



Department of Environmental Conservation

Clean Water Act, Section 404 Dredge & Fill - Feasibility Study

Jason Brune, Commissioner, DEC

February 22, 2023



DEC's Primacy Programs

- Clear Air Act
- Clean Water Act
 - Section 402 regulating the discharge of wastewater
- Resource Conservation and Recovery Act
- Safe Drinking Water Act

- **NEXT UP**
 - Clean Water Act **Section 404** regulating the discharge of dredge and fill material



SB 27

28th Legislature

Regulation of Dredge and Fill Activities

- In 2013, the Legislature passed SB 27, which mandated: “The Department of Environmental Conservation... **shall**... take reasonable steps to assume primacy of the [404] program.”
- Passed 15-2 in the Senate and 25-13 in the House



Clean Water Act Section 404

- ▶ Regulates the discharge of dredged or fill material into WOTUS





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



Legal Landscape

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



Legal Landscape

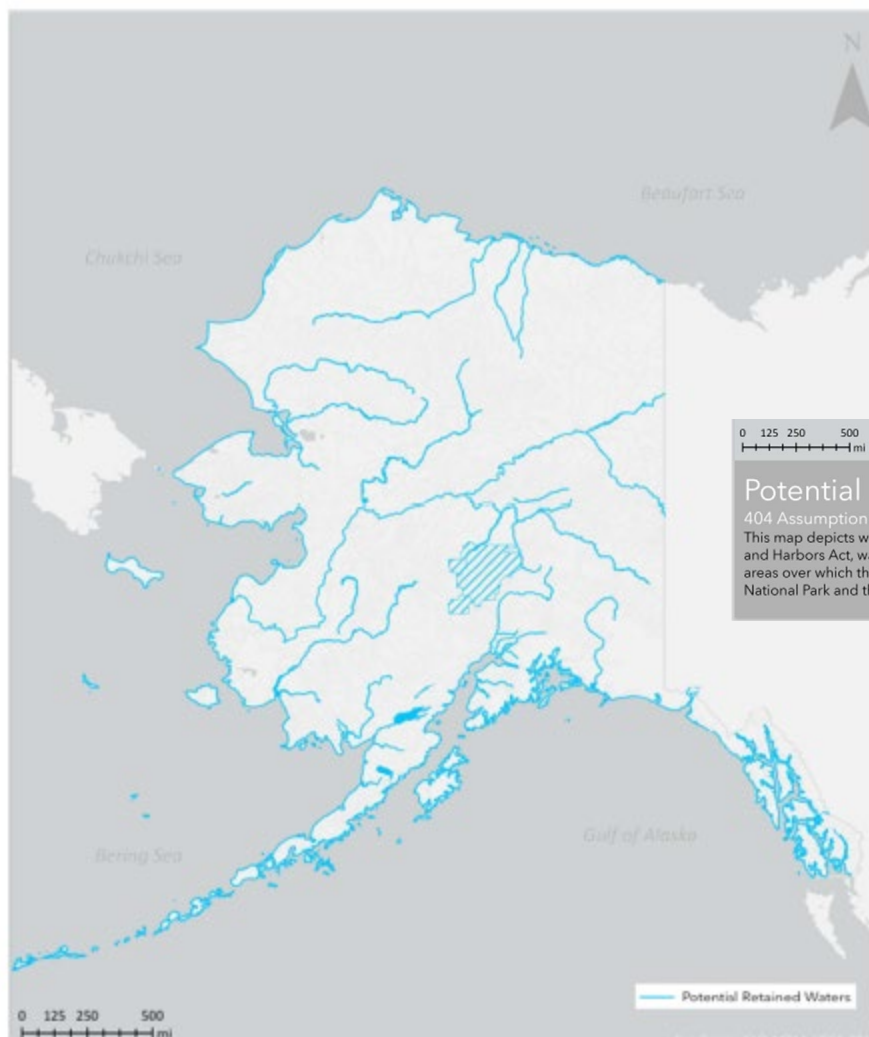
- CWA 404(g) – State administration of 404 program over certain waters
 - Congress's intent (CWA 101(b))
 - How much does the State get to assume?
 - State = “assumable waters”
 - Corps = “retained waters”
 - Defined by parenthetical in 404(g)
 - Federal guidance to clarify
- Takeaway? State gets majority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



