



404 Assumption: The Million Dollar Question Dept of Environmental Conservation

Jason Brune, Commissioner, DEC

Shannon Miller, Program Manager, Division of Water

Julie Pack, General Counsel, DEC

February 2, 2023



Groundhog Day!



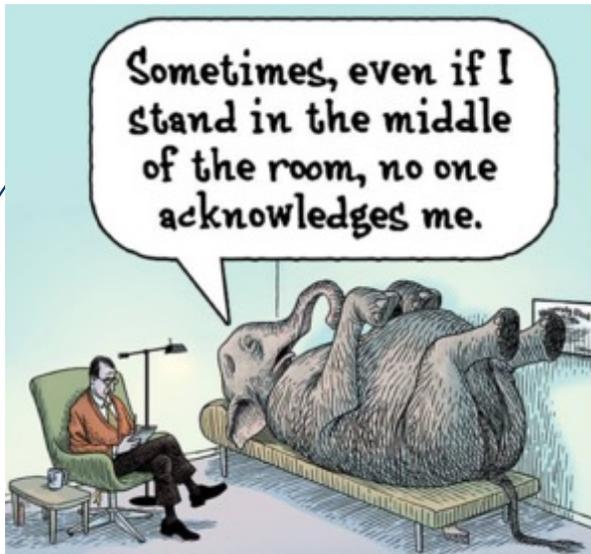


Thank you RDC and others!

- ▶ Organizations that supported the state's 404 Assumption efforts last year
 - ▶ RDC
 - ▶ The Alliance
 - ▶ AMA
 - ▶ AGC
 - ▶ CAP
 - ▶ AFA
 - ▶ Alaska Chamber



The Elephant in the Room





EPA's 404(c) Pre-emptive Veto

► Governor Dunleavy

“EPA’s veto sets a dangerous precedent. Alarmingly, it lays the foundation to stop any development project, mining or non-mining, in any area of Alaska with wetlands and fish-bearing streams. My Administration will stand up for the rights of Alaskans, Alaska property owners, and Alaska’s future.”

“The State of Alaska has a responsibility to develop its resources to provide for itself and its people. Alaska does resource development better than any other place on the planet, and our opportunities to show the world a better way to extract our resources should not be unfairly preempted by the federal Government.”



EPA's 404(c) Pre-emptive Veto

➔ **ADF&G Commissioner Doug Vincent-Lang**

“Alaska’s Title 16 permitting process would ensure protection of fish and fish habitat in the Bristol Bay area. But these statutory protections have been flouted by EPA, choked off before Alaska’s expert habitat and fish biologists had the opportunity to weigh in.”



EPA's 404(c) Pre-emptive Veto

► DNR Commissioner John Boyle

“The precedent set by this action will percolate throughout the investment community. EPA is violating the rights guaranteed by the Alaska Statehood Act through the capricious exercise of its authority, robbing Alaskans of a multi-billion dollar asset on State lands that were specifically selected for their mineral potential without affording the project the predictable, fair, and science-based permitting process that all projects deserve.”



EPA's 404(c) Pre-emptive Veto

➔ DEC Commissioner Me

“EPA’s draconian decision—taken under a Biden Administration that so desperately wants to see domestic development of the natural resources needed to support our Nation’s renewable energy goals—is dumbfounding. This decision will drive development not only out of Alaska but out of the country, straight into third world countries where little care is given to environmental protection, environmental justice is non-existent, and child labor is exploited.”



EPA's 404(c) Pre-emptive Veto

► Attorney General Treg Taylor

“The precedent set by this preemptive veto—if valid—should alarm all permit applicants, investors, and States who wish to retain their traditional land- and resource-management authority. If EPA can rely on undefined terms and subjective standards not based in science to short circuit the Corps’ appeals process and the State’s permitting process here—it can do it anywhere.”



EPA's 404(c) Pre-emptive Veto

► Attorney General Treg Taylor

*"The State remains committed to defending its property rights, including its right to develop its mineral interest for the benefit of all Alaskan citizens. EPA's decision has short-circuited the State's normal process for environmental review, and has instead substituted the opinions of purported "experts" located in Washington, DC. The future of Alaska's mineral development should be decided at home, by Alaskans. Washington's overstep into the State's process was unwarranted and should not be allowed to continue. As such, **the State intends to challenge EPA's decision.** The State presented strong legal and policy arguments outlining why EPA's decision is wrong and...*

We look forward to meeting EPA in court.



Back to the 404 Feasibility Study

And oh by the way, to answer a question before it's even asked. . .

- ▶ EPA's statutory 404(c) power will be unaffected by state assumption of the 404 program.





DEC's Primacy Programs

- ▶ Clear Air Act
- ▶ Safe Drinking Water Act
- ▶ NPDES
- ▶ RCRA

- ▶ NEXT UP?

