foundational waters is difficult to discern.

An explicit exclusion of permafrost wetlands under the Proposed Rule is needed to reflect the lack of scientific evidence underpinning their inclusion.

b. Alaska Forested Wetlands

Forested wetlands are swampy areas that primarily receive water from precipitation, rather than runoff, streams, or groundwater infiltration.[88] Near-constant precipitation in these wetlands keeps the ground saturated with water. Hydrophytic vegetation and isolated pockets of hydric soils exist on hillsides and other slopes. Because the water in these wetlands comes from precipitation, these wetlands, at least in Alaska, exist independently of any jurisdictional waterways and regularly do not share surficial hydrologic connections to these waters. These wetlands' independent existence indicates that they should be categorically excluded from WOTUS coverage. The 2015 Connectivity Report and Technical Support Document contain insufficient science to suggest otherwise.

c. Alaska's Wetland Mosaics

Wetland mosaics consist of numerous small, discrete wetlands, separated from each other by uplands. Alaska's wetland mosaics can span hundreds of acres. The Proposed Rule would regulate wetland mosaics as a single unit on the basis that the discrete wetlands are "similarly situated."[89] But the lack of Alaska-specific science underlying the Proposed Rule means that the agencies cannot assume with *any* degree of scientific certainty that Alaska's many diverse and discrete wetlands are sufficiently connected to each other to be treated as one unit for jurisdictional determinations. Perhaps, following further study, the science will reveal that arctic wetlands, for example, are

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[87] The term permafrost, a contraction of permanently frozen ground, was proposed in 1943 by Siemon W. Muller of the U.S. Geological Survey ("USGS") to define a thickness of soil or other superficial deposit, or even of bedrock, beneath the surface of the Earth in which a temperature below freezing has existed continuously for 2 or more years. When the average annual air temperature is low enough to maintain a continuous average surface temperature below 0°C, the depth of winter freezing of the ground exceeds the depth of summer thawing, and a layer of frozen ground is developed. *See* Ray, Louis L., USGS, *Permafrost*, accessible at https://pubs.usgs.gov/gip/70039262/report.pdf.

[88] Alaska Dept. of Fish & Game, *Featured Species-Associated Wetland Habitats: Freshwater Grass Wetland, Freshwater Sedge Wetland, Bog and Salk Marsh *Estuarine)*, accessible at https://www.adfg.alaska.gov/static/species/wildlife_action_plan/appendix5_wetland_habitats.pdf.

[89] 86 FR 69430 ("Waters, including wetlands, would be evaluated either alone, or in combination with other similarly situated waters in the region.").

separated by frozen, virtually impermeable barriers. In such a case, each wetland would be an isolated water, all its own, that cannot be WOTUS under *SWANCC*.[90]

Additionally, this provision almost certainly violates the Commerce Clause. In *United States v. Lopez*,[91] the Supreme Court ruled that upholding a federal ban on firearms near schools would require the Court to "pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[92] The Proposed Rule's potential to regulate Alaska's wetland mosaics as a single unit similarly piles "inference upon inference"—by inferring, first, the possibility of a connection among discrete wetlands in Alaska (based on no evidence); and further inferring (again based on no evidence) the possibility of a connection between these units and interstate commerce. This is an exercise of "general [federal] police power" that does not exist.

The Proposed Rule would place the burden of proof on *Alaska* to rebut the presumption that wetlands are *not* covered WOTUS. This is entirely unacceptable, not in the least because that presumption is based on a scientifically unsupported assumption (that wetlands in Alaska are permeable or otherwise connected to each other). The WOTUS definition should not make *any* assumptions unsupported by science, and particularly should not do so when such an assumption would, in practice, work to expand federal jurisdiction over large swaths of Alaska wetlands in clear violation of federalism principles. The Proposed Rule lacks a sufficient scientific basis for regulating wetland mosaics in Alaska as a single unit. The agencies cannot simply assume this problem away. Tracking this gap in the data, the WOTUS definition must categorically exclude Alaska's wetland mosaics.

d. Alaska exclusion from "other waters"

As applied to Alaska, the "other waters" catch-all is a vast expansion of federal power that is entirely unjustified by the Proposed Rule or its supporting documents. As previously explained,[93] the agencies provide no justification for their quiet deletion of the "use, degradation, or destruction" threshold criteria from the 1986 definition of "other waters." This deletion would heavily and disproportionately impact Alaska, which has more unused waters than any other State.

There is no indication that this provision's impact on Alaska was considered in creating this catch-all. And there is insufficient science in the supporting scientific documents (which hardly mention Alaska) to justify this deletion. To reflect this omission, the WOTUS definition must explicitly exclude Alaska from the catch-all's coverage.

e. Historical Alaska-Specific Exceptions

This is not the first time Alaska's unique circumstances have justified Alaska-specific exceptions. As one example, Alaska permafrost wetlands were excluded from the Food Security Act's definition of

[90] 531 U.S. at 171 (holding that "nonnavigable, isolated, intrastate waters" cannot be covered under WOTUS).
[91] 514 U.S. 549, 566 (1995).
[92] *Id.* at 567.
[93] *Supra* Section (1)(d).

"wetland" by its 1986 amendments.[94] As second example, the Alaska National Interest Lands Conservation Act created "Alaska specific carve-outs to the National Park Service's authority," which had the effect of setting aside extensive land in Alaska for national parks and preserves "on terms different from those governing such areas in the rest of the country."[95] As a third example, the Crude Oil Windfall Profit Tax Act of 1980 contained a tax exemption for crude oil extracted from certain areas of Alaska.[96] In yet another example, an "Alaska graywater" exception was made to the prohibition on state regulation of graywater discharges from seafaring vessels.[97]

Such Alaska-specific exceptions make sense. As the U.S. Supreme Court and Congress recognized in the context of the crude-oil tax exemption, it was "Alaska's 'unique climatic and geographic conditions'" that justified the differential tax treatment.[98] Specifically, the Court noted that "development and production of oil in arctic and subarctic regions is hampered by severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure[.]"[99] These conditions increase the cost of drilling wells in Alaska to "as much as 15 times greater than that of drilling a well elsewhere in the United States."[100]

Here, too, it is Alaska's unique climatic and geographic characteristics that justify excluding certain categories of wetlands from the WOTUS definition.[101] The excluded categories encompass wetlands unique to Alaska whose connection to foundational waters is not established by the Proposed Rule's scientific underpinnings.

f. Conclusion

Application of the WOTUS definition to Alaska's permafrost wetlands, forested wetlands, and wetland mosaics are not supported by the Proposed Rule's scientific underpinnings. Similarly unsupported by science is the Proposed Rule's application of the "other waters" provision to Alaska.

Adopting Alaska-specific exclusions to mirror these data gaps will help refine an otherwise blanket rule that, in its present form, ill-fits and heavily falls on Alaska. These exclusions will also provide clarity, predictability, and a workable path forward toward cooperative federalism.[102]

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[94] 16 U.S.C. § 3801(27) ("For purposes of this Act, and any other Act, this term"—wetland—"shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils."); PL 99–349, 100 Stat. 710 (1986) (adding this language).
[95] *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019); *see* 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.*
[96] 26 U.S.C. §§ 4986–4998 (since repealed).
[97] 33 U.S.C. § 1322(p)(9)(A)(i) and (v).
[98] *United States v. Ptasynski*, 462 U.S. 74, 78 (1983) (quoting H.R.Conf.Rep. No. 96-817, p. 103 (1980)).
[99] *Id.* (internal quotes removed).
[100] *Id.*
[101] The lack of Alaska-specific exclusions in the CWA makes sense. At the time the CWA's predecessor was enacted—1948—Alaska was not a state. *See EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203 n.2 (1976). And at the time of the 1972 Amendments creating the CWA, Alaska was still very young, its climate and geography were not well understood, and the need for Alaska-specific exceptions was not apparent.
[102] Additionally, these exclusions avoid the outer limits of federal authority under the Commerce Clause, so would likely survive *Sackett v. EPA* in the event of an outcome unfavorable to the agencies. *See* No. 21-454 (Supreme Court granting

4. The path forward is through cooperative federalism, not compulsive federal regulation.

"The Clean Water Act anticipates a partnership between the States and the Federal Government[.]"[103] The agencies flout the CWA by treating States not as partners, but as subservient implementers.[104] The federal government's role is simply to establish a baseline of protection upon which the States may build.[105] States, and particularly Alaska, do not need the federal government to encroach on state power by expanding its own jurisdiction or establishing more stringent standards than necessary.[106]

Alaska in particular needs to be respected as a partner. Congress and the United States Supreme Court have acknowledged the need for Alaska to be free to use its resources for the economic security and social benefit of its residents.[107] This is in part because as a young state, Alaska is not heavily industrialized: Alaska's waters, wetlands, and vast natural areas remain largely undeveloped compared to those in the lower-48 states. Expansion of even basic transportation and utility networks, and industry development, remain in nascent stages in much of the state. As a result, Alaska's needs are vastly different from those of the lower-48.[108] To address these needs, Alaska must have the flexibility to manage its own water and lands.

The four Alaska-specific exclusions would further federalism principles without decreasing environmental protections. Take the example of permafrost: the federal government is not well-positioned to regulate permafrost wetlands, but Alaska is. Alaska has the authority[109] and legal infrastructure[110] to regulate permafrost wetlands. The responsibility is primarily and traditionally on Alaska to protect its own wetlands.[111] And so is the incentive: Alaska has a strong interest in

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certiorari in *Sackett v. EPA* on the following question: Whether the U.S. Court of Appeals for the 9th Circuit "set forth the proper test for determining whether wetlands are 'waters of the United States'" under the CWA.).

[103] *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

[104] As Justice Scalia noted in the *Rapanos* plurality opinion, this partnership means more than the states' assumption of primacy of federal programs under the oversight of federal agencies. *Rapanos*, 547 U.S. at 737–39 (plurality op.).

[105] "Federalism is rooted in the belief that the issues that are not national in scope of significance are most appropriately addressed by the level of the government closest to the people." Federalism Executive Order 13132 (Aug. 4, 1999).

[106] Under a cooperative federalism approach, the agencies would have to accept that some policy determinations about how to best balance competing interests and resources should be left to the States, even if federal regulators disagree with the outcome.

[107] *See, e.g.*, Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3010 *et seq.*, and *Sturgeon v. Frost*, 139 S. Ct. 1066, 1074 (2019).

[108] Alaska's Constitution, unlike that of other States, requires a careful balancing of interests in the management of natural resources. *See* Alaska Constitution, Article VIII: Natural Resources.

[109] Alaska law confers on the Department of Environmental Conservation the authority to create a wetland permitting program. AS 46.03.020(14).

[110] *See, e.g.*, 18 AAC 60.227–.228 (governing landfills located on permafrost); 18 AAC 72.265 (specifying test hole depth "in areas of known or suspected permafrost" and requiring that test holes be monitored as "necessary to protect public health, public and private water systems, and the environment"); 18 AAC 75.630(a)(2)(B) (classifying public land underlain with permafrost as "[v]ery sensitive terrestrial environment[]" which triggers treatment different than other, less sensitive, types of land).

