THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Environmental Conservation

DIVISION OF WATER
Director's Office

PO Box 111800
Juneau, AK 99811
Main: (907) 465-5180
www.dec.alaska.gov

October 13, 2023

Kathy Hurld
Oceans, Wetlands, and Communities Division
Office of Water
Environmental Protection Agency HQ
Pennsylvania Avenue NW
Washington, DC 20460

Re: State of Alaska Comments to *Clean Water Act Section 404 Tribal and State Program Regulation*, 88 Fed. Reg. 55276–55330 (Dkt. EPA-HQ-OW-2020-0276)

Dear Ms. Hurld,

The State of Alaska, Department of Environmental Conservation ("DEC"), Division of Water ("Division") writes to provide input on the Environmental Protection Agency ("EPA")'s proposed revisions to the 404(g) regulations ("Proposed Rule"). EPA has indicated these revisions are intended to: (1) "clarify the requirements and processes for assumption and administration of a CWA section 404 program," and (2) "facilitate Tribal and State assumption of the section 404 program[.]"[1] The State of Alaska shares these goals and appreciates EPA's efforts in their pursuit.

Alaska received legislative authority to assume the 404 program in 2013.[2] Over the past two years, Alaska has been actively pursuing State assumption. My Division has lead these efforts. We have engaged our Legislature, other States, and industry; the Corps, EPA, and interested Tribes; and other members of the public. We have analyzed the current regulations, statutes, and relevant caselaw. We have considered other States' applications and preparatory materials, and analyzed topical correspondence with EPA. We have reviewed the *Final Report of the Assumable Waters Subcommittee* published in May 2017[3] ("*2017 Subcommittee Report*") and evaluated its applicability in Alaska. We have identified the failures of the Corps' current compensatory mitigation program in Alaska and staked out a vision for a program better suited to Alaska's unique circumstances. We have catalogued our existing resources and identified

[1] 88 Fed. Reg. 55276.
[2] Alaska Statutes ("AS") 46.03.020(14).
[3] Locatable at https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf (last accessed Oct. 11, 2023).

gaps to be filled. In culmination of these efforts, we developed a detailed plan for 404 program assumption.

Accordingly, Alaska, and my Division in particular, is especially well-poised to provide EPA with valuable input on how well the Proposed Rule achieves its desired ends of clarifying and facilitating State assumption.

As detailed below, on balance, we do not believe that EPA's proposed revisions, if finalized, will achieve its stated goals. Indeed, some aspects are likely to deter State assumption. And some do not give effect to Congress's recognition in § 101(b) that "it is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" as well as "to plan the development and use . . . of land and water resources." This foundational policy statement, which aminates the entire Clean Water Act, is undermined by micromanagement of State programs. Consistent with Congress's intent, EPA must leave States with maximum responsibility and flexibility in assumed programs.

Below, we offer comments to correct course where we believe necessary, organized chronologically as they appear in the Proposed Rule. Please consider amending the Proposed Rule consistent with our comments.

Comments on Proposed Rule

A. Program Approval

1. Program Assumption Requirements

EPA proposes to impose more requirements on what a State application must contain. For example, EPA would require States to identify "position descriptions as well as budget and funding mechanisms in the program description"[4]; introduce new terminology mandating that all elements currently listed in 40 CFR 233.11(a) are addressed in an assumption application, on penalty of disapproval[5]; and require a description of inter-agency coordination if applicable.

While these requirements are more onerous than the current program description requirements, these are details that my Division identified last session and marked for inclusion in our application. Alaska therefore does not object to these additional requirements.