▶ 404



Legal Landscape

- ▶ Clean Water Act (1972)
- ▶ “navigable waters” - Waters of the United States (WOTUS)
 - ▶ Defines scope of CWA coverage
 - ▶ Controversial
 - ▶ Frequently changing
 - ▶ 2015 Obama Administration (Clean Water Rule)
 - ▶ 2020 Trump Administration (NWPR)
 - ▶ 2023 Biden Rule
 - ▶ *Sackett v. EPA*



Legal Landscape

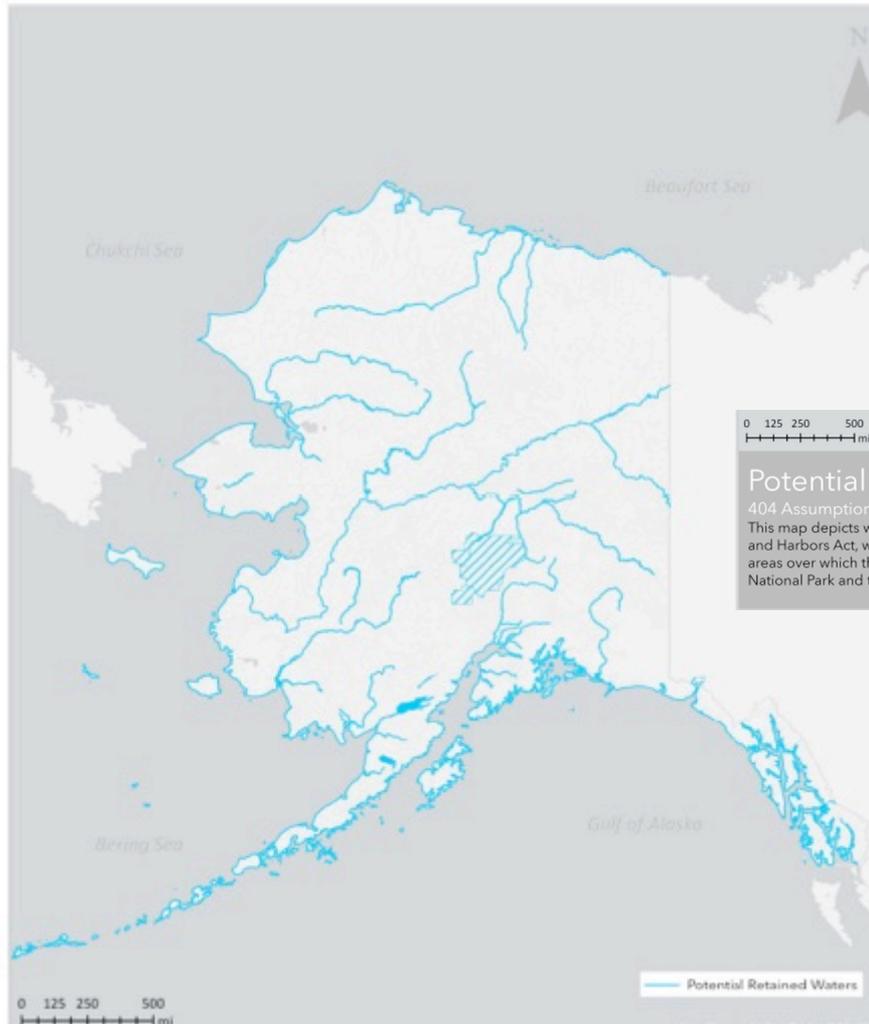
- ▶ CWA 404(g) – State administration of 404 program over certain waters
 - ▶ Congress's intent (CWA 101(b))
 - ▶ How much does the State get to assume?
 - ▶ State = “assumable waters”
 - ▶ Corps = “retained waters”
 - ▶ Defined by parenthetical in 404(g)
 - ▶ Federal guidance to clarify
 - ▶ Takeaway? State gets majority of wetlands when it assumes the program.



Legal Landscape

➤ (g) State administration

➤ (1) 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***) 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. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.