[111] Alaska's Constitution, unlike other state constitutions, requires Alaska to maintain a careful balance of interests in the management of natural resources. *See* Alaska Constitution, Article VIII Natural Resources. Alaska's water quality regulations are generally identical to, or stricter than, federal regulations. *See* 18 AAC 83.435 ("An A[laska] P[ollutant] D[ischarge] E[limination] S[ystem] permit must include conditions to meet any applicable requirement in addition to or more stringent than promulgated effluent limitations guidelines or standards under 33 U.S.C. 1311, 1314, 1316, 1317, 1328, and 1345 . . . ."); 18 AAC 70.005–.050 (statewide water quality standards).

ensuring that Alaskans, and our environment, remain healthy.[112] Alaska takes this responsibility very seriously. It is time for the agencies to respect that.

Alaska's door remains, as it has been, open. Alaska and the agencies have worked together before, in the *Alaska Wetlands Initiative*,[113] to take an important first step toward partnership. Joining forces once more, Alaska and the agencies could agree to formally ecoregionalize[114] Alaska, and perhaps even create a new Administrative Region for Alaska. The agencies need not usurp Alaska's power to manage its own waters and lands by expanding the definition of WOTUS. Nor does doing so, and applying a one-size-fits-all approach, better protect the waters in Alaska.

Conclusion

The Proposed Rule stretches the definition of WOTUS to exceed that of any administration before it. This expansion precludes any *possibility* of a co-equal partnership between states and the federal government, in clear violation of the federalism principles enshrined in the CWA. In the course of drafting this rule, the agencies appear to have followed their now-longstanding policy of ignoring Alaska entirely: many of the Proposed Rule's provisions do not account for Alaska's specific characteristics and much of the Proposed Rule's supporting science simply omits Alaska and Alaska-related studies. The only solution is to include Alaska-specific exclusions in WOTUS, carefully crafted to mirror the omissions in the underpinning science. These will mark a desperately needed first step toward mending the relationship between Alaska and the federal government, as we work, collectively, to protect our waters.

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[112] *See Williams Alaska Petroleum, Inc. v. State of Alaska,* No. S-17772 (State of Alaska litigating against refinery following drinking water contamination resulting from refinery activities).

[113] The *Alaska Wetlands Initiative* was a part of the Clinton Administration's August 24, 1993 Wetlands Plan, under which the agencies worked with the State of Alaska to identify and address Alaska-specific issues related to the implementation of the CWA's § 404 regulatory program in Alaska. Many solutions arose from this collaboration, including developing a comprehensive mitigation strategy for oil and gas development activities on the North Slope, issuing a written statement recognizing the flexibility to consider circumstances in Alaska in implementing alternative analyses and compensatory mitigation requirements under the § 404 regulatory program, and implementing an abbreviated permit processing procedure for certain waters in Alaskan villages. *See* Environmental Protection Agency, Department of the Army, U.S. Fish and Wildlife Service, National Marine Fisheries Service, *Alaska Wetlands Initiative Summary Report* (May 13, 1994), accessible at https:/ / archive.epa.gov/ water/ archive/ web/ pdf/ alaska.pdf. Alaska seeks a return to such collaboration.

[114] A good starting place is with the study and accompanying ecoregion map created by Spencer, P. et al, *Home is where the habitat is: an ecosystem foundation for wildlife distribution and behavior*, Arctic Research of the United States (2002), accessible at https:/ / www.nsf.gov/ pubs/ 2003/ nsf03021/ nsf03021_2.pdf.

Appendix 6. Waters of the United States (WOTUS) and Waters of the State (WOTS): Definitions and History

This appendix describes the definition of "Waters of the United States" (WOTUS). The definition has been controversial, and the last three federal administrations have amended the regulatory definition. In addition, three U.S. Supreme Court decisions have affected the definition. These changes have expanded and contracted the areal extent of WOTUS and therefore the Corps' jurisdiction. They have changed the extent of federal jurisdiction and have sometimes been difficult for agency staff and permit applicants to keep up with. This appendix describes the definition's convoluted history.

The appendix also describes Alaska's definition of "Waters of the State" (WOTS). WOTS are more extensive than WOTUS; WOTS includes all WOTUS and more. This appendix describes how WOTS differ from WOTUS.

WOTUS: Waters of the United States[65]

Introduction

The 1972 amendments to the Clean Water Act (CWA) established federal jurisdiction over "navigable waters," defined in the Act as the "waters of the United States" (WOTUS). Section 404 of the CWA requires parties that intend to place dredged or fill material into navigable waters (WOTUS) to first obtain a permit from the Corps. Therefore, the extent of the Corps' jurisdiction is dependent on the extent and therefore the definition of WOTUS. However, the CWA does not define "waters of the United States"; rather, it provides discretion for EPA and the U.S. Department of the Army to define the term in regulations.

EPA and the Corps' regulations that define WOTUS are controversial because they define the extent of federal jurisdiction under the CWA, including regulation of discharges (Section 402), and regulation of dredged and fill materials (Section 404). Additionally, many States (including Alaska) believe that an unduly expansive WOTUS definition impinges upon States' traditional authority to make land- and resource-use decisions within state boundaries.

Early Definitions:

Following the passage of the CWA, the Corps and EPA promulgated different definitions of WOTUS. In the mid-1980s, during the Reagan Administration, EPA and the Corps promulgated a definition of "waters of the United States." The definition is below. It is an expansive definition that not only includes waters that are navigable for the purposes of interstate or foreign commerce, but also any tributaries including even prairie potholes or wet meadows that could affect these waters. It even includes waters from which fish can be taken and sold in interstate commerce.

[65] The WOTUS history explained in this appendix is adapted from, and frequently quoted from, an EPA website: https://www.epa.gov/wotus/about-waters-united-states (visited December 2022).

40 CFR § 230.3(s) The term waters of the United States means (or meant in the 1980s):

1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters including interstate wetlands;
3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
    a. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
    b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
    c. Which are used or could be used for industrial purposes by industries in interstate commerce;
4. All impoundments of waters otherwise defined as waters of the United States under this definition;
5. Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
6. The territorial sea;
7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

U.S. Supreme Court Decisions

1985, the Bayview decision upholds the expansive definition. In 1985, in *United States v. Riverside Bayview Homes, Inc.*, the U.S. Supreme Court deferred to the Corps' assertion of jurisdiction over wetlands adjacent to a traditional navigable water.

2001, SWANCC narrows the definition by excluding isolated ponds. In 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the Court rejected a claim of federal jurisdiction over non-navigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters, noting that the term ''navigable'' must be given meaning within the context and application of the statute. The Court famously held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The fact that the court chose to focus on whether a stop for migratory birds qualified a water as WOTUS is evidence of the expansive extent of the original definition.

2006, Rapanos: confusion and further narrowing. In 2006, the court issued a somewhat confusing decision: *Rapanos v. United States.* The decision was confusing because there was not a clear majority on the court. Four justices ruled that WOTUS included "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" and ''wetlands *with a continuous surface connection*'' to a ''relatively permanent body of water connected to traditional interstate navigable waters (emphasis added).''

However, that narrow definition was not a majority – it included only four of the nine justices. Justice Kennedy issued a separate concurring opinion with a different approach. His opinion is summarized as that a water or wetland must have a "significant nexus" to waters that are navigable in fact. He stated that adjacent wetlands possess the requisite significant nexus if the wetlands ''either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'' Justice Kennedy's test is often referred to as the "significant nexus" test. The four remaining judges would have allowed a water which qualified under either approach – the four-justice continuous surface connection or Justice Kennedy's significant nexus.[66]

Recent Regulatory Definitions

2015: the Obama administration's Clean Water Rule. In 2015, the Obama administration promulgated what it called the Clean Water Rule to define WOTUS consistent with the Supreme Court's direction. It was an expansive definition. It included all waters within 100 feet of a stream's ordinary high water; all waters within 1,500 of high tide or a stream's ordinary high water if the water was within the 100-year floodplain; and all water within 4,000 feet of the high tide or ordinary high water that met an expansive "significant nexus" test.

This definition was controversial. The two federal district courts that reviewed the merits of the 2015 Clean Water Rule found that the rule suffered from certain errors and issued orders remanding the 2015 Clean Water Rule back to the agencies. Multiple other federal district courts preliminarily enjoined enforcement of the rule, such that more than half of the states continued to implement the 1980s regulations and not the 2015 Clean Water Rule.

2020: the Trump administration's National Waters Protection Rule. The Trump administration replaced the 2015 Clean Water Rule with a narrower Rule, which they titled the National Waters Protection Rule in April 2020. Four months later in August, a federal district court in Arizona vacated the Trump administration's rule and remanded it back to the EPA.[67]

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[66] In 2007, the Ninth Circuit held that Justice Kennedy's *Rapanos* concurrence was controlling in the Ninth Circuit, which applies to all courts and states in the Ninth Circuit, i.e., Alaska. The case was *N.Cal. River Watch v. Cty. of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007)

[67] The Arizona District Court did not opine whether it believed its decision applied to all states, only the Ninth Circuit, or only Arizona. However, after the decision, the agencies decided that they would voluntarily revert to the 1980s rule, nationwide. See https://www.epa.gov/wotus/about-waters-united-states.

2023: the Biden administration's new WOTUS definition. On December 30, 2022 the Biden administration finalized its rule and published it in the Federal Register on January 18, 2023. It does not become effective until 60 days after it was published (March 20, 2023). The Biden administration's rule is more expansive than the 1980s definition. The new Biden rule would require a finding of WOTUS under either Kennedy's significant nexus test or the *Rapanos* plurality's relatively permanent test, making the definition, if finalized, the broadest it has ever been. However, it is likely to be short lived, at least in part, for the reason explained below.

The Coming Supreme Court Decision – Sackett

On October 3, 2022, the U.S. Supreme Court heard arguments in *Sackett v. Environmental Protection Agency.* Given the confusion that resulted from the no-majority *Rapanos* decision, many observers expect the Court to try to craft a durable decision acceptable to a majority of justices. While the Court has yet to announce a decision, many people expect it to narrow the extent to which WOTUS will include waters that are not connected to a traditional navigable water through a surface connection. It is possible, perhaps likely, that the Court's ruling will modify the definition recently adopted by the Biden administration.

Conclusion

The definition of WOTUS and the extent of the Corps' jurisdiction over placement of dredged and fill material has not been stable. It has changed at least six times since the first definition. It is likely to change again when the U.S. Supreme Court announces its *Sackett* decision this spring. We do not know whether *Sackett* will result in a stable, long-term definition, or whether it will be just one more stop in the cycle of expansion and contraction. We may not know for years.