2. Retained Waters

The Proposed Rule provides that a "State must submit a request to EPA that the Corps identify the subset of [WOTUS]" that would be retained by the Corps.[6] The State must also demonstrate that it has taken "concrete and substantial steps toward program assumption,"[7] so

[4] 88 Fed. Reg. 55324.
[5] 88 Fed. Reg. 55283.
[6] 88 Fed. Red. 55284.
[7] 88 Fed. Reg. 55288.

the Corps knows that developing a retained waters list "is a worthwhile expenditure" of the Corps' "time and resources."[8] The Proposed Rule would allow the Corps 180 days to develop a retained waters list.[9] The Corps' starting point would be the Rivers and Harbors Act ("RHA") Section 10 waters list, and the default for adjacent wetlands would be a 300-foot administrative boundary line from the ordinary high water mark of the subject water body (as reflected in the *2017 Subcommittee Memo*).[10] Any change in retained waters would be deemed a "substantial revision" triggering new requirements including publication in the Federal Register, public notice and comment, and inter-agency consultation.[11]

Thank you for proposing to codify a default administrative boundary line. Alaska agrees with the rationale underlying the 2017 Subcommittee's evaluation and recommendation of the default boundary-line approach, which is that the line should be drawn only so far as "necessary to protect these waters from activities that may adversely impact navigability."[12] As recognized by the 2017 Subcommittee, the Corps is tasked under the Rivers and Harbors Act with protecting the "navigable capacity" of waterways subject to that Act.[13] And as the 2017 Subcommittee further recognized, the only "[r]egulated activities that may impact navigable capacity . . . would likely occur in areas that are in close proximity to the waterways retained by the [Corps]."[14] Therefore, tracking back to the navigable capacity of a waterway, and establishing a boundary on that basis, makes sense. To do this, of course, the Corps must document the navigable capacity of the waterways it seeks to retain.

The second, more obvious, caveat that must be reflected in the final rule is that this line cannot be used to demarcate waters outside of the scope of "waters of the United States" (of which "retained waters" are a subset). This means that if a wetland is distinguishable[15] from a traditionally navigable water at a point closer than 300 feet away from the water body, it is the point closer to the water body which demarcates the extent of the retained water for that water body. Frequently, in Alaska, wetlands are distinguishable before that point. To prevent unnecessary delay and confusion, the final rule should indicate that the administrative boundary line is in no event to exceed the point at which a wetland is distinguishable from the adjacent waterway, consistent with *Sackett v. EPA*.

Alaska does not oppose requiring the Corps to identify which waters it believes are retained, and which are assumable. We suggest that, for added clarity and certainty, the Corps affirmatively indicate that each of the waters on its prepared list are "navigable" and include information appended to the list demonstrating the waters' navigability. Making navigability

---

[8] 88 Fed. Reg. 55288.
[9] 88 Fed. Reg. 55288.
[10] 88 Fed. Reg. 55285, 55325.
[11] 88 Fed. Reg. 55291.
[12] *2017 Subcommittee Report* at 26.
[13] *Id.* at 26.
[14] *Id.* at 26.
[15] *See Sackett v. EPA*, 598 U.S. 651, 678 (2023) (holding that, to be subject to the Clean Water Act, a wetland must be "indistinguishable" from a water body that is a waters of the United States in its own right).

findings will provide clear direction to the Corps and will provide additional assurance to the State, the State's Legislature, and members of the public that the list is unlikely to change and can, therefore, be relied on. Imposing such a procedure is also consistent with the purpose underlying the administrative boundary in the first place: demarcating the point at which regulation is needed to protect the navigable capacity of certain waterways.

We further suggest requiring that the Corps work with the State in assembling this list, which will facilitate program transition. The Corps does not need six months to prepare the list of retained waters: this should not be an onerous task, given the availability of Section 10 waters lists. If, however, the Corps needs to determine the navigability of certain waterbodies, and thoroughly document each waterbodies' navigability, as we recommend, six months is a reasonable amount of time.

We strongly urge EPA to eliminate the requirement that the State prove that it has taken "concrete and substantial steps toward program assumption" before the Corps begins preparation of the retained waters list. EPA would require States to submit proof of legislation authorizing funding, legislation authorizing assumption, a Governor directive, or a letter awarding a grant or other funding to pursue assumption.[16] But the very first step of the assumption process is evaluating what stands to be gained – i.e., what waters can be assumed. This is a foundational, and preliminary, piece of information that States absolutely need. Without it, States will have a *very* difficult time gaining the momentum necessary to obtain the items listed to prove "concrete steps." The retained waters list must be made available to the State at the beginning – not the middle or the end – of a State's push for assumption. Requiring otherwise risks severely hamstringing States' efforts.