0 125 250 500
mi

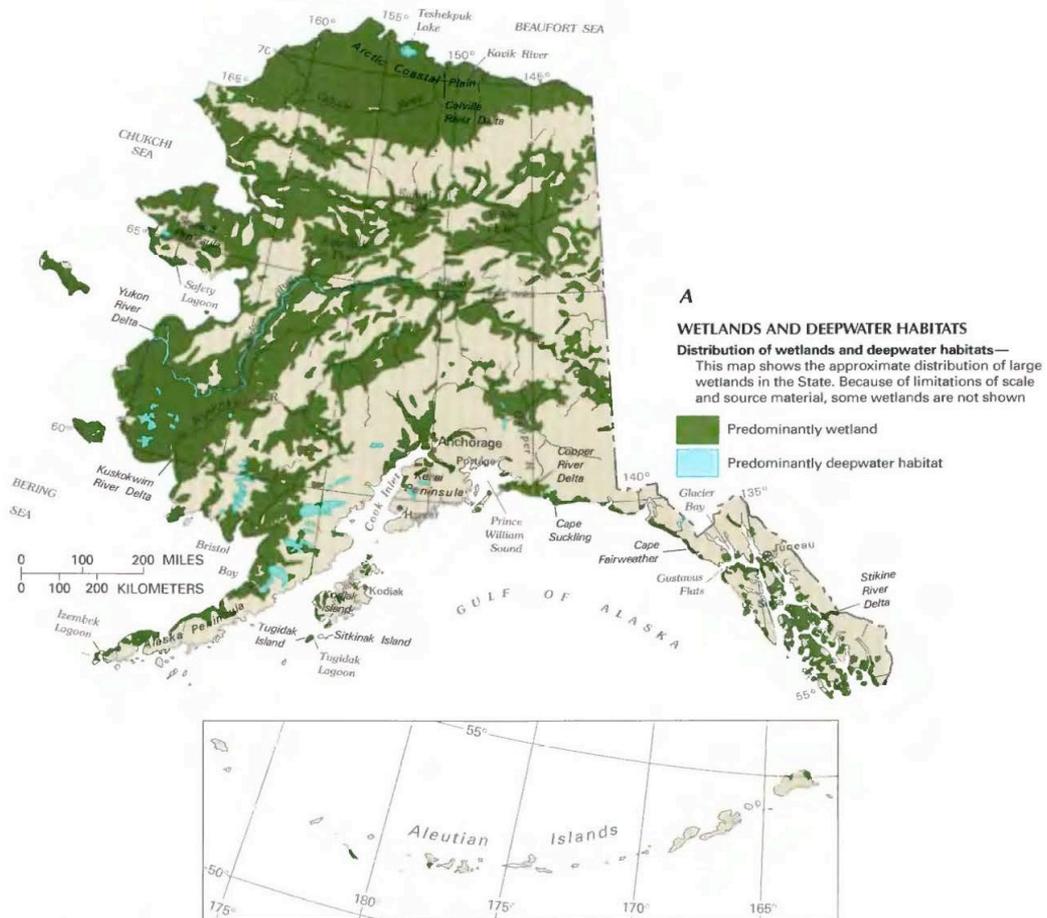
Potential Retained Waters

404 Assumption Feasibility Report

This map depicts waters that the Corps has listed under Section 10 of the Rivers and Harbors Act, waters that are subject to the ebb and flow of the tide, and areas over which the State may not assume permitting authority (Denali National Park and the Annette Islands Reserve)."

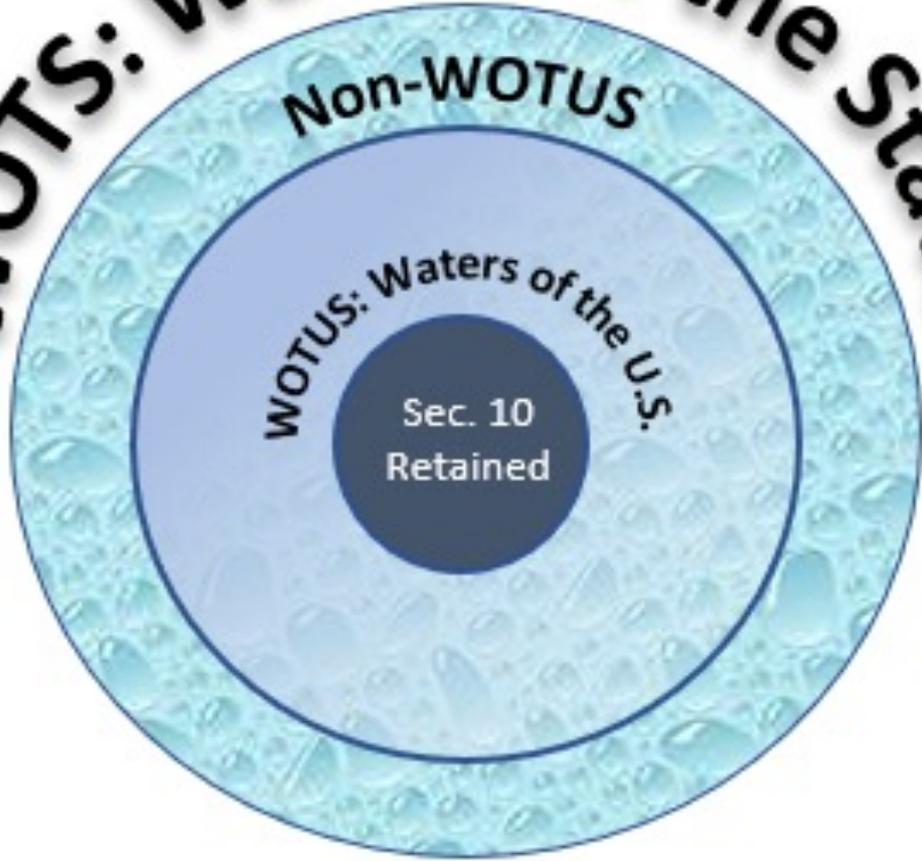
Prepared by ADEC GIS Coordinator - Rob Clark