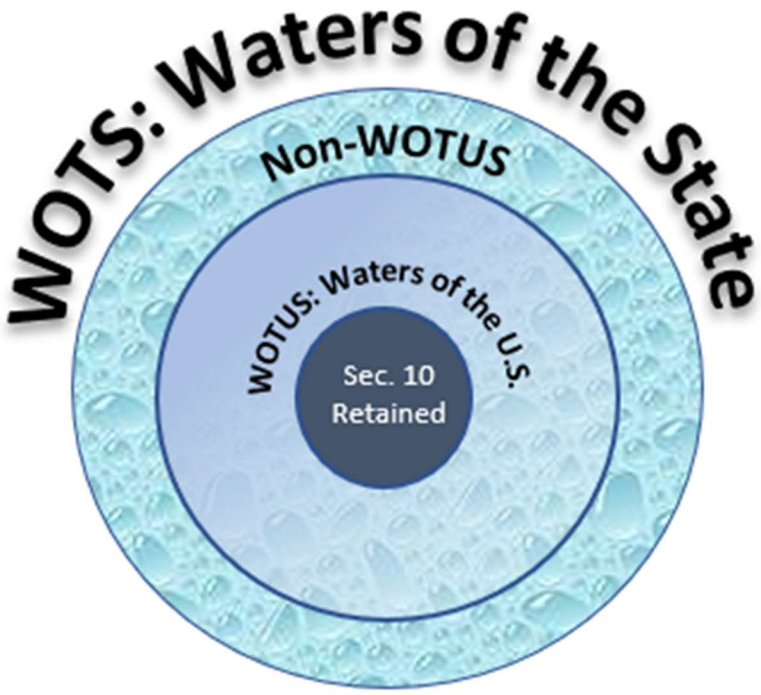
WOTS: Waters of the State

The state has adopted an expansive definition of waters. However, the state's definition does not necessarily imply as heavy a regulatory presence as the federal definition. The state's definition is given in AS 46.03.900(37): "waters" includes lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, straits, passages, canals, the Pacific Ocean, Gulf of Alaska, Bering Sea, and Arctic Ocean, in the territorial limits of the state, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially in or bordering the state or under the jurisdiction of the state."

The state's definition includes anything one typically considers wet including groundwater or natural, wetlands, or public or private waterbodies.

Because the state's definition is inclusive of and more expansive than the federal definition, all WOTUS are WOTS, but not the other way around. This is displayed graphically in the figure below.

In the visual display, all WOTUS are also WOTS. But not all WOTS are WOTUS.


WOTS: Waters of the State
Non-WOTUS
WOTUS: Waters of the U.S.
Sec. 10
Retained

Appendix 7. Corps-Identified Section 10 Waters

Source: Alaska District > Missions > Regulatory > Recognizing Wetlands > Navigable Waters (army.mil)

The following is a list of waters in Alaska that are regulated under Section 10 of the Rivers and Harbors Act. All waters that are subject to the ebb and flow of the tide are also regulated under Section 10 of the Rivers and Harbors Act.

No:	Waterway	Navigable Length	Remarks
1.	Becharof Lake	043.0	Empties into Egegik Lake
2.	Big Lake	004.5	Drainage to Tidal Water not navigable
3.	Buckland River	040.0	40 miles to the West Fork
4.	Campbell Lake	Entire	Entire length and Breadth
5.	Chatanika River	139.0	139 miles to Long Creek
6.	Chena River (including Noyes Slough)	Entire	Entire length of the river and slough
7.	Colville River	258.0	258 miles to the Etivluk R.
8.	Copper River	287.0	Entire Length in Alaska
9.	Lake Clark	045.0	Connects with Lake Illiama
10.	Eagle River	024.0	24 miles to the Visitors Cent
11.	Eek River	020.0	Tributary to Kuskokwim River
12.	Egegik River	028.0	Navigable for Entire Length
13.	Eyak River	4.5	N/A
14.	Iditarod River	340.0	N/A
15.	Lake Illiama	070.0	Heads Kvichak River

16.	John River	105.0	105 miles to Hunt Fork
17.	Kantishna River	100.0	N/A
18.	Kasilof River	006.0	Drains Tustemena Lake
19.	Kenai Lake	020.0	N/A
20.	Kenai River	081.0	Navigable for entire length
21.	Kobuk River	200.0	N/A
22.	Koyukuk River	544.0	N/A
23.	Kuparuk River	052.2	52.2 miles to the Toolik R.
24.	Kuskokwim River	400.0	Navigable to McGrath
25.	Kuzitrin River	015.0	N/A
26.	Kvichak	050.0	N/A
27.	Lake Louise	008.0	4 miles wide
28.	Little Susitna River	084.0	84 miles to the Schrock Road Bridge
29.	Mantanuska River	075.0	75 miles to Caribou Creek
30.	Naknek	019.5	N/A
31.	Nenana River	080.0	80 miles to the Parks Highway Bridge
32.	Noatak	400.0	400 miles to Portage Creek
33.	Nushagak River	034.0	Navigable from mouth of Wood River.
34.	Porcupine River	225.0	Navigable entire length in AK
35.	Sagavanirktok River	160.0	160 miles to the Atigun River
36.	Selawik Lake	050.0	20 miles wide

37.	Skilak Lake	012.6	On Kenai River, Downstream of
38.	Snake River	000.475	Authorized project at Nome
39.	Stikine River	30.0	Authorized project for entire length
40.	Susitna River	115.0	N/A
41.	Tanana River	455.0	Nenana 250 miles upstream is transfer point for Railroad
42.	Tolovana River	135.0	Entire Length
43.	Tustumena Lake	023.0	Head of Kasilof River
44.	Ugashik River	013.0	Entire Length
45.	Willow Creek	004.0	4 miles to the Parks Highway Bridge
46.	Wood River and Lakes	048.0	Navigable for 24 miles on River
47.	Yukon River	1,432.0	Navigable entire length in AK

Appendix 8. Corps' Data Workload Review, Methodology and Results

ORM-2 Data Analysis

An in-depth analysis was conducted on a five-year span (2017 to 2022) of the Alaska District regulatory permitting workload. The conclusions reached from reviewing the data are summarized within this report. The full data set is available in the 404 Master Workbook and found in word tables.

404 Program Workload Analysis: Methods

In October 2022, DEC obtained from the Alaska District, ORM-2 permitting data that had been exported into Microsoft Excel. The data contained authorization records from 2017 through 2022. The first step in the permit workload analysis was to filter and transfer the ORM-2 permit data into the 404 Workload Master Workbook for analysis. Only those permits with an end date (issue date) between 2017 and 2022 were included. The following filters were used to complete the initial data transfer:

Permit Authority - entries identified as Section 404 and Section 10/404 were selected. Entries where the permit authority was identified as None, where there was no permit authority identified, or no action selected these actions were not counted. Remaining unidentified permit authorities or actions were not utilized in calculating workload. Entries where the permit authority was identified as Section 10 were transferred to a worksheet labeled Section 10 LOP Permits and not used in the workload analysis, as those actions are not assumable by the State

Action Type: all AJD, NWP, Permitmod, Permitransfer, PJD, RGP, SP, Mitigation Banks, EIS, Unauthact were filtered separately. LOP, RGP and SP data was transferred to separate worksheets labeled accordingly. NWP entries were filtered based on the permit type and were transferred to separate worksheets for each NWP. This criterion was set so that review time in workdays could be accurately measured from the beginning to the end of a particular action.

NWP - ORM-2 data was filtered by each permit number and transferred to a new worksheet labeled with the NWP number (i.e., NWP 1 through NWP 59).

Multiple NWPs - ORM-2 data with at least two NWP numbers identified were transferred as one set onto a worksheet labeled NWP Multi.

No NWP - ORM-2 data where no permit number was identified were transferred as one set onto a worksheet labeled NWP UnID (unidentified).

Once all of the data was transferred to the new workbook, all duplicate entries were deleted. A single permit could have multiple entries within the ORM-2 data for each Corps' permit application number. If the entries occurred on different dates, all entries were kept. If the entries identified the same start and end dates, then duplicates were not counted as a 404 action. Actions were counted within each AJD, LOP, NWP, Permitmod, Permitransfer, PJD, RGP, SP, Mitigation Banks, EIS, and Unauthact. The closure method was critical to determining what

action the Corps took on each DA permit action. Actions that were closed by permit issuance or denial were actions that were completed by the Corps. ORM-2 data is a record of all actions taken by the Alaska District. Not all actions taken by the Corps result in a permit but do represent workload. For instance, actions in uplands are not permitted by the Corps (No permit is required), however time was spent to make the determination. There also were actions withdrawn by the applicant or the Corps. This data was transferred to separate worksheets and labeled accordingly. These additional spreadsheets, refine, sort, and classify the supplied ORM-2 data.

Alaska District Permit Workload Data Setup

Once the duplicate data was removed, each worksheet was set up so the columns with the more pertinent data were on the left side of the worksheet and the rest of the data on the right. Then the following columns were added to each worksheet to help analyze and interpret the data.

- Review Time (workdays) - This column was added to provide information on the number of workdays that transpired between the date the permit application was deemed complete and the date the permit was issued.
- Waterway - If the identified waterway was a typical marine/coastal waterway (i.e., cove, harbor, passage, inlet, etc.), the permit was assigned to the Marine category. If a waterway was identified and the waterway was a river, unnamed creek or tributary, or wetland, the permit was assigned to the Freshwater category.
- Project Name/Project Description - If the project name or description identified a typical marine/coastal waterway, the permit was assigned to the Marine category. If the project description identified impacts below a standard tidal datum (i.e., high tide line, mean higher-high water, etc.), the permit was assigned to the Marine category. If the project name or description identified a river, unnamed creek or tributary, or wetland, the permit was assigned to the Freshwater category.
- Unidentified - Permits with no descriptors in any of the above columns were identified as "Unknown".
- Section 10 Water - This column was added to categorize each permit entry as having impacts to waters currently identified on the Alaska District Section 10 Lakes or Section 10 Rivers Inventories.
- Alaska District Office - This column was added to categorize each permit entry geographically based on current Alaska District office locations.

Actions Supplied in ORM-2 Data

Preliminary Jurisdictional Determinations (PJD), Approved Jurisdictional Determinations (AJD)

The number of Alaska District PJD's was reported for 2017-2022, but no information was available on how the Alaska District performs this work. There are different types of PJD's that vary in complexity. A PJD can be a simple determination of whether jurisdictional waters are present or absent, or it can be a very labor-intensive report with field work, and WOTUS

boundary delineation. The Alaska District data most likely represents the less labor-intensive JD, which was performed in the office. The Alaska District has a policy that requests applicants, who want a timely answer on a PJD request, on parcels larger than five acres, to submit a consultant supplied Preliminary Jurisdictional Report following guidance in Alaska District Special Public Notice (SPN) 2020-00399. Reviewing an applicant submitted PJD Report is more labor intensive than an Alaska District desktop PJD.

The reported and calculated number of CWA 404 PJD's for 2017-2022 totaled 987 (197/year). In addition, the Corps reported 83 AJD's (17/year). It should be noted the Corps is willing to permit a project on a PJD if the applicant or proponent agrees to the findings. Therefore, PJD and AJD numbers will never match. Also, during this time frame applicants requested AJDs because of changing WOTUS rules. The Trump Administration changed the definition of WOTUS on June 22, 2020[68] and this was referred to as The Navigable Waters Protection Rule (NWPR) in the AJD data.

