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of **ALASKA**
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404 Assumption Cheat Sheet *Department of Environmental Conservation*

Intro:

The purpose of this document is to provide a basic overview of DEC's efforts to assume primacy over the Clean Water Act's Section 404 program, which is currently administered by the Corps. Speaking to the 404 program in SB 27 in 2014, the Alaska Legislature explicitly directed:

"The Department of Environmental Conservation . . . shall . . . take reasonable steps to assume primacy of the program."

To fulfill this legislative directive, DEC respectfully requests an appropriation of **\$5 million**.

What is 404?

404 refers to the section of the Clean Water Act (1972) that requires a permit before dredged or fill material may be discharged into waters of the United States. Section 404(g) of the Clean Water Act (CWA) gives states and tribes the option of assuming, or taking over, the permitting responsibility and administration of the Section 404 permit program for certain waters. Section 404 permits for those assumed waters would be issued by the state or tribe instead of the U.S. Army Corps of Engineers (Corps). The CWA provides that the Corps retains permitting authority in a small subset of waters defined by 404(g). While Section 404 is often described as a wetlands program, it applies to all waters of the United States, not just wetlands. In Alaska, most 404 permits involve wetlands.

What are Waters of the United States (WOTUS)?

"Waters of the United States," or "WOTUS," is the term that the Clean Water Act uses to define the scope of EPA and Corps power under the Clean Water Act. EPA and the Corps can only regulate activities in these waters - waters that are outside the scope of waters of the United States are subject exclusively to state regulation. This definition is very important, very controversial, and changes with new federal administrations.

What is Assumption?

"Assumption" means a state has applied to the Environmental Protection Agency (EPA) and been approved to administer a state dredge and fill permitting program in lieu of the federal section 404 program administered by the Corps and EPA. An approved state is responsible for permitting the addition of dredge and fill material into assumed waters of the United States. There are currently three states that have assumption of the 404 program: Michigan, New Jersey, and Florida.

What is dredge and fill?

"Dredge" is material that is excavated or dredged from waters of the United States. "Fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of a water body.

Discharges of fill material generally include activities like: placement of fill that is necessary for the construction of any structure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for intake and outfall pipes and subaqueous utility lines; and fill associated with the creation of ponds.

Legislative History with 404

In 2013, Senate Bill 27 was signed into law directing DEC and DNR to evaluate the potential benefits, costs, and consequences to the state of assuming primacy for regulating dredge and fill activities. The bill directed the agencies to take reasonable steps to assume primacy and to take action, including adoption of necessary regulations, to obtain federal approval of a state program and to implement the program. It provided the agencies with all necessary authority to take over 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. Before this process could be completed, the price of oil dropped and 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."

The Feasibility Study 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. It also evaluates the benefits and challenges of assuming the 404 program.

What are the benefits of 404 Assumption?

Based on the experience of Michigan, New Jersey, and Florida, administration of the Section 404 program offers several significant benefits for states in terms of overall program efficiency and wetland resource protection. These include improved resource protection, increased program efficiency, effective allocation of federal and state agency resources, improved integration with other state resource programs, increased regulatory program stability, and increased control over

projects affecting the health of the State's environment and economy. One major benefit of assumption is the potential for greater control over compensatory mitigation.

What is compensatory mitigation and why is it a good thing?

Compensatory mitigation is how the Corps contributes to the national goal of “no net loss” of wetlands. Under the 404(b)(1) Guidelines, which apply to 404 permits, “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.”

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). These are examples of opportunities that are currently available under the governing law—but which the Corps frequently does not allow due to misalignment with national priorities like the “no net loss” goal.

What are the challenges with 404 Assumption?

The fact that only three states have assumed 404 program administration highlights the significant hurdles associated with this process. These hurdles include cost (assumption is not currently federally subsidized) as well as the lack of clarity over key components of program assumption, like which waters of the United States a state or tribe may assume. Recognizing this lack of clarity, and in adherence to Congress's intention that states take over this program, the federal agencies have recently committed to working with states to facilitate this process. The federal agencies have taken several steps in this direction, such as EPA's prioritization of updating its 404(g) implementing regulations.

What will be the fiscal impact of the State assuming this program?

The program will cost \$4.9 million dollar in general fund and 28 positions, expanding with an additional 4 positions in year two to a total of 32. After the State application is approved, the Department will be evaluating a fee structure to decrease the dependence on general fund dollars. The State is also working with other states, the Congressional delegation, and national organizations to pursue federal funding for assumption efforts. Similar state-administered programs receive federal funding for states that have primacy (Clean Air Act, NPDES, Safe Drinking Water Act, RCRA).