Source: U.S. Geological Survey
 National Water Summary- Wetland Resources: State Summaries (1996)

WOTS: Waters of the State



WOTUS: Waters of the U.S.

Sec. 10
Retained



Steps Toward Assumption:

- ▶ 2013 - State passed SB. 27
- ▶ 2022 – Alaska Legislature provided DEC with \$1 million to draft the feasibility report
- ▶ 2023 - Clean Water Act Section 404 Dredge and Fill Program Assumption Feasibility Report



Clean Water Act Section 404 Dredge and Fill Program Assumption

Feasibility Report



Prepared for
Alaska Department of Environmental Conservation
Anchorage, Alaska

Prepared by Jade North, LLC
Anchorage, Alaska

January 25, 2023



<https://dec.alaska.gov/water/wetlands-404>



Clean Water Act Section 404

- ▶ Regulates the discharge of dredged or fill material into waters and wetlands
- ▶ Alaska's wetlands cover approximately 174 million acres, or about 43% of Alaska's surface area
 - ▶ May include tundra, permafrost, marshes, and bogs
 - ▶ Most construction, and resource and community development projects require Section 404 permits



Examples of Activities Requiring 404 Permits



- ▶ Site improvement fill for residential, commercial, or recreational development
- ▶ Construction of revetments, breakwaters, levees, dams, dikes, and weirs
- ▶ Placement of riprap and fill material for roads, airports, or buildings
- ▶ Resource development projects



Benefit: Permit Streamlining

- ▶ Opportunities for permit streamlining
 - ▶ Eliminating the 401 certification
 - ▶ Greater use of General Permits
 - ▶ Coordination with other project permits
- ▶ More use of Alaska-specific policies and procedures
 - ▶ Ability to tailor policies and procedures to Alaska's unique conditions



Benefit: Mitigation Flexibility & Alaska's Water Quality Priorities



- ▶ Under 404 assumption, Alaska may be able to address clean water priorities that don't involve creating or restoring wetlands
- ▶ Examples might include:
 - ▶ Cleanup of orphan CS
 - ▶ Replace perched culverts
 - ▶ Cleanup of tundra pond trash disposal sites



Benefit: Accountable to Alaskans

- ▶ State government agencies are more accessible to Alaskans than federal agencies
- ▶ A State-run program is accountable to Alaskans and the legislature
- ▶ Increased control over our environmental and economic future



Benefit and a Challenge: Environmental Review

- ▶ In some cases, the State Program will not need to conduct the federal NEPA process **but**
 - ▶ Must be as stringent as 404(b)(1) Guidelines



Challenge: Clarifying Federal/State Responsibilities

- ▶ The Corps will retain jurisdiction over some waters
 - ▶ Jurisdictional boundaries must be clear to avoid permittee confusion
- ▶ The State will need to establish MOAs with the Corps, EPA, and potentially with the USFWS



Workload & Staffing Analysis

- ▶ Alaska could assume approximately 75% of the Corps' permitting responsibilities
 - ▶ Approximately 581 actions per year
 - ▶ 32 FTE = 18 actions/FTE/year
- ▶ Corps completed 775 actions/year
 - ▶ Over a 5-year period (2017-2022)
 - ▶ 48 FTE = 16 actions/FTE/year



Workload Analysis

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



Cost Analysis

➤ Program development (two years)

FY 2024-2025

- FY2024:
- \$4,964.0
- 28 FT Positions in FY 24
- Training, equipment, and travel
- Legal consultation, regulations development
- Coordination with agencies
- Assumption application development
- Anticipate four additional positions in FY 25



Feasibility Study Recommendation

Alaska should take the necessary steps to assume the CWA Section 404 permitting and compliance program from the Corps



Next Steps to Assumption

- ▶ Obtain funding & hire staff
- ▶ Prepare application to EPA: submit final Q1 2025 (Q3 FY 25)
- ▶ Program approval mid-late 2025





Details, details, details.

Clean Water Act Section 404 Dredge and Fill Program Assumption

Feasibility Report



Prepared for
Alaska Department of Environmental Conservation
Anchorage, Alaska

Prepared by Jade North, LLC
Anchorage, Alaska

January 25, 2023



<https://dec.alaska.gov/water/wetlands-404>



Questions?