3. Compensatory Mitigation

The Proposed Rule would add a requirement that a State's assumption application include "[a] description of the State's approach to ensure that all permits issued satisfy the substantive standards and criteria for the use of compensatory mitigation consistent with the requirements of part 230, subpart J."[17] Subpart J is the compensatory mitigation portion of the 404(b) Guidelines.[18] EPA indicates that a State "may deviate from the specific requirements of subpart J to the extent necessary to reflect State administration of the program using State processes as opposed to Corps administration . . . [but] may not be less stringent than the requirements of subpart J."[19]

The State appreciates EPA's explicit recognition of the flexibility the States enjoy when crafting a compensatory mitigation program tailored to their State. Last legislative session, in Alaska, we obtained broad consensus on how to expand and improve upon the Corps' compensatory mitigation program in Alaska. We discussed allowing permittees to clean up

[16] 88 Fed. Reg. 55284–55285.
[17] 88 Fed. Reg. 55292–55294, 55325.
[18] *See* 40 Code of Fed. Reg. ("C.F.R.") parts 230.91–.98 (entitled "Compensatory Mitigation for Loss of Aquatic Resources").
[19] 88 Fed. Reg. 55325.

contaminated sites affecting water quality, completing projects to improve fish passage, and improving wastewater management, among other projects that would improve the health of Alaska's environment. We spoke with EPA Region 10, who expressed their support. States are incentivized to find the projects that would most improve water quality in their State and to design a compensatory mitigation system accordingly. The Corps has no such incentive. We appreciate EPA's continued support on this point.

4. Effective Date for Approved Programs

EPA proposes an effective date of 30 days after program approval unless a later effective date, not to exceed 120 days, is established for special circumstances.[20]

Alaska has no objection to a short transition time to transfer an assumed program from the Corps to a State.

B. Comments Related to Permit Requirements

1. Compliance with the CWA 404(b)(1) guidelines

EPA uses the proposed rule as a vehicle to offer suggestions regarding how States may "demonstrate they have sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines."[21] EPA uses this section to advance interpretations of its existing regulations, such as: "EPA considers the human use effects under subpart F . . . to encompass impacts of proposed discharges on Tribal interests, including impacts on fisheries and other aquatic resources, aesthetics, and historic and cultural uses."[22]

Alaska's Attorney General Office is more than capable of demonstrating that the State has sufficient authority to issue permits that assure compliance with the 404(b)(1) Guidelines. We suggest EPA defer to a State Attorney General Office's evaluation of its own State's authority.

2. Judicial Review and Rights of Appeal

Presently, the standards governing a court challenge to a NPDES permit are different from the standards governing a court challenge to a Corps-issued 404 permit. EPA proposes to make the judicial standard of review for a State-issued 404 permit similar to that required for State NPDES programs, with one modification: the finalized rule will "specify that State requirements that provide for the losing party in a challenge to pay all attorneys' fees, regardless of the merit of their position, are an unacceptable impingement on the accessibility of judicial review."[23] EPA's basis for this is to "give effect to the CWA's requirements for public

[20] 88 Fed. Reg. 55294.
[21] 88 Fed. Reg. 55296.
[22] 88 Fed. Reg. 55298.
[23] 88 Fed. Reg. 55298.

participation in the permitting process" as reflected in § 101(e).[24] Curiously, EPA would not make this section applicable to Tribe-administered 404 programs—only State-administered programs.

