

Response to Comments
Alaska National Pollutant Discharge Elimination System
Program Approval

U.S. Environmental Protection Agency, Region 10
October 31, 2008

On May 1, 2008,¹ the State of Alaska submitted to the U.S. Environmental Protection Agency (EPA) a program submission seeking authorization for the Alaska Department of Environmental Conservation (ADEC) to administer the National Pollutant Discharge Elimination System (NPDES), pursuant to Clean Water Act (CWA) § 402(b)² and 40 CFR Part 123. The program submission includes a Program Description (PD), Attorney General’s Statement (AGS), and Memorandum of Agreement (MOA), as required by 40 CFR §§ 123.21 - .24. The State’s program submission (also referred to as an “application”) refers to Alaska’s NPDES program as the Alaska Pollutant Discharge Elimination System (APDES), and uses the term “primacy” when referring to NPDES program authorization. This document constitutes EPA’s responsiveness summary required by 40 CFR § 123.61(b), and identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received, and explains EPA’s response to the comments.

EPA provided for public participation as part of its review of the APDES program application, including publishing a notice in the Federal Register and Alaska newspapers on June 18, 2008, informing the public of a 60-day public comment period on Alaska’s application. The notice identified a website where the public could find and review the State’s submission, the State’s implementation plan to transfer the administration of specific program components from EPA to the State over 3 years, EPA’s oversight and enforcement role, instructions as to how to obtain copies of the application, and instructions for submitting comments to EPA. EPA held public meetings in Fairbanks (July 21, 2008), Juneau (July 22, 2008), and Anchorage (July 23, 2008) at which it presented an overview of Alaska’s application and the program approval process, and heard public testimony. Prior to the formal public comment period, EPA provided information about Alaska’s application at the Alaska Forum on the Environment in 2007 and 2008.

EPA received written and public hearing comments from 71 individuals and representatives of organizations or tribal governments. An appendix to this document lists and assigns a number to each commenter. Similar comments are grouped together, assigned a comment number, and summarized below, followed by EPA’s response. Each comment summary also indicates which commenters raised the issue, using the

¹ The State supplemented its submission between May 1 and June 9, 2008, and amended it further during the course of the public comment and approval processes.

² The Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), is codified at 33 U.S.C. Chapter 26 (§§ 1251 to 1387). This Responsiveness Summary will cite to the CWA using the section numbers from the CWA itself, rather than the different section numbers from 33 U.S.C. Chapter 26.

commenter numbers listed in the appendix. EPA received twenty resolutions from tribal governments, which were counted as one comment. Comments signed by multiple signatories were counted as multiple comments.

Comment 1 -- Judicial Review of APDES Permits

Commenters: 55, 69, 45, 28, 25

A number of comments concerned the state's unique "loser pays" rule, which could require good faith permit challengers to pay all or part of a permittee's court costs and attorney fees if the permit challenge is unsuccessful. The comments argue that the specter of attorney fee awards in those circumstances would deter potential permit challengers from taking court action. The comments argue that this deterrent effect would violate 40 CFR § 123.30, which requires state NPDES programs to "provide an opportunity for judicial review in State Court that is sufficient to provide for, encourage, and assist public participation in the permitting process." This requirement would be met by a judicial review process that is "the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit." Id.

Response to Comment 1

The comments do not establish that the judicial review process for NPDES permits in Alaska fails to "provide for, encourage, and assist public participation in the permitting process." On its face, the "loser pays" rule appears to be symmetrical insofar as potential litigants challenging an infirm permit or seeking enforcement of a valid permit will gain from the rule when successful. EPA does not believe that Alaska's "loser pays" rule is necessarily inconsistent with the regulatory requirement at 40 CFR § 123.30 for a judicial review process that encourages public participation.

The Agency has considered the assertions that Alaska's "loser pays" rule may act as a disincentive to prospective litigants in some cases, and concluded that the State's system is likely to operate in practice similarly to the system for judicial review of EPA-issued NPDES permits, for at least four reasons. First, the applicable State court rule regarding attorney fees in appeals of administrative agency decisions, Alaska Appellate Rule 508, is essentially identical to the provisions that apply to permit appeals in federal court, CWA § 509(b), under which substantial fee awards do not routinely occur.