Mitigation Banks and In-Lieu Fee Program

Currently the Alaska District chairs the State Interagency Review Team (SIRT) for mitigation banks. This means it must review and approve proposed mitigation bank prospectuses and monitor mitigation bank sites. A complete prospectus contains a substantial amount of information pertaining to bank objectives, ecological suitability of the site, base line of the area, ownership, land use, credit calculations, performance standards, monitoring, and other factors. The prospectus provides detail on the proposed mitigation bank or in-lieu fee (ILF) program and is the basis for public and SIRT comment. For Mitigation Banks, ILF programs and Permittee Responsible Mitigation, the information supplied to the Corps must meet the requirements of the 2008 Mitigation Rule. The Alaska District has three mitigation banks approved for use. No ILF programs are approved. One ILF program has been submitted to the Corps for approval (twice) but has not advanced. DEC was unable to obtain any data from the Alaska District on mitigation monitoring. Permittee responsible mitigation (mitigation undertaken and constructed by the permittee) monitoring is usually required for up to five years, and the same is required for approved mitigation banks. Monitoring requires that agency staff review monitoring reports, make site visits, and resolve issues.

EIS (Environmental Impact Statement)

An EIS is an environmental document required by the National Environmental Policy Act (NEPA) for federal actions that significantly affect the quality of the human environment (42

[68] Final rule at: Federal Register :: The Navigable Waters Protection Rule: Definition of "Waters of the United States" Engineers Corps and Environmental Protection Agency (2020, April 21). *The Navigable Waters Protection Rule: Definition of "Waters of the United States"*. National Archives and Records Administration, Federal Register. Retrieved December 29, 2023, from https://www.federalregister.gov/documents/2020/04/21/2020-02500/the-navigable-waters-protection-rule-definition-of-waters-of-the-united-states. Note that this rule was amended during the writing of this report. The December 30, 2022 revision can be found at: Revising the Definition of "Waters of the United States" | US EPA. The rule was formally published in the Federal Register on January 18, 2023. Copy at: Federal Register :: Revised Definition of "Waters of the United States"

USC §4332). The Alaska District may be the lead Federal agency or a cooperating agency for compliance with NEPA for major 404 permit actions. The lead federal agency is generally the agency with the larger federal control over the proposed action. For actions in which the Corps is the lead Federal agency, an EIS would only be required for certain actions that require a Standard (Individual) Permit.

The decision to prepare an EIS is made based on whether the action would or could result in significant impacts to the human environment. In many cases this is soon after the receipt of a complete Corps' permit application, although a determination may not be made until an environmental assessment is prepared, which occurs at the end of the Standard Permit process. As the lead Federal agency, the Corps is responsible for the preparation and content of the EIS to ensure an independent review. Although the applicant incurs the cost of the preparation of the EIS, the contractor is under the sole direction of the Corps and will have limited interaction with the applicant.

Following selection of the third-party contractor, the Corps will initiate the scoping process by publishing a Notice of Intent (NOI) to prepare an EIS in the Federal Register (FR), and issue public notice. The NOI is intended to solicit from the public comments to consider in the EIS. Based on comments received during scoping, the EIS will be prepared by the contractor. When ready, the Draft EIS (DEIS) is released to the public through a Notice of Availability (NOA) published in the Federal Register by the EPA. The Corps will also publish a public notice for the proposed action with the DEIS, which will be sent to all adjacent property owners, interested agencies and the public, and will be posted on the Corps' website. The public will be given a specific period in which to comment on the DEIS. Following the close of the comment period of the DEIS, the Final EIS (FEIS) is completed based on comments received. The FEIS is then released to the public through a Notice of Availability published in the Federal Register by EPA. Following the close of the comment period on the FEIS, if all information has been received to make a permit decision, the Corps will prepare a Record of Decision (ROD) for the action. A public notice will be published following the completion of the ROD.

EISs are multiyear actions that typically require staff to track workload, handle public comments, assemble the public record, and complete the Record of Decision. The Alaska District does not complete the EIS, but requires the project proponent to hire a third party consultant to complete the EIS. The Alaska District is responsible to complete the Record of Decision and the 404(b)(1) evaluation.

The reported number of EISs finalized during the reporting period equals 12 (2.4/year).

Nationwide Permit (NWP)

Nationwide Permits authorize specific activities in areas under Corps’ Regulatory jurisdiction. These activities are minor in scope and must result in no more than minimal adverse impacts, both individually and cumulatively. Individuals wishing to perform work under a Nationwide Permit must ensure their project meets all applicable terms and conditions, including the regional conditions specific to Alaska.

Pre-construction notification (PCN): A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by Nationwide Permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. The DEC database could easily be configured to allow these notifications to be submitted online.

PCN may be required by the terms and conditions of a Nationwide Permit, or by regional conditions. A PCN may be voluntarily submitted in cases where preconstruction notification is not required, and the project proponent wants confirmation that the activity is authorized by Nationwide Permit.

If the conditions cannot be met, a Regional General Permit or Standard Permit will be required. Many NWPs require written verification from the Corps of Engineers prior to conducting the work. The proponent is required to submit a PCN. The District has to review and submit the PCN to agencies for review.

The reported and calculated number of CWA 404 NWP equals 1,416 (283/yr).

Permit Modification (Permitmod)

Changes requested by a project proponent or applicant that are not substantive changes to the original SP can be authorized by the District by a permit modification.

The reported number of permit mods equals 492 (98/year).

Permit Transfer (Permitransfer)

A permit transfer is a request to transfer a current authorized action to a new responsible party. The reported and calculated number of permit transfers equals 201 (40/year).

Regional General Permit) (RGP)

Regional General Permits (RGPs) are issued by the Alaska District. Some RGPs authorize specific activities statewide, while others are specific to certain regions in Alaska. GPs can only authorize activities or categories of activities that have minimal impacts both individually and cumulatively. They are issued for five years, at which time they automatically expire, unless the Alaska District has completed the procedures to reissue the RGPs.

Most RGPs require written verification from the Corps of Engineers prior to conducting the work. The proponent is required to submit a PCN. The Alaska District has to review and submit the PCN to agencies for review.

The reported and calculated number of CWA 404 RGPs equals 210 (42/year).

Standard Permit (SP)

Individual Permits or Standard Permits require an Engineer Form 4345 and a complete WOTUS avoidance, minimization, and compensatory mitigation statement for each application. A

complete Department of Army permit application undergoes a full public interest review. A public notice, usually lasting 30 days, is distributed to all known interested persons. The permit decision is generally based on the outcome of a public interest balancing process, where the benefits of the project are weighed against the detriments. A permit will be granted unless the proposal is found to be contrary to the public interest or fails to comply with the EPA's 404(b)(1) Guidelines. The 404(b)(1) Guidelines allow the Corps to permit only the least environmentally damaging practicable alternative. Processing time usually takes 90 to 120 days, unless a public hearing is required, or an EIS must be prepared. Projects can also take longer if Government to Government consultation is requested by a Tribe.

The reported and calculated number of finalized SP decisions equals 274 (55/year).

Enforcement

Performing work in waters of the United States without Corps' authorization can have consequences. Enforcement is a part of the Corps' program. State and federal agencies, groups and individuals that report suspected violations often aid Corps' surveillance and monitoring activities. The Corps may issue orders requiring corrective action including removal of the unauthorized work and restoration, or in certain cases accept an after-the-fact permit application, initiate legal action, or recommend referral to the EPA for administrative, civil or criminal penalties. The EPA has independent enforcement authority under the CWA for unauthorized discharges. The Corps works closely with the EPA to coordinate the most effective and efficient resolution of Section 404 CWA violations. A violation of the CWA involves the discharge of pollutants into WOTUS from a point source by any person without authorization or exemption. An aspect of enforcement is compliance monitoring. The purpose of compliance monitoring is to check to see if a representative sample of the projects that were approved were actually built according to permit conditions. Compliance monitoring needs to be conducted routinely to measure program effectiveness and act as a deterrent to permittees either not reading, not understanding, or ignoring the terms and conditions in their permits, and to discourage the submission of incomplete, poorly prepared and inaccurate as-built drawings.

Unauthorized Activity (Unauthact)

Once a permit is issued, compliance with all terms and conditions of the permit is required. The Corps may conduct inspections during or after construction to determine if the work is in compliance with the permit. If the Corps determines the work is not in compliance, the permittee may voluntarily bring the violation into compliance, or the Corps may issue a permit modification if appropriate.

In cases where resolution of the violation cannot be reached, the Corps may issue a compliance order. If a permittee fails to comply with the compliance order, the Corps may suspend or revoke the permit, initiate administrative penalties up to $27,500, or take legal action for criminal or civil actions to obtain penalties (or all three). Penalties of up to $50,000 per day and/or imprisonment for up to three years may be imposed for any person who knowingly violates the CWA.

The Alaska District reported 164 unauthorized (39/year) and 46 (9/year) noncompliance actions during 2017-2022. It is not clear how many of these actions included site visits.

Appeals

The Corps has an administrative appeal process whereby applicants and landowners may appeal denied permits, issued permits that contain requirements that are unacceptable to the applicant or jurisdictional determinations, which are made by the Alaska District. Appeals by third parties are not allowed, except through federal court. The request for an appeal of such decisions must be submitted to the Corps within 60 days of the date of the appealable decision. A site visit or an appeal conference or meeting may be conducted during the appeal process.

The Pacific Ocean Division (POD) located in Hawaii is responsible for making appeal decisions for the Alaska District. The POD office normally makes a decision on the merits of the appeal based on the administrative record in 90 days. The division will either uphold the Alaska District decision or remand the case back to the Alaska District with direction for reconsideration of the Alaska District's initial determination. After re-evaluation, the Alaska District is to make a final decision. This final decision is not subject to further appeal.

The reported number of appeals equals 2 (<1/year).

Letters of Permission (LOP)

LOP is a type of Individual Permit issued through an abbreviated processing procedure that includes coordination with federal and state fish and wildlife agencies, and a public interest evaluation, but without the publishing of an individual public notice. The LOP cannot be used to authorize the transportation of dredged material for the purposed of dumping it in ocean waters.

LOPs may be used:

(1) In those cases subject to Section 10 of the Rivers and Harbors Act of 1899, when the Corps has determined the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. Examples of activities that may qualify for a Section 10 LOP include: fixed or floating small private boat docks, private piers, maintenance dredging using existing disposal sites, etc.

Or

(2) In those cases, subject to Section 404 of the CWA after:

(A) The District Engineer, through consultation with federal and state fish and wildlife agencies, the Regional Administrator, Environmental Protection Agency, the state water quality certifying agency (DEC, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures;

(B) The District Engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and

(C) A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.

All LOPs in the Alaska District's data base are for Section 10 actions. No actions are counted in the finalized actions. These Section 10 actions are retained by the Corps after State 404 Program assumption.

Current Number and Types of Alaska District Permits

Based on the actions described above the Alaska District finalized a total of 3,873 (775/year) CWA actions from 2017 to 2022. There are over 840 (168/year) actions that fall into categories of no data or not in Corps' jurisdiction. These actions still require the Alaska District to file a reply.

Defining Assumable Waters (State workload)

Once the State of Alaska assumes the 404 Program, it can issue State 404 permits, but only in assumable waters. The first question that arose in the workload analysis is what portion of the Alaska District's workload would be assumable? This posed a dilemma because at the time of this writing, no determination by the State of Alaska and the Alaska District has been made regarding which waters in Alaska are assumable and which are not. To get a sense of the program by region and area of the State the number of Corps' actions will be viewed by area.