As a preliminary matter, EPA lacks a basis for imposing different requirements on States and Tribes with Treatment as States ("TAS") status administering an assumed program. When Tribes attain TAS status, they are "*treated as states*" – not subject to special requirements (or exempt from certain requirements). EPA's rationale for not applying this section to Tribes – that "requiring Tribes to waive sovereign immunity to judicial review of permitting decision would be a significant disincentive to Tribes" to assume the program – applies equally to States. This is an arbitrary distinction.

Second, provisions about attorneys' fees in court are outside the scope of permissible bases on which to approve or reject a State's application.[25] EPA's cited authority, CWA § 101(e), does not leave it up to EPA alone, but rather EPA and the States, to "provide[] for, encourage[], and assist[]" public participation by "develop[ing] and publish[ing] regulations specifying minimum *guidelines* for public participation."[26] This is not an appropriate application requirement and may not be repackaged as one without a statutory re-write.

Third, by requiring parity with NPDES standards of review, as opposed to the current 404 standards of review, EPA essentially subjects State 404 permits to a higher degree of court scrutiny than Corps 404 permits. And, of course, CWA § 509(b)(1), does not authorize the judicial review of federally issued 404 permits – that is authorized by the federal Administrative Procedure Act ("APA"), and subject to APA standards.[27] Legally, EPA may not require State 404 permits to meet a higher level of scrutiny than federal 404 permits. Practically, this will disincentivize State assumption by jeopardizing industry support.

Fourth, EPA's proposal would not allow States to limit standing to challenge permits in State court.[28] If EPA is going to require States to rewrite standing rules in their courts – some of which are developed by common law, and therefore very difficult to rewrite – in order to assume the 404 program, EPA all but guarantees that States whose courts do not already utilize EPA's preferred standing rules will be unable to assume the program.

This section, as proposed, poses strong disincentives and potentially insurmountable hurdles to assumption. Alaska recommends deleting it in its entirety.

---

[24] 88 Fed. Reg. 55298.
[25] *See* CWA §§ 404(g), (h).
[26] 88 Fed. Reg. 55298 (quoting 33 U.S.C. § 1251(e)).
[27] *See* 88 Fed. Reg. 55300.
[28] 88 Fed. Reg. 55300.

C. Comments Related to Program Operation

1. Five-Year Permits and Long-Term Projects

The Proposed Rule acknowledges that Congress limited 404 permit terms to five years. EPA, however, is concerned that "if applicants with long-term projects only submit information about activities that will occur during one five-year period of their project in their permit application, the permitting agency and members of the public will not have sufficient information to assess the scope of the entire project." To address its concern, EPA is proposing that permit applicants for projects whose lifespan is expected to exceed 5 years must "include an analysis demonstrating that each element of the 404(b)(1) Guidelines is met . . . for the full term of the project."[29] This requirement would apply to assumed programs only, creating another disparity between Corps-issued 404 permits and State-issued 404 permits. EPA indicates that this new requirement will improve environmental protection and will "provid[e] the applicant with more regulatory certainty" because it will "ensure consistency in permitting decision associated with the project."[30]

This proposed requirement would hinder, if not halt entirely, assumption efforts. As a practical and political matter, placing more requirements on permit applications under a state-assumed program, as compared to a Corps-run program, is likely to generate strong public opposition from industry. Without industry support – crucial for many States – a State is unlikely to generate the momentum necessary to make the requisite legislative changes and obtain funding.

This new requirement suffers from legal infirmities as well. First, EPA is not free to substitute its judgement for Congress, who imposed permit terms of 5 years. Requiring permittees to demonstrate compliance with the 404(b)(1) Guidelines for the lifespan of the project is inconsistent with Congress's requirement that permits be limited to 5 years. Second, this requirement would make State programs more stringent than the federal program. While States may choose to make State programs more stringent than the federal program, EPA may not force that choice. EPA's suggestion that this proposed requirement improves regulatory certainty, and therefore is a helpful addition, disregards reality. Alaska recommends deleting this new provision.