Second, Alaska Civil Rule 82, which State judges are permitted to apply by analogy in administrative appeals, expressly provides for the denial or reduction of an attorney fee award to a prevailing permittee litigant in two circumstances: (1) if "a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts"; and (2) if "other equitable factors" justify denial or reduction of an attorneys fees award. Alaska Civil Rule 82(b)(3)(I) and (K). This would allow State Courts to avoid the deterrence that concerns the commenters.

Third, the Alaska Supreme Court recently highlighted the continued vitality of the Rule 82(b)(3)(I) exception, the purpose of which is to avoid deterring good faith litigants by the threat of an onerous attorney fees award. State v. Village of Nunapitchuk, et al., 156 P.3d 389 (Alaska 2007).

Fourth, the State of Alaska, in its NPDES Program Description, has made two helpful declarations: (1) the State has committed to not seek attorneys fees from permit challengers who, in good faith, bring unsuccessful permit challenges; and (2) in response to the concerns raised in these comments, the State now formally acknowledges the possibility of deterrence from fee awards against litigants who appeal APDES permits in good faith, and the applicability of the Rule 82(b)(3)(I) exception to avoid that deterrent effect should permittees or other intervenors seek fee awards against such litigants. Read in conjunction with 40 CFR § 123.30 and ADEC's statements in the Program Description, EPA believes that Rule 82(b)(3)(I) and (K) create a presumption that no fees will be awarded against NPDES permit challengers who litigate in good faith in Alaska state courts. This should eliminate the deterrent effects that these comments discuss.

Comment 2 -- Third-Party Contractors/Conflict of Interest
Commenters: 65, 69

18 AAC 83.125 allows the hiring of a private contractor, paid by the permit applicant, to draft APDES permits and supporting documents for ADEC. Several commenters expressed concern about the possibility of contractors having conflicts of interest, and about allowing contractors to exercise control over the permitting process in a way not intended by the CWA. One commenter urged that any such contractor be paid by the applicant but hired and managed directly by ADEC.

Response to Comment 2

The State regulations contain adequate safeguards to eliminate conflicts of interest on the part of private contractors drafting APDES permits and related documents. Any such contractor must execute a disclosure statement certifying that it has no financial or other conflicting interest in the outcome of the permitting project. 18 AAC 83.125(a)(2). ADEC has the sole authority to select the contractor, and will not select any contractor that has a conflict of interest. 83.125(a)(1) and (3). It is ADEC that will develop the terms of the contract with the contractor, and will direct the contractor's performance. 83.125(a)(4) and (5). ADEC must independently evaluate any documents prepared by the contractor, is not bound to accept them, and has sole responsibility for the ultimate adequacy of the documents. 83.125(b) and (d). Finally, nothing exempts any permits prepared by contractors, or with their help, from the appeal process. PD § 6.4.4 affirms all of these ADEC oversight mechanisms.

Comment 3 – Administrative Penalties

Commenters: 45, 69, 28, 25

APDES Program does not meet the seventh criterion of CWA § 402(b) of the Clean Water Act. Three comments questioned whether the APDES program meets the seventh criteria in Section 402(b) of the Clean Water Act because of the fact that ADEC does not have the authority to assess civil administrative penalties. The ability to recover such penalties in court remains a legal avenue, but it is a time-consuming and costly process that the State is unlikely to take in order to enforce compliance. “Without the authority to assess administrative civil penalties, DEC’s ability to enforce an APDES program is severely hampered, which scuttles the rigorous regulations of the federal program.”

Response to Comment 3

The proposed APDES program contains all of the enforcement authorities required by federal statute and regulation. The authority to assess civil penalties in an administrative proceeding, as opposed to a judicial lawsuit, is but one optional component of a comprehensive enforcement regime. The applicable federal regulation requires the State to have:

- (1) Administrative cease and desist authority, 40 CFR § 123.27(a)(1),
- (2) Judicial injunctive authority, § 123.27(a)(2),
- (3) Authority “[t]o assess or sue to recover *in court* civil penalties” for permit violations, § 123.27(a)(3)(i) (emphasis added), and
- (4) Authority to pursue criminal remedies, § 123.27(a)(3)(ii) and (iii).