Location of Permitting Activity

The data shows permitting activity spread over Alaska. Heavier permit activity occurs throughout the south central, interior and far north regions. The permits are concentrated in population centers and on the North Slope. The next area with substantial permit activity is the southeast, which is accessible only by air or marine ferry routes. The Alaska District has offices in Fairbanks, Anchorage, Kenai, and Juneau. The Anchorage Office is located on Joint Base Elmendorf, and the Fairbanks office is located on Fort Wainwright.

The Fairbanks Office is responsible for the Fairbanks North Star Borough, the Taylor Highway westward to the Parks Highway north of the Alaska Range, the Dalton Highway, and all military projects north of the Alaska Range, including the cities of Big Delta, Birch Creek, Central, Chena Hot Springs, Chicken, Circle, Circle Hot Springs, Delta Junction, Dot Lake, Dry Creek, Ester, Fairbanks, Fox, Healy, Healy Lake, Livengood, Manley Hot Springs, Minto, Nenana, North Pole, Rampart, Tanacross, and Tok.

The Juneau Office is responsible for projects located in southeast Alaska, from Cape Suckling south to Cape Fanshaw, Admiralty Island, Chichagof and Baranof Islands. Communities include Angoon, Gustavus, Haines, Juneau, Klukwan, Skagway, Elfin Cove, Hoonah, Pelican, Port Alexander, Sitka, Tenakee Springs, and Yakutat.

The Kenai Office is responsible for projects located within the Aleutian Chain, the Bristol Bay Borough, the Kenai Peninsula Borough, the Kodiak Island Borough, and the Lake & Peninsula Borough.

The Anchorage office is responsible for all projects not located in areas covered by the three field offices.

If staffing or vacancies occur within offices, the Alaska District will cross boundary lines to staff projects. A consideration in operating a regulatory program is how to deploy the correct number of staff to cover the projected activities. If assigned staff are located near to their work, less staff time is spent traveling to sites, and customer service improves as applicants can meet with staff and staff make site visits.

To identify the greatest concentrations of workload, the boroughs were ranked from the highest to the lowest in the table below. This is intended to give a general indication of the geographical distribution of workload. Limitations of Table 1 are that the data is not sorted by permit type, wetland or non-wetland impact, and assumable vs. non-assumable. While future project location patterns may change, they are unlikely to change very much based on five years of data.

Total Number of Actions in Each Borough/Census Area with Begin Dates from 2018-2022

Borough/Census Area	Section 10	Section 10/404	Section 404	No Authority Data	Grand Total
Kenai Peninsula Borough	315	84	381	682	1462
North Slope Borough	8	67	345	363	783
Fairbanks North Star Borough	8	40	253	339	640
Matanuska-Susitna Borough	21	39	274	276	610
Anchorage Municipality	13	38	187	335	573
Yukon-Koyukuk Census Area	9	19	169	265	462
Valdez-Cordova Census Area	41	37	108	198	384
Ketchikan Gateway Borough	69	36	60	205	370
Bethel Census Area	1	9	154	165	329
Juneau City and Borough	19	61	103	104	287
Prince of Wales-Hyder Census Area	53	20	57	133	263
Nome Census Area	4	27	90	140	261
Blank	1	7	20	222	250
Southeast Fairbanks Census Area	-	6	68	112	186
Kodiak Island Borough	14	17	26	87	144
Wrangell City and Borough	21	14	34	70	139
Northwest Arctic Borough	4	9	42	72	127
Petersburg Borough	5	13	34	60	112
Sitka City and Borough	25	31	29	24	109
Aleutians West Census Area	8	11	11	67	97
Denali Borough	2	4	45	46	97
Hoonah-Angoon Census Area	18	18	29	27	92
Kusilvak Census Area	-	5	51	32	88
Lake and Peninsula Borough	3	7	11	43	64
Dillingham Census Area	8	14	13	29	64
Haines Borough	3	17	13	26	59
Aleutians East Borough	14	5	1	19	39
Bristol Bay Borough	3	1	5	10	19
Yakutat City and Borough	3	5	5	4	17
Skagway Municipality	3	3	5	4	15
Grand Total	**696**	**664**	**2623**	**4159**	**8142**

State programs with wide-reaching responsibility, such as other water quality programs, natural resources and land management programs, transportation and fish and wildlife agencies, typically have regional offices throughout a state. Some of those regional offices are co-located with headquarters offices. Co-location reduces indirect (overhead) costs for such essentials as office space and vehicles. State natural resource programs are frequently integrated in this way, giving states the advantage of providing better one-stop-shopping types of services than the

federal government. State offices would not be located on Federal military bases. This level of service is expected by many state citizens and is one factor that sets states apart from the federal government.

Appendix 9. Methodology to Evaluate Corps' Workload and State Workload under 404 Program Assumption

Summary of all Corps' ORM-2 Data 2018-2022

The Alaska District provided all ORM-2 data from the 2018-2022 timeframe to DEC. An analysis was conducted to evaluate Corps' workload to be used to extrapolate potential State workload under 404 Program assumption. Since the State cannot assume the program for all waters, assumptions were made regarding Corps-retained waters.

Data actions in the ORM-2 database include all AJD, APPEAL, COMPCERT, CONGRINQA, DANGERZON, DEVESAEFH, DEVINLIEUA, DEVMBA, DEVRPSS, EIS, EMERGA, FOIAA, LOP, NONCOMPLY, NPR, NWP, PERMITMOD, PERMTRANS, PGP, PJD, PREAPPCONS, PUBMEETA, RGP, SP, STRMOD, and UNAUTHACT. For purposes of this analysis, where actions are not attributed to Section 10, Section 10/404, or Section 404, they have been identified as "No Authority Data."

This analysis looks at total Corps' actions, as that is more representative of Corps' workload than a simple count of the number of permits issued. A copy of the entire workbook of tables has been provided to DEC. This analysis is a summary of the workbook tables.

*DA numbers in the workbook of tables represent individual projects. They are counted more than once within the tables if they were withdrawn and later resubmitted or if permits were submitted under more than one authority.

Total Number of Actions in Each Authority with Begin Dates from 2018-2022

Section 10 Actions	Section 404 Actions	Section 10/404 Actions	No Authority Data	Total Actions from 2018-2022
696	2623	664	4159	8142

Summary of all Data

Total Number of Actions in Each Borough/Census Area with Begin Dates from 2018-2022

Borough/Census Area	Section 10	Section 10/404	Section 404	No Authority Data	Grand Total
Aleutians East Borough	14	5	1	19	39
Aleutians West Census Area	8	11	11	67	97
Anchorage Municipality	13	38	187	335	573
Bethel Census Area	1	9	154	165	329
Bristol Bay Borough	3	1	5	10	19
Denali Borough	2	4	45	46	97
Dillingham Census Area	8	14	13	29	64
Fairbanks North Star Borough	8	40	253	339	640
Haines Borough	3	17	13	26	59
Hoonah-Angoon Census Area	18	18	29	27	92
Juneau City and Borough	19	61	103	104	287
Kenai Peninsula Borough	315	84	381	682	1462
Ketchikan Gateway Borough	69	36	60	205	370
Kodiak Island Borough	14	17	26	87	144
Kusilvak Census Area		5	51	32	88
Lake and Peninsula Borough	3	7	11	43	64
Matanuska-Susitna Borough	21	39	274	276	610
Nome Census Area	4	27	90	140	261
North Slope Borough	8	67	345	363	783
Northwest Arctic Borough	4	9	42	72	127
Petersburg Borough	5	13	34	60	112
Prince of Wales-Hyder Census Area	53	20	57	133	263
Sitka City and Borough	25	31	29	24	109
Skagway Municipality	3	3	5	4	15
Southeast Fairbanks Census Area		6	68	112	186
Valdez-Cordova Census Area	41	37	108	198	384
Wrangell City and Borough	21	14	34	70	139
Yakutat City and Borough	3	5	5	4	17
Yukon-Koyukuk Census Area	9	19	169	265	462
Blank	1	7	20	222	250
Grand Total	**696**	**664**	**2623**	**4159**	**8142**

Rationale from Estimating Potential State Workload

To determine how many actions are attributed to Section 404 authority, all Section 10 authority actions were removed since Section 10 permits will remain with the Corps. Section 10/404

authority actions were then removed, assuming if the action was in a Section 10 water the wetlands will be within the correct distance to be considered adjacent and will remain with the Corps.

Actions	Number of Actions
Total Corps' Actions	8142
Remove Section 10 authority actions	-696
Remove all Section 10/404 authority actions	-664
Total estimated State actions	6782

To determine percentage of assumable actions (potential State workload as a percentage of existing Corps' workload) the total remaining actions (6782) were divided by the total actions (8142) and multiplied by 100 = 83% of the actions are assumable or, stating the converse, 17% of all action types are Section 10 and Section 10/404 and remain with the Corps.

This does not account for the missing data in the database, "No Authority Data" actions which total 4159. This represents a substantial portion of the summary data tied to an action. This data was reviewed, and it is clear from the *Authority of all Actions Table* that there is only one action that is Authority specific to Section 10 (DANGERZON). All the other actions can apply to Section 10 and or Section 10/404. Therefore, the assumed calculated percentage of Section 10 and Section 10/404 in this authority would apply at the same ratio through all action types.

The 83% was applied to the No Authority Data number of actions (4159)(.83) =3452

No Authority Actions equals 3452 assumable actions, added to the Section 404 only actions (2623) (all potentially assumable) totals 6075 assumable actions.

Actions assumable by the State can now be tabulated and calculated as percent of the Corps' workload. The potential State workload (6075 actions) divided by the total Corps' workload (8142 actions) multiplied by 100 equals 75%.

The State can expect to assume approximately 75% of the Corps' workload under program assumption. This may vary depending on the final decisions on retained/assumable waters.

Total Number of State Assumable Actions in Each Authority from 2018-2022

Section 10 Actions	Section 404 Actions	Section 10/404 Actions	No Authority Data	Total Assumable Actions from 2018-2022	Percent of Total workload
0	2623	0	3452	**6075**	**75%**

Appendix 10. Analysis of Changing Nature of Corps' Workload

Permit Number Between Data Set Analysis

The Corps supplied ORM data that could be searched in 2022. Therefore, there is more data that in the 2018 -2022 data than the 2005 to 2014 data.

In the 2018-2022 the data can be sorted by AJD (Approved Jurisdictional Determination), APPEAL (Appeal), COMPCERT (Compliance Action) , CONGRINQA (Congressional Inquiry), DANGERZON, (Danger Zone Action), DEVESAEFH (Develop Programmatic ESA or EFH Consultation), DEVINLIEUA (Develop In-Lieu Fee Program), DEVMBA (Develop Mitigation Bank), DEVRPSS(Develop RGP/PGP/SPGP/Section 404-LOP), EIS (Environmental Impact Statements), EMERGA Emergency Action), FOIAA (Freedom of Information Act Action), LOP (Letter of Permission), NONCOMPLY (Noncompliance), NPR (No Permit Required), NWP (Nationwide Permit), PERMITMOD (Permit Modification), PERMTRANS Permit Transfer) , PGP (Programmatic General Permit) , PJD (Preliminary Jurisdictional Determination), PREAPPCONS (Pre-Application Consultation), PUBMEETA Public Meeting), RGP (Regional General Permit), SP (Standard Permit), STRMOD (Structure Modification), UNAUTHACT (Unauthorized Activity).