2. Tribes as Affected Downstream States

The Proposed Rule includes three changes to "afford protection to Tribal resources," specifically Tribal resources and interests that are "off reservations" that "may be affected by activities permitted under assumed 404 programs."[31] These changes would: (1) enable Tribes who have TAS status for <u>any</u> CWA provision to comment on State 404 permits as an Affected

[29] 88 Fed. Reg. 55326.
[30] 88 Fed. Reg. 55303.
[31] 88 Fed. Reg. at 55305.

State;[32] (2) create a new TAS option, specifically for the ability to comment on State 404 permits as an Affected State; and (3) codify an opportunity for Tribes to request EPA review of permits that may affect Tribal rights or interests. If EPA objects to the draft permit, a State may not issue the permit until the State has taken "steps required by EPA to eliminate an objection."[33] EPA justifies these additional requirements as "[c]onsistent with the Federal trust responsibility and the policies underlying CWA section 518."[34]

Under existing law, when a TAS Tribe is notified of an upstream project, and objects, additional requirements are imposed on the permitting State that are not imposed when similar objections/comments are made by a non-TAS Tribe. Namely, the State must notify the TAS and the EPA Regional Administrator of its decision not to accept the recommendations of the TAS Tribes and its reasons for doing so.[35] The Regional Administrator then has time to comment on, object to, or make recommendations regarding the Tribal concerns set forth.[36] This, of course, applies only to those Tribes who have applied for and attained TAS status – it does not presently include all Tribes. Notably, States already must public notice permits – giving Tribal stakeholders an opportunity for comment and input on every permit. States must provide EPA with a copy of every permit application[37] – giving Tribal stakeholders additional opportunity to provide comment through EPA.

Alaska values input from our Tribal stakeholders, and is not seeking in any way to diminish or preclude their participation in the 404 permitting process. EPA's proposed changes to the current process, however, are problematic for several reasons.

First, proposed changes (1) and (2) allow any Tribe to be treated as TAS irrespective of whether they have met Congress's requirements for TAS status. This is unlawful: EPA may not rewrite statutory text to short circuit the process for attaining TAS status. Broadening the scope of which Tribes are considered TAS Tribes may only be effectuated by statutory change.

Second, these provisions do not apply to permits issued under a federal 404 program, so EPA has no basis for imposing these requirements here.

Third, EPA's reliance on a "Federal trust responsibility" disregards the Supreme Court's June 2023 holding in *Arizona v. Navajo Nation* that "[t]he Federal Government owes judicially enforceable duties to a Tribe 'only to the extent it expressly accepts those responsibilities.' "[38] "Whether the Government has expressly accepted such obligations," the Court continued, " 'must train on specific rights-creating or duty-imposing' language in a treaty, statute, or

[32] 88 Fed. Reg. 35303. Currently, only States, and Tribes with TAS to assume the 404 program, have this comment opportunity. 88 Fed. Reg. 35303.
[33] 88 Fed. Reg. 55305.
[34] 88 Fed. Reg. 55304.
[35] 88 Fed. Reg. 55304; *see* 33 U.S.C. 1341(1)(e).
[36] 88 Fed. Reg. 55304.
[37] Clean Water Act § 404(j).
[38] *Arizona v. Navajo Nation*, 599 U.S. 555, 564 (2023) (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)).

regulation."[39] This requirement "follows from separation of powers principles."[40] Following the Court's decision in *Arizona v. Navajo Nation*, then, the federal government – which includes EPA – must identify with specificity the "rights-creating or duty-imposing" language in a treaty, statute, or regulation which creates, and delineates, the scope of a specific federal trust responsibility. In a nationally applicable rulemaking like this, EPA must identify and delineate this trust responsibility for each federally recognized Tribe it seeks to act on behalf of. And to the extent EPA relies on CWA § 518, § 518 is not an independent grant of power and cannot be relied upon for these revisions.

Fourth, to the extent EPA seeks to graft federal consultation requirements onto States, EPA may not do this. It is up to States and Tribes to manage their relations with each other, not EPA.