The APDES program provides ADEC with all of those authorities. A Note after § 123.27(c) explains that a state may have other enforcement remedies in addition, and explicitly lists certain remedies that “while not mandatory, are highly recommended,” including procedures to assess penalties through an administrative proceeding. This makes it clear that administrative penalty authority is optional, not required.

The comments correctly point out that the State’s enforcement program as a whole must be sufficient to meet CWA § 402(b)(7), which requires that the State have *adequate* authority “to abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.” Even without administrative penalty authority, Alaska has given ADEC adequate authority to meet this test. Administrative remedies, as identified in PD § 9.4.3, include a Compliance Letter, Notice of Violation, Nuisance Abatement Order (AS 46.03.800 and AS 46.03.810), Compliance Order by Consent (COBC), Compliance Order, Permit Revocation or Modification, Emergency Order (AS 46.03.820), Subpoena Powers, and Settlement Agreement. Judicial remedies, as identified in PD § 9.4.4, include a Consent Decree, Civil Suit for injunctive relief and damages (AS 46.03.760 and AS 46.03.765),

Preliminary Injunctive and Temporary Restraining Order (AS 46.03.765) and Permanent Injunction. Furthermore, as explained on pages 4-8 of ADEC's *Enforcement Manual*, ADEC may recover future ADEC costs incurred for monitoring compliance with the COBC, and may recover past State costs relating to the violations resolved in the COBC. These are significant enforcement tools which provide the State adequate authority to meet the requirements of federal law.

Comment 4 -- "Mandated by Law"

Commenter: 69

The State originally sought to limit the monitoring and reporting requirements that ADEC could include in APDES permits to those requirements "mandated by law." That limitation was expressed in both statute (AS 46.03.100(h)) and regulation (18 AAC 83.425(c)). EPA objected that this would limit ADEC's discretion to determine appropriate permit monitoring and reporting requirements on a case-by-case basis, an authority which CWA § 308(a) gives to EPA, and which CWA § 402(b)(2) requires state NPDES programs to have as well. See also CWA § 304(i), 40 CFR §§ 123.25(a)(19) and 122.48. One commenter expressed the concern that limits on ADEC's authority to include appropriate monitoring and reporting requirements in APDES permits "hamstrings enforcement of important water quality protections and caters to permittees."

Response to Comment 4

Alaska has addressed this concern by amending the applicable statute, AS 46.03.100(h), and the applicable regulation, 18 AAC 83.425(c), to authorize ADEC to include in a permit any monitoring or reporting requirements that are "authorized by law, including [CWA § 308]." See also AS 46.03.020(13). This provides ADEC with the same discretionary authority that the CWA gives to EPA when it issues NPDES permits, which satisfies the requirements for a state NPDES program.

Comment 5 -- Public Access to Information

Commenter: 69

The Alaska Public Records Act allows broad access to information, but that access is often hindered by excessive costs to obtain documents. Although allowed, "DEC never approves fee waivers," which is a hindrance to public participation and enforcement for the APDES program and justifies rejection of the APDES application.

Response to Comment 5

Alaska statutes (AS 40.25.110) and regulations (2 AAC 96.210(a)) require all public agencies to maintain public records, and to make them available for public inspection. State law also allows for an agency to charge a fee for copying public records.

ADEC makes available all releasable documents for inspection without cost in ADEC offices. ADEC does not assess a fee to inspect public records unless there is a cost to the agency to search for the records. 2 AAC 96.240(c). However, AS 40.25.110(d) allows for ADEC to reduce or waive a fee related to a public record request if the agency determines that the waiver is in the public interest.