The 2005-2014 data set was supplied as a sorted excel table. The data did not include: AJD, APPEAL, COMPCERT, CONGRINQA, DANGERZON, DEVESAEFH, DEVINLIEUA, DEVMBA, DEVRPSS, EIS, EMERGA, FOIAA, NONCOMPLY, NPR, PERMITMOD, PERMTRANS, PREAPPCONS, PUBMEETA, STRMOD, UNAUTHACT.

The only comparison that can be done to determine workload trends is to use equivalent data between the two data sets. The common action types include LOPs, NWPs, PGPs, RGPs, and SPs. Using this data allows for a permit issued comparison. Data found in the data sets was incomplete from 2001-2004, 2012-2017, and in 2022.

Because incomplete data years can skew yearly results, the following tables only include years with complete data. The data is shown in four-year increments for consistency.

Authority of Actions with Begin Dates from 2005 through 2008

Action Type	Section 10	Section 10/404	Section 404	No Authority Data	Total
LOPs	-	-	-	12	**12**
NWPs	412	433	626	802	**2273**
PGPs	2	3	6	4	**15**
RGPs	64	66	114	229	**473**
SPs	128	90	156	54	**428**
Total	**606**	**592**	**902**	**1101**	**3201**

Total of Section 10/404 and 404 = **1494**

Authority of Actions with Begin Dates from 2009 through 2012

Action Type	Section 10	Section 10/404	Section 404	No Authority Data	Total
LOPs	-	-	-	3	**3**
NWPs	297	370	696	393	**1756**
PGPs	-	-	-	-	**-**
RGPs	43	42	190	133	**408**
SPs	59	55	177	15	**306**
Total	**399**	**467**	**1063**	**544**	**2473**

Total of Section 10/404 and 404 = **1530**

Authority of Actions with Begin Dates from 2018 through 2021

Action Type	Section 10	Section 10/404	Section 404	No Authority Data	Total
LOPs	190	-	-	13	**203**
NWPs	172	275	1038	70	**1555**
PGPs	-	-	4	-	**4**
RGPs	231	1	213	36	**481**
SPs	12	95	166	50	**323**
Total	**605**	**371**	**1421**	**169**	**2566**

Total Section 10/404 and 404 = **1792**

The section 10 permits were not accounted and only Section 10 and Section 404 permits were totaled. The No Authority data was ignored to ensure compatible data.

Section 10/404 and 404 Actions from 2005 through 2021

Complete Data Years	Section 10/404 and Section 404	Permit Average
2005-2008	1494	374
2009-2012	1530	383
2018-2021	1792	448

The permits have increased from 374 to 383 to 448 permits. This is an increase of seventy-two permit actions from the 2005 until 2021 or a **16% increase**.

Another way is to look at data is by Boroughs and Census areas using the same LOPs, NWPs, PGPs, RGPs, and SP actions.

Actions by Borough 2005 through 2008

Row Labels	Section 10	Section 10/404	Section 404	No Authority Data	Grand Total
Aleutians East	4	2	5	8	19
Aleutians West	4	4	7	3	18
Anchorage	17	8	78	95	198
Bethel	20	56	29	60	165
Bristol Bay	2	2	1	3	8
Denali	5	4	10	5	24
Dillingham	2	4	3	3	12
Fairbanks North Star	28	58	81	44	211
Haines	5	3	11	12	31
Juneau	40	16	37	49	142
Kenai Peninsula	183	130	111	229	653
Ketchikan Gateway	39	34	21	38	132
Kodiak Island	8	11	8	34	61
Lake and Peninsula	3	3	4	10	20
Matanuska-Susitna	31	48	104	87	270
Nome	18	14	37	25	94
North Slope	39	60	46	70	215
Northwest Arctic	24	16	17	54	111
Prince of Wales-Outer Ketchikan	38	21	49	45	153
Sitka	10	6	39	28	83
Skagway-Hoonah-Angoon	9	4	9	22	44
Southeast Fairbanks	6	9	44	38	97
Valdez-Cordova	31	17	46	67	161
Wade Hampton	4	9	12	7	32
Wrangell-Petersburg	20	15	43	29	107
Yakutat	5	1	10	5	21
Yukon-Koyukuk	11	37	40	31	119
Total Actions	**606**	**592**	**902**	**1101**	**3201**

Actions by Borough 2009 through 2012

Borough	Section 10	Section 10/404	Section 404	No Authority Data	Grand Total
Aleutians East	3	6	4	2	15
Aleutians West	4	5	5	4	18
Anchorage	13	16	107	65	201
Bethel	7	10	40	8	65
Bristol Bay	1	1	2	-	4
Denali	4	8	29	17	58
Dillingham	-	10	11	4	25
Fairbanks North Star	13	44	87	8	152
Haines	6	1	11	2	20
Juneau	18	21	43	19	101
Kenai Peninsula	129	77	117	121	444
Ketchikan Gateway	25	20	29	11	85
Kodiak Island	11	3	17	8	39
Lake and Peninsula	1	23	18	24	66
Matanuska-Susitna	23	19	102	54	198
Nome	28	59	39	16	142
North Slope	35	59	71	21	186
Northwest Arctic	13	5	17	10	45
Prince of Wales-Outer Ketchikan	16	8	37	14	75
Sitka	11	12	18	12	53
Skagway-Hoonah-Angoon	5	6	7	10	28
Southeast Fairbanks	1	4	40	31	76
Valdez-Cordova	7	9	56	36	108
Wade Hampton	2	8	18	4	32
Wrangell-Petersburg	11	14	49	9	83
Yakutat	1	1	2	1	5
Yukon-Koyukuk	11	18	87	33	149
Total Actions	**399**	**467**	**1063**	**544**	**2473**

Actions by Borough 2018 though 2021

Borough	Section 10	Section 10/404	Section 404	No Authority Data	Grand Total
Aleutians East Borough	13	5	1	3	22
Aleutians West Census Area	7	8	6	2	23
Anchorage Municipality	13	20	107	7	147
Bethel Census Area	1	4	84	4	93
Bristol Bay Borough	3	1	2	-	6
Denali Borough	1	2	29	-	32
Dillingham Census Area	6	7	10	2	25
Fairbanks North Star Borough	6	23	121	7	157
Haines Borough	3	10	7	2	22
Hoonah-Angoon Census Area	16	9	16	1	42
Juneau City and Borough	18	21	48	9	96
Kenai Peninsula Borough	274	54	194	33	555
Ketchikan Gateway Borough	63	26	42	5	136
Kodiak Island Borough	13	13	22	1	49
Kusilvak Census Area	-	4	26	3	33
Lake and Peninsula Borough	3	3	6	2	14
Matanuska-Susitna Borough	19	17	129	10	175
Nome Census Area	1	19	43	7	70
North Slope Borough	6	46	208	11	271
Northwest Arctic Borough	4	4	26	7	41
Petersburg Borough	4	5	26	-	35
Prince of Wales-Hyder Census Area	46	12	25	7	90
Sitka City and Borough	22	12	19	1	54
Skagway Municipality	2	2	4	-	8
Southeast Fairbanks Census Area	-	4	46	6	56
Valdez-Cordova Census Area	37	17	62	6	122
Wrangell City and Borough	14	8	15	5	42
Yakutat City and Borough	3	2	3	-	8
Yukon-Koyukuk Census Area	7	10	85	15	117
Blank	-	3	9	13	25
Total Actions	**605**	**371**	**1421**	**169**	**2566**

The information displayed by Borough allows a look at trends over time. ORM data entry is becoming more consistent as fewer actions have no authority. Permits continue to be issued in

population and industrial areas of the Kenai Peninsula, Fairbanks, North Slope, Matanuska-Susitna, North Star Boroughs, and the Municipality of Anchorage.

It important to note that tasks not represented in the in 2005 to 2014 data exist in today's workload. The 404 Program has gotten more complicated over time for multiple reasons. The changing WOTUS Rules, Mitigation Rule, CWA 401 coordination requirements, changing NWPs to include preconstruction notifications (PCNs), and RGPs with PCN requirements. There are fewer non reporting NWP and RGPs being reauthorized every five years. Each round of Regional and General Permit conditions result in more Federal and State agency coordination and conditions.

In 2008 the State of Alaska assumed the NPDES EPA Federal permitting process. EPA no longer leads EIS CWA 402 actions in Alaska. This change leaves the Corps as the major Federal agency on major construction projects where there is no Federal Land Manager. Examples include the Pebble Mine Application, Donlin Gold Mine EIS, Alaska Stand Alone Pipeline, and the Nanushuk Project.

The Corps must determine on each permit application if the agency has jurisdiction for the placement of fill or structures/work in waters of the United States, including wetlands. The Corps performs Jurisdictional Determination (JD) as a free service to the public upon request, excluding JD requests involving areas greater than five acres or those requiring considerable labor hours. To expedite the permit process, the Corps encourages applicants to use consultants to submit Jurisdictional Determination Reports (JDRs), for large, complex projects. JDRs are submitted to the Corps for review and verification as a Preliminary JD (PJD). If the Corps agrees with the PJD conclusions, they will complete the required documentation to convert the JDR to an Approved JD (Special Public Notice 2020-00399). This work continues to get more complex as WOTUS rules change and RGLs or court cases add additional documentation to the PJD process.

In October 2016 RGL 16-01 provided additional instructions on PJDs and AJDs. The Corps included a PJD request form and documentations sheets adding to internal paperwork requirements. The paperwork and requirements change with each WOTUS change.

RGLS are completed by HQ and the Districts are obligated to follow the prescribed RGL instructions.

Appendix 11. Required Components of a State Assumption Application

Regulations beginning at 40 CFR § 233.10 describe the elements of a state application to administer the 404 permit program. The application must be submitted (in triplicate) to the EPA Regional Administrator. The state should also submit the application electronically. While covered under different regulations than those for the 402 Program, the application elements are similar and DEC has good templates to start from, based on the 402 primacy application completed in 2008 (Primacy Application, October 29, 2008 - Program Description (alaska.gov). The main elements are shown in Table 5. Required Elements of a 404 Program Assumption Application and described below.

There are six elements to the application:

Governor's Letter

The application requires a cover letter from the Governor to the EPA Administrator requesting approval under CWA Section 404(g) for the state to administer its own permit program for the discharge of dredged or fill material into navigable waters of the state (subject to specific limitations described in Section 4.5).

Program Description

The application must include a complete Program Description (PD), as described in 40 CFR § 233.11. The PD must include the scope and structure of the State's program, the extent of the State's jurisdiction, scope of regulated activities, interagency coordination, and permit exemptions, and permit review criteria. It must describe procedures for permitting, including public and administrative review; the State's organizational structure, including other agencies that may be involved and their role; funding and manpower needs; anticipated workload (JD's, permitting including number of discharges under different permitting tools, mitigation, inspection and compliance/enforcement); copies of all forms to be used in administering the program and a description the program data management system; the compliance evaluation and enforcement program and policy including coordination with the Corps and EPA; State jurisdictional waters and waters retained by the Corps, including a comparison of State and Federal definitions of wetlands (note that for the 402 Program implementation, Alaska adopted a regulatory definition of "waters of the U.S." that tracks the federal definition); and, a description of how the State will address certain exemptions for farm roads, forest roads, or temporary roads for moving mining equipment (404(f)(1)(e)). See Appendix 12. Program Description Outline for 404 Program Assumption. It's important to note that DEC needs to develop the PD and that all program elements described in the PD must be in place before or by program assumption approval.

