

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION OFFICE OF THE COMMISSIONER

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January 8, 2009

The Honorable Gary Stevens
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, Alaska 99801

The Honorable Mike Chenault
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, Alaska 99801

Dear President Stevens and Speaker Chenault:

This letter serves as the Department of Environmental Conservation's (DEC) fourth annual report to the legislature on efforts to obtain state primacy for the National Pollutant Discharge Elimination System (NPDES) wastewater discharge program. We are pleased to report that the Environmental Protection Agency (EPA) approved the state's program on October 31, 2008. This report provides background information, a recap of the approval process, a description of the program responsibilities transferred to the Department, and notice of a petition filed with the U.S. Ninth Circuit Court challenging EPA's approval of our program.

Background

The 24th Alaska Legislature passed Senate Bill 110 during its 1st regular session in 2005 directing DEC to seek primacy from the EPA for the NPDES wastewater discharge program. Governor Murkowski signed this legislation into law on August 27, 2005 with an effective date of November 25, 2005. Section 6 of the bill reads as follows:

REPORT TO THE LEGISLATURE. Until full authority for administering the National Pollutant Discharge Elimination System has been transferred to the Department of Environmental Conservation, the Department of Environmental Conservation shall submit, within 10 days after the date the Legislature convenes in regular session, a report to both houses of the Legislature and the governor that includes the following information:

(1) the department's progress in preparing and submitting its application to the United States Environmental Protection Agency by June 30, 2006;

(2) a description of the progress by the United States Environmental Protection Agency in reviewing the state's application and the expected or actual date and contents of the agency's approval; and

(3) the progress made by the Department of Environmental Conservation and the United States Environmental Protection Agency during the five-year National Pollutant Discharge Elimination System program transition period, the identification of the program responsibilities that have been transferred to the Department of Environmental Conservation and the program responsibilities retained by the United States Environmental Protection Agency, whether the transition is proceeding on schedule, and identification of relevant statutory, regulatory, or financial impediments to obtaining National Pollutant Discharge Elimination System primacy as intended by the Legislature.

Work Group Involvement

As required by Section 5 of SB 110, the Department has continued to confer with the NPDES Primacy Work Group, which includes representatives of affected permittees. The Work Group met one time and participated in one teleconference during the last calendar year providing assistance to review and respond to EPA's comments received on the October 2007 draft primacy application.

The Work Group's members are listed at the DEC website at: http://www.dec.state.ak.us/water/npdes/work_group.htm along with agendas, meeting summaries, and other documents germane to the Work Group process. All Work Group meetings were publicly noticed and open to the public with a specific allocation of time on the agenda for public comment.

Primacy Application Approval Timeline

Application submittals

Section 5 of SB 110 provided legislative direction to the Department to submit the NPDES primacy application to EPA before July 1, 2006. DEC submitted the original application to EPA in June 2006. EPA deemed the application incomplete and provided extensive comments in October 2006. The Department revised the application based on comments received and submitted a draft application to EPA in October 2007, which EPA provided comments on in January 2008. EPA's comments required several minor statutory revisions which were passed by the legislature in April 2008 via HB 149. DEC submitted a final application to EPA in May 2008.

Statutory and Regulatory Issues

As previously reported, DEC introduced HB 149 and SB 91 during the 1st session of the 25th Legislature (February 2007) to address a small number of statutory shortcomings EPA identified that were necessary to secure full authority to implement the NPDES Program. HB 149 passed out of the House and was transmitted to the Senate where it did not receive a hearing in the Senate Judiciary Committee before the end of the session. Without the passage of HB 149, DEC was unable to finalize and submit an application to EPA in 2007. During the 2nd session of the 25th Legislature, HB 149 passed out of the Senate Judiciary Committee and was subsequently passed by the full Senate in April 2008. The passage of HB 149 satisfied all outstanding statutory shortcomings allowing DEC to submit a final application to EPA in May 2008.

EPA's review of the May 2008 application revealed that a few APDES regulations at 18 AAC 83 adopted in 2006 needed amendments to agree with updates to the 2008 statutes. Although the amendments were not required to obtain program approval, DEC amended the regulations as requested by EPA and provided a 30-day public notice in August 2008. The amendments became effective in October 2008. There are no remaining statutory or regulatory impediments to program implementation; however, DEC will need to make occasional revisions in response to changes to the federal program to keep Alaska's program current.