ADEC has a uniform practice of routinely waiving the fee for a public record request where it believes the effort associated with collecting a fee would likely exceed the fee collected. For this reason, ADEC does not collect a fee for copying where the number of copies is 200 or fewer and where staff time spent gathering the records is less than five hours in a calendar month. If the number of copies exceeds 200, ADEC requires that the requestor pay for the full number of copies, including the initial 200 at \$.25/page, and charges for staff time when it exceeds five hours in a calendar month. ADEC works with the requester to refine their request to reduce the number of documents necessary to satisfy the requester's needs in order to reduce any burden that fees might impose. According to ADEC's public record request logs, the majority of public record requests have been provided to the requestor at no cost. Like all public documents, the public record request logs are available to the public for review.

Comment 6 -- DEC Lacks Authority to Adopt Future Versions of Federal Regulations

Commenter: 69

DEC lacks the authority to adopt future versions of the federal regulations prospectively. A mechanism must be developed so that current regulatory requirements are part of permits, or EPA cannot approve the APDES program.

Response to Comment 6

Prospective incorporation of future federal regulations is not a requirement for state-administered NPDES programs. A state must "keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures or priorities." 40 CFR §123.62(a). If there are future changes to federal statute or regulations that require a change in the APDES program, the State has committed in the MOA § 3.01 (¶4), to "[e]nsure that new applicable federal NPDES regulations are incorporated into state regulations within one year of federal promulgation or within two years if a state statute must first be enacted, pursuant to 40 CFR § 123.62(e)." This adopts the federal regulations' timeframes for revisions to State programs that were established before the promulgation of applicable EPA regulations.

If the APDES program does not comply with federal requirements in the future, whether because of changes to federal requirements, or because of changes in the State program, EPA may initiate revisions to the State's program to ensure compliance with those requirements. 40 CFR §123.62(a). Ultimately, continued noncompliance with

federal requirements could lead to withdrawal of APDES program approval, pursuant to 40 CFR §§ 123.63 and 123.64.

Comment 7 -- Alaska has not adopted all the requirements contained in 40 CFR Part 123

Commenter: 69

Specific requirements that the Alaska regulations omit are 40 CFR §§ 123.26, 123.27, 123.28, 123.29, 123.30, and 123.35.

Response to Comment 7

Unlike 40 CFR § 123.25(a), the EPA regulations cited in this comment do not contain specific provisions that state NPDES programs must have the authority to implement (either verbatim or in more stringent versions). Rather, the cited regulations set forth descriptive requirements for state NPDES programs. The proposed APDES program does in fact satisfy each of these requirements, which are addressed in turn in the following paragraphs.

40 CFR § 123.26 identifies the requirements for state compliance evaluation programs. This regulation has a number of requirements pertaining to collection and analysis of self-reported information from permittees, inspection and surveillance, and evaluating public complaints and other compliance information to identify violations. The proposed APDES program application describes an extensive compliance evaluation program that meets these requirements. The main components of Alaska's program that meet the requirements of 40 CFR § 123.36 are described in the Program Description (Parts 9 and 10, and Appendix I), Alaska Statutes (e.g. AS 46.03.020(6)), Alaska Regulations (e.g. 18 AAC 83.405(j)), and Attorney General Statement (Part I, § 5).

40 CFR § 123.27 sets out the required elements for the state's enforcement authority. Like § 123.26, this regulation addresses a number of program components, including state authority to restrain environmentally harmful activity, to enjoin threatened or continuing violations, to assess civil penalties and criminal fines. Alaska's authority and procedures corresponding to these requirements are described or established in a number of places including the Program Description (§§ 9.4 and 9.6), Alaska Statutes (AS 46.03.758-.820), and the Attorney General Statement (Part I, § 9).

40 CFR § 123.28 requires a state NPDES program to have "authority to issue permits to control the disposal of pollutants into wells." The regulation specifically notes that a State may, and should where possible, rely on existing authorities. The Attorney General Statement (Part I, §§ 1.b) describes the State's broad authority:

ADEC has broad authority over the disposal of pollutants into state waters and onto state land. In fact, ADEC's statutory authority to regulate such

disposal through permits or other authorizations does not distinguish between discharges to surface waters and discharges to groundwater. Under AS 46.03.100(a), a person may not dispose of wastes into state waters or onto state land without a permit or authorization from ADEC. The term "waters" is defined to include all "bodies of surface or underground water." AS 46.03.900(37). Thus, ADEC's authority over discharges to the land and to groundwater is just as broad as its authority over discharges to surface water.