Fifth, EPA includes no criteria against which to assess the validity of a Tribe's asserted off-reservation interest. So far as the Proposed Rule goes, a Tribe need only select a permit application and "have identified [it] as having a potential impact on Tribal resources."[41] Doing so imposes additional requirements, and political pressure, on States. Without discussion or evaluation, this rulemaking appears premised on the existence of Tribal rights to resources existing off-reservation. Before purporting to impose legally binding requirements to protect these rights, EPA must first indicate what it believes these rights to be.

The revisions proposed in this section are legally indefensible. Potentially creating new, substantive rights for Tribes is inconsistent with the scope of this rulemaking, which is billed as one of clarifying and facilitating State assumption. Additionally, the uncertainty injected into the assumption process by these proposed changes are likely sufficient to defeat many States' bids for assumption. Alaska suggests removing them from this rulemaking, and retraining focus on the intended goals of clarifying and facilitating State assumption.

D. Comments Related to Compliance Evaluation and Enforcement

The Proposed Rule provides that States and Tribes "do not need authority to prosecute based on a simple negligence *mens rea* in their criminal enforcement programs."[42] It "does not change the standard applicable to EPA's criminal enforcement of the CWA."[43]

Alaska has no objection to this provision, which does not change current law.

---

[39] *Id.*
[40] *Id.*
[41] 88 Fed. Reg. 55305.
[42] 88 Fed. Reg. 55308.
[43] 88 Fed. Reg. 55308.

E. Comments Related to Federal Oversight

1. Withdrawal Procedures

In general, Alaska is appreciative of EPA's transparency with this rulemaking. But EPA's proposal under this section to "simplify" and "streamline" its own withdrawal procedures is at odds with facilitating State assumption. This proposal would eviscerate the processes that are currently in place to ensure that withdrawal is done fairly and after the State or Tribe has had a full and fair opportunity to be heard.[44]

Currently, EPA may only withdraw program approval following a formal adjudication process, which allows for motion practice, presentation of evidence, and other due process-like safeguards.[45] Under EPA's new process, or lack thereof, a Regional Administrator may withdraw program approval if he finds that a State is "not administering the program consistent with the requirements of the CWA and 40 CFR part 233" and gives the State or Tribe "30 days to demonstrate compliance."[46] If the 30 days pass and the State has, in EPA's estimation, failed to demonstrate compliance, EPA will hold a public hearing (non-adjudicatory hearing). Thereafter, EPA must notify the State of specific deficiencies and give the State 90 days to return to compliance or return the program.[47]

Missing from the new proposed process is a meaningful opportunity for the State to be heard, or meaningful standards to constrain the Regional Administrator's discretion. Alaska urges EPA to retain the existing withdrawal procedures, which ensure a fair process. The new procedures do not. The new procedures, and specifically the discretion – i.e., instability and unpredictability – they inject into the withdrawal process, will discourage, rather than facilitate, State assumption. Please remove this section and retain the existing procedures.

2. Program Reporting

EPA proposes to increase the requirements of what must be in a State's annual report to EPA.[48] EPA would require a "robust" overview that includes identifying implementation challenges and solutions, quantitative reporting, and specific metrics related to compensatory mitigation, resources, and staffing.[49]

The more onerous EPA's regulations are, the more State resources are taxed in ensuring compliance. And the more difficult it is to secure the necessary legislative authority and funding. There is no demonstrated benefit in this provision, which appears rooted in a mistrust of State management. Alaska suggests this provision be removed.

---

[44] 88 Fed. Reg. 55310.
[45] 88 Fed. Reg. 55311.
[46] 88 Fed. Reg. 55310.
[47] 88 Fed. Reg. 55310.
[48] 88 Fed. Reg. 55311.
[49] 88 Fed. Reg. 55311.

F. General

1. Dispute Resolution

EPA proposes to add a "general provision to . . . clearly articulate that EPA may facilitate resolution of potential disputes between the Tribe or State and Federal agencies and provide for resolution or elevation procedures . . . ." This section specifically suggests that EPA may resolve disputes regarding retained waters.[50]

EPA has not demonstrated a need for it to serve in a dispute-resolution role. Please consider removing.

