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Alaska Legal Updates



WOTUS

Sackett

- Eliminates CWA coverage of a large amount of our 174+ million acres of wetlands (% still uncertain)
- Cited CWA 101(b) and generally reaffirmed that States play a primary role in the management of land and waters within state boundaries
- Reaffirmed import of “navigable” in “navigable waters” though left door open



Discussion points

- PI in place – pre-2015 rule applies. How can we ensure that the agencies' implementation of the pre-2015 rule complies with *Sackett*?
- State dredge and fill (“DNF”) program
 - Do we have authority to enact a state dredge and fill program for WOTS?
 - What would our staffing needs look like?
 - What asks would we need to make of our legislature, were we to decide to pursue





More Questions

- How can the State of Alaska take the lead on making jurisdictional determinations?
 - APDES program?
 - State DNF program?
- What do we call state waters that are non-WOTUS?
 - “WOTSnonWOTUS” aka “WNW”
 - “F.R.E.E.” – Federally Regulated Effluent Exempt

Nav-for-Title

- Knik River
- BLM asserted that this was non-navigable
- Forced us to court

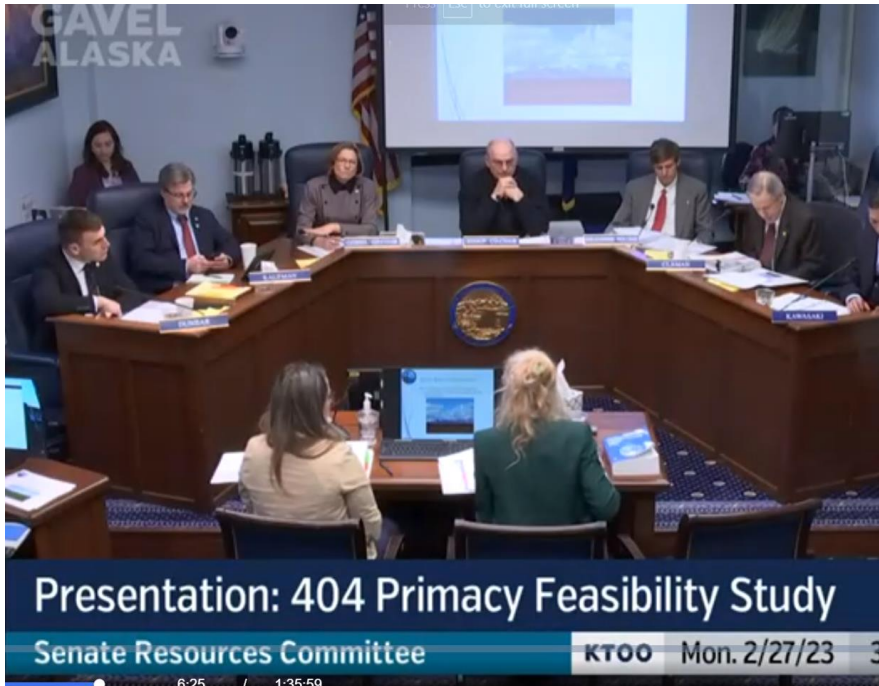


Human Health Criteria

- EPA wrote State a letter threatening to promulgate HHC for us if we didn't do so ourselves, on EPA's timeline
- Big deal for Alaska:
 - FCR
 - proposed tribal WQS rules
- Cited authority: CWA 303(c)(4)(B) allows EPA to promulgate WQS for state upon making a "necessity determination"
 - Must find that EPA promulgation of a standard is necessary to meet CWA requirements



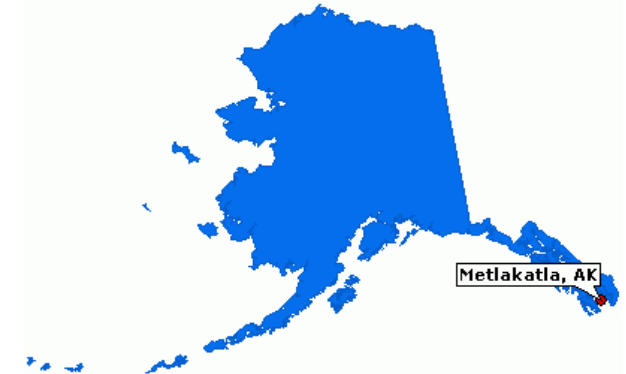
404 Assumption – Legislative efforts



- DEC went to legislature for funding
 - DEC already has express statutory authority
 - Ask: \$5 mil, 28 – 32 staff positions (compared to a Corps' 48)
- DEC narrowly did not get the funding.
 - Major sticking points:
 - ***Lack of federal funding***
 - Lack of confidence that the 32 positions could be filled
 - Minor sticking points:
 - 404(c)
- Now evaluating 404(g) regulations

EPA proposed rules

- Tribal Reserved Rights WQS Rule
- Tribal Baseline WQS Rule
- No prior engagement with the State
- Unable to articulate how the rule applies in AK given our unique tribal landscape
- 227 federally recognized tribes
- 1 reservation



Alaska v. EPA? – 404(c)



- Original jurisdiction - legal
 - SCOTUS has discretionary* authority to take any case between a state and the United States. 28 U.S.C. § 1251.
 - SCOTUS looks at 2 factors:
 - “the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim.”
 - Availability of alternative forum
- Original jurisdiction – historically
 - Involved disputes over water rights of land ownership
 - State v United States actions are rare:
 - Last one: 2005 (Alaska)
 - Others include California (1979) and Utah (1971)

Big-Picture

- Alaska's role in the shift to a renewable energy economy?
- Communication with the federal government at the policy level
- Resort to litigation



Thank you!