The regulations that reflect this provision may be found in 18 AAC 72.010 for domestic wastewater and in 18 AAC 72.500 for nondomestic wastewater. These authorities satisfy 40 CFR § 123.28.

40 CFR § 123.29 requires that "State permit programs shall provide that no permit shall be issued when the Regional Administrator has objected in writing under Sec.123.44." This requirement is satisfied by 18 AAC 83.015(c)(2), which states: "The department will not issue an APDES permit for a discharge . . . when the regional administrator has objected to issuance of the permit." This requirement is also reflected in the MOA (§ 4.05, ¶1).

40 CFR § 123.30 requires states to "provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State," and then sets forth several requirements that the State's review procedures must meet. Alaska's program satisfies this requirement because it does provide for judicial review, in State Court, of final NPDES permit decisions, including denials, satisfying this federal regulation. The procedures and authorities for this review are described in the Attorney General Statement (Part I, § 13). To summarize briefly, the required State Court judicial review is authorized by AS 44.62.560(a); AS 22.10.020(d) and (e); 18 AAC 15.220(b)(4) (regarding permit denials); Alaska Rule of Appellate Procedure 601(b). See also AS 44.64.030(c) and 18 AAC 15.300(c) (regarding judicial review of decisions by Alaska's Office of Administrative Hearings). The comment does not identify any deficiency in the State's review procedures, other than the more specific objection addressed above in Response to Comment 1.

40 CFR § 123.35 contains specific requirements for State NPDES programs regarding municipal separate storm sewer systems. At 18 AAC 83.010(d), the State of Alaska has adopted by reference the federal regulatory requirements for small MS4 facilities, located at 40 CFR §§ 122.30 - 122.37. In addition, the State has prepared a guidance document, now referenced in the PD, that further addresses this issue. These regulations and the inclusion of the guidance document reflect the program requirements outlined in 40 CFR § 123.35.

Comment 8 -- Review Periods

Commenters: 69, 28, 46

18 AAC 83.115(e) and 18 AAC 83.120(m) allow the permit applicants to review the preliminary draft permit and the proposed final permit before it is provided to the public. The program description also describes the added access provided to individual and general permittees. To provide more access and influence is unacceptable and unnecessary. Regulations give the permit applicants inappropriate influence over the permitting process. 18 AAC 83.990(50) provides the discharger an opportunity to review the preliminary draft permit and allows “dischargers undue influence over the permitting process.” The ADEC proposal allows industry to work with regulators before the public comment on the draft permit and the proposed final permit, whereas the public will not have that opportunity.

Response to Comment 8

The Clean Water Act and EPA regulations contain a number of public notice and comment requirements that state NPDES programs must meet. See, e.g., CWA § 402(b)(3); 40 CFR §§ 123.25(a)(28)-(30). The commenters do not argue that the proposed APDES program provides inadequate public involvement to satisfy these requirements. Rather, they argue that the proposed program provides excessive opportunity for input by permit applicants. The comments do not point to any authority, however, that limits the amount of notice or comment opportunities that a state may afford to interested parties as a group or individually.

ADEC’s regulations provide the permit applicant two opportunities to provide such additional input. One is a 10-day period for a permit applicant to review the preliminary draft permit, to provide written and oral comments, to propose amendments, or to discuss the preliminary draft permit with ADEC prior to the 30-day public comment period. 18 AAC 83.115(e). The other additional opportunity is a five-day period for a permit applicant to review and discuss the proposed final permit with ADEC and the related response to comments, prior to their final issuance. 18 AAC 83.120(m). Both the preliminary draft and the proposed final permit will be posted on ADEC’s web page. Neither of these permit review opportunities for permittees detracts from other parties’ ability to influence and oversee the permitting process, either through the formal notice and comment and appeal processes, or through informal interactions with ADEC. The comment points to nothing in the CWA or the applicable regulations that would prohibit this practice by the State.