2. Conflict of Interest

EPA proposes to broaden the current conflict-of-interest prohibition to apply to "individuals" and not just "public officer[s] or employee[s]."[51] The proposed revisions would require "any public officer, employee, or individual with responsibilities related to the section 404 permitting program who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency" to "make known such interest in the official records of the agency" and to "refrain from participating in any manner in such decision by the agency or any entity that reviews agency decisions."[52]

Alaska opposes this new provision. Its vague and broad articulation makes it unclear to whom, exactly, this provision applies. The additional uncertainty injected to the 404 assumption process by this provision will not facilitate State assumption, as desired.

3. Partial Assumption

EPA has declined to revise the regulations on this point because EPA continues to believe that partial assumption is not allowed by statute.[53] EPA additionally indicates its belief that partial assumption would be difficult for States to implement.

The inability for States to take a partial or phased approach to assumption has, historically, been a major hurdle for States seeking to assume.[54] It is almost certainly a hurdle for TAS Tribes as well.

---

[50] 88 Fed. Reg. 55312.
[51] 88 Fed. Reg. 55312.
[52] 88 Fed. Reg. 55312.
[53] 88 Fed. Reg. 55314.
[54] *E.g.*, *State of Oregon HB 2436 Partial 404 Assumption Legislative Update* (Nov. 2019) (identifying workgroup recommendation of "partial assumption" of 404 program covering "specific geographic areas for specific activities" in Oregon); Oregon Department of State Lands Dec. 2020 Legislative Update, at 5 (viability of partial assumption dependent on "revised 404(g)

EPA should not be making policy calls about how easy or difficult EPA estimates it will be for States to partially assume the program – and certainly not without recent conversation with States, including Alaska. The conversations that Alaska has had with other States indicate that, contrary to EPA's statement, partial assumption would not be difficult for States to implement. States could, and sometimes would prefer to, take a partial or phased approach to assumption. Alaska urges EPA to reconsider pragmatic options allowing for a partial or phased assumption.

G. Comments Related to Potential Impacts of the Proposed Regulatory Changes on Existing State Section 404 Programs (Judicial Review, Compensatory Mitigation, Five-Year Permits and Long-Term Projects, Program Scope, Conflict of Interest)

This section is likely impactful to the States that have already assumed, and may jeopardize retention of their programs. Alaska urges EPA to pay particular attention to comments on this section from the States who have already assumed the program (New Jersey, Michigan, and Florida), and to any comments or input from Nebraska and other States actively seeking assumption. They are in a unique position to opine on this section and their comments should receive extra weight.

H. Other – Technical & Minor Updates

EPA proposes to define "Indian lands" to mean "Indian country" as defined in the criminal code (15 U.S.C. § 1151).[55]

Alaska supports the incorporation of 15 U.S.C. § 1151. For utmost clarity, EPA should incorporate 15 U.S.C. § 1151 by including an explicit reference to the provision in the text of the final rule.

I. Comments Related to Statutory and Executive Order Reviews:

1. EO 13132 Federalism analysis:

The Proposed Rule indicates that EPA "has concluded that compared to the status quo, this rule does not impose any new costs or other requirements on States, preempt State law, or limit States' policy discretion; rather, it helps to clarify and facilitate the process of State assumption of the section 404 program."[56] EPA further indicates that "EPA engaged with State officials early in the process of developing the proposed rule . . . [citing Trump EPA's engagement from 2018]."[57] EPA's *(2023) State Engagement Summary Report*, posted as a

---

rules on assumption"), available at https://www.oregon.gov/dsl/WW/Documents/LegislativeUpdate-December2020.pdf.

[55] 88 Fed. Reg. 55316.

[56] 88 Fed. Reg. 55319–55320.