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Potential Retained Waters

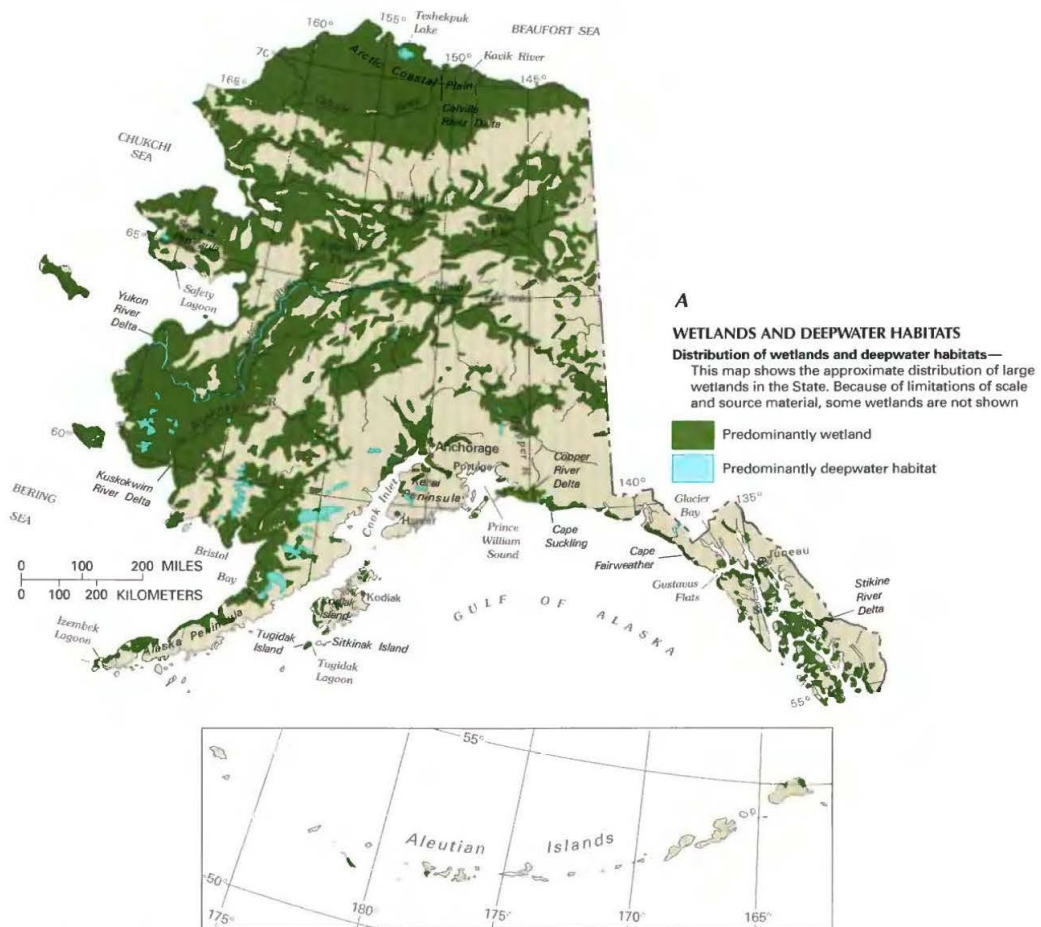
404 Assumption Feasibility Report

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)."

East, German, FAO, NOAA, USGS, EPS



Prepared by ADEC GIS Coordinator - Rob Clark



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



EPA's 404 (c) Veto Power

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





Alaska's Landscape & Clean Water Act, Section 404

- ▶ 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
- ▶ 404 Regulates the discharge of dredged or fill material into WOTUS – Intended to be assumed by states





Steps Toward Assumption:

- AS 46.03.020 (14)
 - “notwithstanding any other provision of law, take all actions necessary to receive federal authorization of a state program for the department and the Department of Natural Resources to administer and enforce a dredge and fill permitting program allowed under 33 U.S.C. 1344 (sec. 404, Clean Water Act) and to implement the program, if authorized.”



Steps Toward Assumption:

- ▶ 2022 – Alaska Legislature provided DEC with \$1 million to draft the feasibility report.

"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."



Steps Toward Assumption:

- ▶ Request for Proposal Language:

“The consultant will research, develop, and publish a persuasive and factual feasibility report for assumption of CWA §404 permitting in Alaska. The intended audience of the report is the Alaska Legislature and should clearly and effectively communicate the advantages and benefits of an Alaska-run dredge and fill permitting program.”



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>



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 our clean water priorities
- 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: NEPA & 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
 - ▶ Requires evaluation of impacts on the physical, chemical, biological, and human use characteristics of the aquatic environment and special aquatic sites.



Challenge: Clarifying Federal/State Responsibilities

- The Corps will retain jurisdiction over some waters
 - Jurisdictional boundaries must be clear to avoid permittee confusion

Ex. Of a Corps-Retained Water

- This map is an ex. only of what a Corp-retained river might look
- Assumes Corps/State agreement of 300-foot administrative boundary between Sec. 10 & State-assumed waters.
- The map est. the banks' ordinary high-water mark & lines 300' inland



Challenge: Clarifying Federal/State Responsibilities

- ▶ 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



Cost Analysis

► Program development (two years)

FY 2024-2025

► FY2024:

- \$4,965.0
- 28 FT Positions in FY 24
- Training, equipment, and travel
- Legal consultation, regulations development
- Coordination with agencies
- Assumption application development

► FY2025

- Anticipate four additional positions
- Approx. \$4700 in FY 25 & beyond



Feasibility Study Recommendation

“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.**”



Next Steps to Assumption

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





Questions?