Program Approval

In June 2008, EPA deemed DEC's May 2008 NPDES application complete and proceeded with a 60-day public review and comment period of the entire application. EPA and DEC jointly attended three public meetings / hearings on the state's application in Fairbanks, Juneau, and Anchorage. DEC also joined EPA at four public meetings / government-to-government consultations with Tribes in Dillingham, Kotzebue, Sitka, and Bethel and a teleconference with the Loudon Village Council.

Following the close of EPA's public review period in August 2008 and responding to numerous public comments received, EPA approved the state's NPDES Program on October 31, 2008. The state's approved program is called the Alaska Pollutant Discharge Elimination System (APDES) Program. The entire application can be accessed at: <http://www.dec.state.ak.us/water/npdes/index.htm>.

There are currently no financial or other impediments to implement the APDES Program.

Transfer of Authority

EPA's approval of the state's APDES Program includes transfer of permitting and compliance / enforcement for specific dischargers in phases over a three-year period,

rather than the five-year period envisioned in SB 110. The schedule to transfer authority is:

- Phase I: At program approval - October 31, 2008
Domestic discharges, seafood industry, and timber handling
- Phase II: One year from program approval - October 31, 2009
Stormwater Program, Pretreatment Program, and miscellaneous industrial discharges
- Phase III: Two years from program approval - October 31, 2010
Mining industry
- Phase IV: Three years from program approval - October 31, 2011
Oil and gas industry and cooling water intake and discharges

As of October 31, 2008, DEC assumed permitting and compliance and enforcement authority for facilities included in Phase I. EPA retains authority for a facility until the facility transfers to the state in accordance with the transfer schedule. DEC will have full authority to implement the APDES Program for all permittees by October 31, 2011.

EPA has no authority to issue a permit to a facility where jurisdiction over that facility has transferred to the state; however, pursuant to the Clean Water Act, EPA retains authority to review all DEC drafted permits and to conduct inspections and pursue an enforcement action on any discharger in Alaska.

Program Capacity Development

Concurrent with developing the NPDES primacy application, the Department has successfully implemented several components of its capacity building plan to ensure the Department has the staffing and training to implement the APDES Program. Staffing for the program is intact. In addition to taking over the permitting and compliance authority over the dischargers in Phase I, staff will continue to receive classroom training, draft permits for EPA, and conduct joint inspections with EPA for phases II- IV facilities during the coming year.

Petition to the U.S. Ninth Circuit Court

On November 28, 2008, a petition (*Akiak et al v. US EPA*) challenging EPA's approval of Alaska's NPDES primacy application was filed with the U.S. Ninth Circuit Court. The petitioners include several Tribal councils, Cook Inlet Keeper, Alaska Center for

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the Environment, Alaska Community Action on Toxics, The Center for Biological Diversity, and The Center for Water Advocacy. The petitioners claim that the state's program does not comply with 40 CFR §123.30 (judicial review of permits) because the state's 'loser pays' rule will deter potential litigants from challenging a permit decision in court. The petitioner also challenges the program based on the absence of administrative penalty authority and the loss of tribal consultation. DEC has filed to intervene in the case in support of EPA's decision and will closely track the petition as it progresses through the court system. We expect briefing to occur during the spring of 2009 with a decision in the summer of 2009. Filing of the petition does not affect DEC's authority to administer the APDES Program for the Phase I facilities transferred to the state.

The Department looks forward to implementing an APDES Program in Alaska that ensures protection of our valuable water resources through issuance of current, protective discharge permits, a robust inspection program, and timely and predictable enforcement actions to ensure compliance. We are prepared to answer any questions you may have about our APDES Program.

Sincerely,



Larry Hartig
Commissioner

cc: Governor Sarah Palin
Mike Nizich, Chief of Staff, Office of the Governor
Randy Ruaro, Deputy Chief of Staff, Office of the Governor
Kelly Goode, Legislative Director, Office of the Governor
Kirsten Waid, Senate Secretary, Alaska State Legislature
Suzi Lowell, House Chief Clerk, Alaska State Legislature