[57] 88 Fed. Reg. 55320.

supporting document on regulations.gov, indicates that the extent of the Biden EPA's engagement with States was two presentations – both "informational webinars" in which "EPA did not seek additional input."[58]

Had the Biden EPA reached out to Alaska during their evaluation, and revision, of the Trump EPA's draft of this rulemaking, Alaska could have provided valuable input, and given EPA a realistic sense of which provisions are likely to facilitate, and which are likely to hinder, State assumption for political or practical reasons. Further, the input requested by Trump's EPA did not cover key issues now covered in this Proposed Rulemaking. In particular, the Trump EPA's outreach was not focused, as this one is, on "mak[ing] permitting more equitable" and including provisions increasing tribal involvement in State programs.[59] Alaska requests that EPA listen to our repeated calls for early, and meaningful, engagement in rulemakings such as this that have significant impacts on our State. EPA's continued failure to do so reflects a disregard of cooperative federalism and a disrespect for States.

2. EO 12898 Environmental Justice

Buried at the end of this rulemaking is the statement that "[t]he proposed rule would enable Tribes to have a more significant role in the permit decision-making process than under current practice."[60]

Alaska respectfully requests that all proposed revisions serving this end be excised from this rule and re-introduced in a separate rulemaking explicitly aimed at pursuing this goal. Bootstrapping these types of provisions into a rulemaking purportedly aimed at "clarifying" and "facilitating" State assumption risks convoluting the effort, and increases the chances that EPA's final rule will, ultimately, backfire on EPA and deter State assumption. Deterring State assumption, of course, is not in EPA's best interests – nor is it consistent with Congress's intent that States assume.

Omissions

Notably, the Proposed Rule does not address what has been a large hurdle for some States considering assumption: clarity on the issue of liability under the Endangered Species Act. Alaska urges EPA to state that Florida's approach – completing a programmatic evaluation – should be used as a model. If EPA disagrees with this, EPA should indicate its reasons for disagreeing – and offer a better solution.

The Proposed Rule also does not account for another major hurdle to State assumption, which is the lack of funding. Alaska thanks EPA for the express notation that "EPA funding programs can also be used by Tribes and States to build capacity to assume the section 404 program (e.g., Wetland Program Development Grants) or to implement assumed programs (e.g., CWA section 106 funds)."[61] Whether the Wetland Program Development Grants could be used

[58] 88 Fed. Reg. 55283.
[59] 88 Fed. Reg. 55277.
[60] 88 Fed. Reg. 55320.
[61] 88 Fed. Reg. 55281.

for 404 assumption efforts was a point of unclarity for us last legislative session. We urge EPA to increase the section 106 funds so that some may be made available to pursue assumption, and otherwise push to make funds available for implementation of a 404 assumed program.

Conclusion

It is in both EPA's and Alaska's best interests, and in service of Congress's intent in enacting § 404 and § 101(b), to propose 404(g) revisions that facilitate State assumption of the Corps-run 404 program. Some of the proposed provisions do this, and we thank EPA for their efforts on those provisions. Some, as detailed above, do not. We appreciate the opportunity to assist EPA in identifying which provisions help and which hinder our shared goals of clarifying and facilitating State assumption.

Thank you for considering and incorporating our comments. Again, we appreciate and share EPA's intent with this rulemaking, and are here to provide continued support in those efforts. If you have any questions on any aspects of the Proposed Rule, or its implications in Alaska, please do not hesitate to contact me at (907) 465-5307 or by e-mail at Randy.Bates@alaska.gov.

Sincerely,

Randy Bates
Director
Division of Water
Alaska Department of Environmental Conservation

CC: (email)
Emma Pokon, Commissioner, Alaska Department of Environmental Conservation
Jim Macy, Director, Nebraska Department of Environment and Energy
Shawn LaTourette, Commissioner, New Jersey Department of Environmental Protection
Phillip Roos, Director, Michigan Department of Environment, Great Lakes, and Energy
Shawn Hamilton, Secretary, Florida Department of Environmental Protection
Association of Clean Water Administrators
Environmental Council of the States
Western States Water Council