Attorney General's Statement

The application package must include a statement by the Attorney General that the laws and regulations of the State provide adequate authority to carry out the program set forth in the Program Description submitted by DEC. The statement must cite specific statutes and

regulations which are fully adopted by the time the assumption application is submitted and effective by the time the program is approved. This timing was a challenge when the State sought approval of the 402 Program but can be addressed by making the State regulations effective upon EPA approval of the program.

If more than one agency has responsibility for administering the State program, the AG Statement must certify that each agency has full authority to administer the program within its category of jurisdiction. If program responsibilities are assigned to DNR or DF&G, their authority to conduct those responsibilities must be described and the State, as a whole, must have authority to implement the entire State 404 Program.

The AG statement must include a legal analysis of State law regarding the prohibition on taking private property without just compensation and how that may affect successful program implementation. Note that the AG Statement for the 402 Program did not require such an analysis, however, Alaska law is similar to federal law regarding takings and will have no impact on successful 404 Program implementation.

The AG statement should include a crosswalk between the State program authorities and the federal program authorities to demonstrate the State's program does not reduce environmental protections offered by federal law.

MOA with the Regional Administrator

The program assumption application must include a MOA signed by the DEC Commissioner and the Regional Administrator (See Appendix 13. Outline for MOA with the EPA Regional Administrator). If DNR or DF&G have responsibility for portions of program implementation, they will need to be parties to the MOA, with their commissioner's signatures.

The MOA must include classes and categories of permit applications for which EPA will waive federal review (as specified in 40 CFR § 233.51). As a provision of the MOA, DEC should propose to EPA establishing heavier oversight in the early years of program implementation and less federal oversight over time (see Section 3.4 EPA Oversight).

The MOA must include the frequency and content of reports, documents, and other information which the State needs to submit to EPA, including the annual report and date for submission. DEC should define reporting based upon the State fiscal year, to coincide with other, internal, State reporting requirements. The MOA also needs to grant access to EPA to review State records, reports, and files related to administration of the approved program and should provide DEC with access to relevant EPA records

The MOA must define EPA and State roles regarding coordination with respect to compliance monitoring and enforcement activities. While EPA will retain enforcement authority over State-issued permit violations (or unpermitted activities), as with the 402 Program, the MOA should include provisions that EPA must first notify the State that it is aware of a potential violation and give the State the first right to take follow up actions. It should also give the State the right to request EPA assistance with a compliance/enforcement action.

Finally, the MOA must include provisions for modification.

MOA with the Secretary

The program assumption application must include a MOA signed by the DEC Commissioner and the Secretary of the Army (See Appendix 14 Outline for MOA with the Secretary of the Army).

If DNR or DF&G have responsibility for program implementation, they will need to be parties to the MOA, with their commissioner's signatures.

The MOA must include a description of waters of the United States over which the Corps retains jurisdiction. These are to be identified by the Corps.

The MOA must include procedures, upon program approval, for transfer to the State of pending 404 permit applications for discharges into State assumed waters, and other relevant information. The MOA can be used to describe any "phase-in" of full program assumption. A phase-in could be based on geographic areas; recognize pending permit applications; transfer certain permit types (for example, State take-over of federal GPs); or consider the seasonality of the permit application cycle. The MOA should also document the procedures for coordination on joint public notice and hearings where both parties may be involved in permitting a project, for example, Corps' permits in retained waters and State certification of those permits. If federal regulations are updated to allow "partial" program assumption prior to DEC submitting its assumption application and DEC wants to seek partial assumption, the MOA can describe work the State will assume. The MOA can be used as a vehicle to make DEC a co-chair with the Corps of the State Interagency Review Team.

The MOA must also identify all GPs (NWP, PGP, RGP) issued by the Corps that the State intends to administer upon program approval, and a plan for transferring responsibility for them to the State, along with files, compliance reports, records of enforcement actions, and other relevant information.

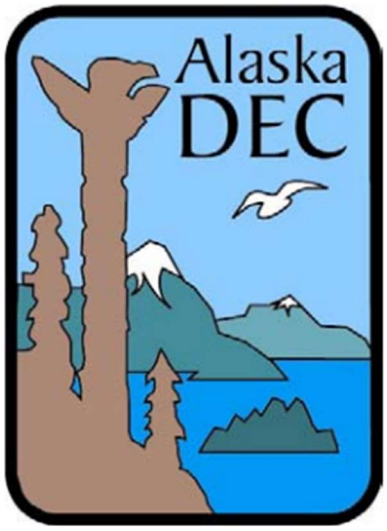
Statutory Authority and Regulations

The program assumption application must include copies of all applicable State statutes and regulations governing the program, including regulations regarding administrative and appeals procedures.

Appendix 12. Program Description Outline for 404 Program Assumption

Document begins on next page.

Alaska's State 404 Program
Program Description



Division of Water

Alaska Department of Environmental Conservation

[Date]

Draft January 2023

Program Description Table of Contents

[*Based on Michigan's recent 404 Program application and DEC's 402 Program Description. Note that Michigan included a lot of their PD information in a "State 404 Program Applicant's Handbook." DEC will need to ensure all that information is covered in the PD, appendices, or other attachments and guidance documents.]

Table of Contents

List of Tables

List of Appendices

Abbreviations and Acronyms

1. Introduction

Purpose

The following program description documents the structure, organization, and procedures that the Alaska Department of Environmental Conservation (DEC) will follow to administer Section 404 of the Clean Water Act (CWA) in the state of Alaska, pursuant to 33 USC §1344 (g).

Guidance

This document is a full and complete description of the Alaska State 404 Program that will be established and administered under State law. It includes all information necessary for the Environmental Protection Agency's (EPA) review and approval in accordance with the provisions of 40 CFR Part 233. The program description is organized in sections with each section corresponding to the lettered requirement in 40 CFR § 233, with one additional section titled "Additional Information" that includes information that may not fit exactly within a lettered category. In instances where detailed descriptions of the permitting program standards and procedures are required, a reference is provided to the memorandum of agreement (MOA), Memorandum of Understanding (MOU), document, or State 404 Program regulation that describes those standards and procedures. The standards and procedures are not repeated in detail within this document. Helpful links to the DEC website are provided throughout for convenience.

Legislative Authority

In 2013, the legislature passed, and the governor signed, SB 27 directing DEC and DNR to evaluate the potential benefits, costs, and consequences to the State of assuming primacy for regulating dredge and fill activities under 33 U.S.C § 1344. The bill directs the agencies to take reasonable steps to assume primacy and provides broad authority to take actions, including adoption of regulations necessary to obtain federal approval of a State program and to implement the program. [Describe any subsequent legislative authority, if any] DEC will implement the law and regulations adopted thereunder.

Overview

State assumption of the 404 Program will provide a streamlined permitting procedure where both federal and State requirements are addressed by State permits. This will provide greater certainty to the regulated community, conserve resources of both applicant and regulator, and afford the State greater control over its natural resources while complying with federal law. When Alaska's program is approved, it will be the fourth state to implement a state-assumed program. Assumption of the dredge and fill permitting program under section 404 of the CWA will result in significant efficiencies for permittees and allow better engagement with the public, while rigorously protecting the environment. The State 404 Program will apply to any project proposing dredge or fill activities within State assumed waters. Such projects include, but are not limited to: single family residences; commercial developments; utility projects; environmental restoration and enhancement; linear transportation projects; governmental development; certain

agricultural and silvicultural activities; and in-water work within assumed fresh water bodies such as docks, piers, marinas, living shorelines, and other shoreline stabilization.

[Describe any pre-public notice stakeholder process] A public notice of proposed rules for the State 404 Program was published on [date]. As part of the rule development process DEC held [workshops/hearings] available to residents throughout the State. [List dates and locations] The public comment period ran from [date] until [date]. All comments and public input were reviewed and incorporated into the draft rule as appropriate. The final rule was adopted on [date] and certified by the Lt. Governor on [date]. The rules will become effective on the date that EPA publishes approval of Alaska's program in the Federal Register. The finalized rules are included in this submission, along with other required components of the assumption package such as Memoranda of Agreement (MOAs) between DEC and the Corps and DEC and EPA. DEC continues to prepare for assumption by conducting both beginner and advanced level wetland delineation training and State 404 Program regulatory and compliance training, which will be provided to existing staff prior to the effective date of assumption and will be provided on regular intervals and as needed into the future. The Department worked diligently with EPA, the U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) to ensure that the State’s process for complying with the requirements of the Endangered Species Act (ESA) is at least as stringent as the federal program. Additionally, the Department has been working with EPA, the State Historic Preservation Office, and Tribes to ensure that the outcomes of the State’s process for protection of historical and cultural resources are at least as protective as those under the federal process.

2. Description of the Scope and Structure of the State's Program (required by 40 C.F.R § 233.11(a))

Purpose of Section (a)

The purpose of Section (a) is to provide the information required in 40 CFR § 233.11(a), which states: "The program description as required under §233.10 shall include: (a) A description of the scope and structure of the State's program. The description should include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria;"

State 404 Program Jurisdiction

In accordance with [Alaska statutes/regulations] the State 404 Program governs all dredge and fill "activity" in waters of the United States regulated by the State under section 404(g)-(l) of the CWA, 33 U.S.C. §§ 1344(g)-(l). The State will administer the CWA section 404 dredge and fill permitting program within assumed waters. The Army Corps of Engineers (USACE) will retain administration of the CWA section 404 dredge and fill permitting program within retained waters.

Agency Coordination

[Briefly describe MOAs with EPA, USACE, USFWS; describe roles of DNR mapping, OPMP, SHPO, and DF&G and any MOAs; identify that DEC may also coordinate with Tribes under the Tribal and Local Government Coordination guidance document]

Scope of Activities Regulated by the State 404 Program

DEC regulations at [insert reference] require that an applicant receive a State 404 Program permit prior to discharging any dredge or fill material in, on, or over State-assumed WOTUS unless the activity qualifies for an exemption. The State 404 Program provides several types of authorizations: verifications of exemption, [permit by rule?], General Permits, and Individual Permits. Where required, applicants must submit the appropriate application with supporting documentation to the Department for review and authorization prior to commencing any regulated activity. A [matrix/website?] to assist applicants in determining the appropriate application form based on the type of authorization required is located [where?]. Typical dredge and fill activities in Alaska include, but are not limited to:

• Dredging • Filling • Wetlands restoration • Excavation • Commercial developments • Residential developments • Single-family residences • Utilities • Transmission lines • Roadways • Airports • Marinas • Docks • Piers • Boat ramps • Dams • Levees • Mining activities

State 404 Program Permit Exemptions

Pursuant to [reference State regulation], a State 404 Program permit is not required for the activities described in 40 CFR §232.3. Notice to the Department is not required to conduct an exempt activity.

State 404 Program General Permits

[Describe federal General Permits the State is assuming and any General Permits already in place. Can refer to the Corps' MOA.]

State 404 Program Individual Permits

3. Description of the State's Permitting, Administrative, Judicial Review and Other Applicable Procedures (required by 40 CFR § 233.11(b))

Purpose of Section (b)

The purpose of Section (b) is to provide the information required in 40 CFR § 233.11(b), which states: “The program description as required under §233.10 shall include: (b) A description of the State's permitting, administrative, judicial review, and other applicable procedures;”

General Summary of Procedures

Specific Permitting and Verification Procedures

Jurisdictional Determinations

General Permits

Individual Permits

Administrative and Judicial Review

4. Description of the Basic Organization and Structure of the Alaska Department of Environmental Conservation, Which will have Responsibility for Administering the State 404 Program (Required by 40 CFR § 233.11(c))

Purpose of Section (c)

The purpose of Section (c) is to provide the information required in 40 CFR § 233.11(c), which states: "The program description as required under §233.10 shall include: (c) A description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program;"

DEC

[Overview of Department and Divisions]

Division of Water

[overview of Programs, organization, attach org charts, include permitting, compliance and enforcement, mitigation, data management, administration]

Other State Agency Roles

[DNR Geospatial mapping, SHPO, OPMP, DF&G]

5. Description of the Funding and Person-Power Which will be Available for Program Administration (Required by 40 CFR § 233.11(d))

Purpose of Section (d)

The purpose of Section (d) is to provide the information required in 40 CFR § 233.11(d), which states: "A description of the funding and manpower which will be available for program administration;"

Introduction

State 404 Program FTE

[Identify staff numbers by job class, location (including plans to move staff to Wasilla or Soldotna) and general job duties (i.e. jurisdictional determinations, engineering, General Permit Authorizations and Individual Permits, mitigation, inspection/compliance, administrative)]

Staff Funding

[Identify numbers of staff, including existing or new staff in related programs such as Water Quality Standards that support the program]

[Identify funding source, by year for first full year after assumption approval]

6. An Estimate of the Anticipated Workload (Required by 40 CFR § 233.11(e))

Purpose of Section (e)

The purpose of Section (e) is to provide the information required in 40 CFR § 233.11(e), which states: “An estimate of the anticipated workload, e.g., number of discharges."

Analysis of Corps' Workload and State-Assumable Workload

[Use data from January 2023 Feasibility Study]

Estimated Number of State 404 Program Permits by Geographic Region

[Anchorage, Fairbanks, Juneau. Use data from the January 2023 Feasibility Study. Demonstrate DEC has sufficient staff to carry out the assumed workload. Consider analysis of the time it takes to conduct specific activities such as JDs, GP authorizations, IPs]

Program Reassessment

[Staffing and funding needs are reassessed annually with development of the annual governor's budget request.]

7. Copies of Permit Application Forms, Permit Forms, and Reporting Forms (Required by 40 CFR § 233.11(f))

Purpose of Section (f)

The purpose of Section (f) is to provide the information required in 40 CFR § 233.11(f), which states: “Copies of permit application forms, permit forms, and reporting forms;” The following is a list of forms included as attachments to this section.:"

[Describe EDMS and electronic ap forms. Include a list of all forms and attach copies to PD. Include 1. application forms for JDs, IPs, GPs (including GP-specific applications), 2. Other forms such as permit transfer, permit modification, 3. permit templates, 4. Inspection reports and compliance documents – Notices of Violation, etc., 5. As built certification form, 6. other templates such as public notices.]

8. Description of the State's Compliance Evaluation and Enforcement Programs (Required by 40 CFR § 233.11(g))

Purpose of Section (g)

The purpose of Section (g) is to provide the information required in 40 CFR § 233.11(g), which states: "The program description as required under § 233.10 shall include: (g) A description of the State's compliance evaluation and enforcement programs, including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA."

Compliance and Enforcement Program Overview

Compliance Assistance

Permit Compliance

Unauthorized Activities

Enforcement

[Include description of inspection and enforcement approach]

Corrective Actions

Administrative Penalties

[If DEC receives administrative penalty authority]

Civil Penalties

[Including guidance for calculating penalty amounts – reference as an attachment]

Appeals and Public Participation in Enforcement Proceedings

Methods to Ensure Coordination and Consistency Across the Program

9. Description of the Waters of the United States Within a State Over Which the State Assumes Jurisdiction under the Approved Program (Required by 40 CFR § 233.11(h))

Purpose of Section (g)

The purpose of Section (h) is to provide the information required in 40 CFR § 233.11(h), which states: "The program description as required under §233.10 shall include: (h) A description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands."

Description of State-Assumed Waters

Description of Retained Waters

State vs. Federal Definitions of Wetlands

Comparison of State Wetlands Delineation Methodology to the Federal Methodology

[Consider use of 1987 Wetlands Delineation Manual and Alaska Supplement, or design Alaska's own.]

Comparison of State vs. Federal Hydrologic Indicators

[If needed]

10. Description of Specific Best Management Practices for Exemptions (Required by 40 CFR § 233.11(i))

Purpose of Section (i)

The purpose of Section (i) is to provide the information required in 40 CFR § 233.11(i), which states: "A description of the specific best management practices proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) of the Act for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment."

Description of Specific Best Management Practices

[Can adopt terms and conditions directly from 40 CFR § 232.3 into State regulation.]

11. Additional Information Related to the Program Description

Purpose of Section

The purpose of Section 11 is to provide additional information that did not fit cleanly into any of the program description sections listed in 40 CFR § 233.11 but are pertinent to a clear description of the State's program.

Memoranda of Understanding/Operating Agreements with Other Agencies

[Identify MOAs with USFW, SHPO, DF&G, DNR OPMP if not covered earlier.]

Information Management

[Describe EDMS and how it is used to tailor permit applications; fill out permit templates and populate other templates such as compliance letters; and manage program data]

Mapping and GIS Data

[Describe Alaska Geospatial Council, Wetlands Tasks Force, and ongoing wetlands mapping work.]

State 404 Program Data Collection

State 404 Program Training and Staff Development

[Describe what's been done and what is planned.]

Comparison with Federal Requirements

DEC prepared a comprehensive cross-walk to document how the State program meets federal requirements [Appendix XX].

Appendix 13. Outline for MOA with the EPA Regional Administrator

Document begins on next page.

MEMORANDUM OF AGREEMENT
BETWEEN THE
ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND THE
UNITED STATES ENVIRONMETAL PROTECTION AGENCY

SECTION I. GENERAL

A. Purpose: States the purpose of the MOA is to describe federal and state roles in implementing the State program.
B. Authorities: Outlines the legal authorities for each agency.
C. Effective Date and Revisions: This section provides for: the effective date of the MOA, which is the approval of the State program by EPA; cooperation between DEC and EPA; retention of authorities by EPA under the CWA; review and revision procedures for the MOA; and that the MOA remains in effect until amended, modified or replaced, the program is withdrawn by EPA, or DEC transfers the program back to the Corps.
D. Confidentiality: Provides for confidentiality procedures.
E. Computing Time Periods: Describes how Saturdays, Sundays, and legal holidays are addressed in computing time periods.
F. Alaska DEC Agreement with Corps: Provides for how this MOA relates to the MOA with the Corps.
G. Alaska MOU with the USFWS (if done) and DF&G (if done): Provides for how this MOA relates to agreements with these two agencies.
H. Operating Agreement with the Department of Natural Resources State Historic Preservation Office: Provides for how this MOA relates to this agency.
I. DEC MOA with Other Agencies: Provides for how this MOA relates to agreements that DEC may enter into with other agencies.

SECTION II. PERMIT APPLICATION REVVIEW AND PERMIT ISSUANCE

A. Lead Agency Responsibility for State Permit Program: Outlines roles, responsibilities, and procedures for DEC and EPA for the review and issuance of permits under the State program, including EPA's periodic review of the State program and access to State records. This section also provides for USFWS consultation and recommendation for protective measures.
B. Waiver of EPA Review: Describes which permits EPA waives its review for.
C. Coordination with Other States and Tribes: Outlines procedures for permit review if the proposed action may impact Indian Country.
D. Permit Processing and Federal Comment: Outlines procedures for federal agency review of permit applications, and public notice.
E. Coordination and Mitigation Banking: Outlines procedures for EPA review of mitigation banking projects.

SECTION III. COMPLIANCE MONITORING AND ENFORCEMENT

This section outlines responsibilities and procedures for compliance monitoring and enforcement by DEC and EPA, including EPA's authorities in Indian Country, EPA's role in monitoring and enforcement of the State program, review of monitoring and enforcement records, coordination between DEC and EPA, procedures for issuing violations, and the use of consent agreements or other enforcement tools.

SECTION IV. PROGRAM MAINTENANCE

This section outlines procedures for program review and oversight, reporting, and State program modifications.

SECTION V. GENERAL PROVISIONS

This section provides general provisions for the MOA.

SECTION VI. SIGNATURES

This section contains the signatures of the authorized representatives of DEC and the EPA.

Appendix 14 Outline for MOA with the Secretary of the Army

Document begins on next page.

MEMORANDUM OF AGREEMENT
BETWEEN
THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND
THE DEPARTMENT OF THE ARMY

SECTION I

Purpose and Authority: Outlines the respective roles of Alaska's Department of Environmental Conservation and the U.S. Department of the Army, and states that the purpose of this MOA is to fulfill the requirements of 40 CFR § 233.14.

Effective Date and Revisions: Provides that the effective date of the MOA is when the EPA approves the State 404 program, that the Corps and DEC will closely cooperate in the implementation of the program, the MOA shall be reviewed at least every 12 months, and that the MOA will remain in effect until either EPA modifies the State program authorization or DEC transfers the program back to the Corps.

SECTION II

Waters to be retained: Outlines which waters are to be retained in Corps jurisdiction per 404(g), in Indian Country, and in Denali National Park and Preserve, and outlines how modifications to the Retained Waters List will be addressed.

SECTION III

Joint Coordination Procedures: Outlines the procedures the Corps and DEC will use to determine if an application is in retained waters or State waters, and also outlines how applications in Section 10 waters will be addressed.

SECTION IV

Existing Permits and Pending Permit Applications: Outlines the procedures that DEC and the Corps will use to address Individual and General Permits existing prior to State assumption where the work has not been competed yet, and provides for the transfer of records from the Corps to DEC.

SECTION V

Review of Applications for State Program Permits: Outlines certain procedures for reviewing State permit applications, including those permits which may involve substantial impairment of navigation, Corps civil works projects, emergency permits, and EPA objections to State permits.

SECTION VI

Coordination of Mitigation Banking: Outlines procedures for mitigation bank instruments and in-lieu fee program agreements, permits for mitigation banks and in-lieu fee programs, and the use of credits from mitigation banks.

SECTION VII

Enforcement. Outlines how DEC and the Corps will coordinate enforcement activities after State program assumption.

SECTION VIII

Communication between parties: Outlines procedures for communication between DEC and the Corps.

SECTION IX

General provisions: Provides general provisions to the MOA.

SECTION X

This section contains the signatures of the authorized representatives of DEC and the Corps.