Comment 9 -- Minor Modifications

Committer: 69

18 AAC§ 83.145(a)(6) adds a provision not authorized by 40 CFR § 122.63 and impermissibly relaxes CWA requirements.

Response to Comment 9

The State has adopted a regulation corresponding to 40 CFR § 122.63 that allows one additional category of “minor modifications” not provided in the corresponding federal regulations. The additional category is, quoted in full:

making a change in a permit provision that will neither result in allowing an actual or potential increase in the discharge of a pollutant or pollutants into the environment nor result in a reduction in monitoring of a permittee’s compliance with applicable statutes and regulations.

83 AAC 83.145(a)(6). While there is no federal counterpart to this state provision, states are not required to adopt regulations identical to the federal scheme. The regulatory requirement is that the state’s requirements must be at least as stringent as the corresponding federal provisions. See 40 CFR § 123.25, note. The Attorney General’s Statement clarifies that 18 AAC 83.145(a)(6) “limits the Department’s discretion to apply the minor modification process to changes that have no potential for additional deleterious impact on the environment or reduce the ability to confirm a permittee’s compliance with applicable requirements.” See AGS Part I, § 8. As so interpreted, the Alaska regulation is at least as stringent as the corresponding EPA regulation. The comment does not describe any way in which the additional State category for “minor modifications” could have an adverse impact on receiving waters.

This does not violate the antibacksliding provision, CWA § 402(o), for the same reason: that provision only applies when permit provisions are made less stringent, which 18 AAC 83.145(a)(6) does not allow.

Comment 10 – Local Limits for Industrial Users

Commenter: 69

18 AAC 83.460 has no counterpart in federal regulation and is problematic since it allows a publically-owned treatment works (POTW) to develop local limits for industrial users that are part of pretreatment programs.

Response to Comment 10

The comment is in error. The federal counterpart for 18 AAC 83.460 is 40 CFR § 122.44(j). The State was required to adopt this provision (or a more stringent one) by 40 CFR § 123.25(a)(15).

Comment 11 – Monitoring and Compliance Reporting
Commenter: 69

18 AAC 83.410 has no counterpart in federal regulation and is vague regarding monitoring and compliance reporting. "At the very least, there should be monthly monitoring and reporting requirements and the certified monitoring and reporting information must be provided to the State."

Response to Comment 11

The comment is in error. The federal counterpart for 18 AAC 83.410 is 40 CFR § 122.41(l). The State is required to adopt this provision (or a more stringent one) by 40 CFR § 123.25(a)(12). The commenter cites no authority for the quoted sentence.

Comment 12 -- Expanded Definition of "New Source"
Commenter: 69

"18 AAC 83.990(44) contains an expanded definition of 'new source' that impermissibly relaxes Clean Water Act requirements."

Response to Comment 12

The State regulations submitted with the Application combine two definitions of "new source" that are both contained in the federal NPDES regulations. One of the federal definitions is found in 40 CFR § 122.2, and the second is in 40 CFR § 122.29 and supplements the first ("a source is a 'new source' if it meets the definition of 'new source' in § 122.2, and . . . "). Combining the two federal definitions into one in the State regulations is acceptable, particularly since neither is a provision that a state NPDES program is required to adopt under 40 CFR § 123.25(a).

Comment 13 -- CWA Section 204(b)
Commenter: 69

APDES regulations do not include specific provisions requiring industrial users' compliance with user charges and construction costs under CWA Section 204(b). CWA Section 204(b) requires that the Administrator not approve any grant for any treatment works unless he has first determined that the applicant has adopted or will adopt a system of charges to assure that each recipient of waste treatment services will pay its proportionate share of the costs of operation and maintenance of any waste treatment services provided by the applicant and that the applicant has legal, institutional, managerial, and financial capability to ensure adequate construction, operation, and maintenance of the treatment works.

Response to Comment 13

EPA believes that adequate authority exists in Alaska to ensure that industrial users will comply with CWA § 204(b). It is not necessary for APDES regulations to include specific provisions requiring industrial users' compliance with user charge systems under CWA § 204(b). Rather, it is sufficient that the municipality or intermunicipal or interstate agency that adopts the system of user charges required by § 204(b) has the authority to ensure compliance by the industrial users with the system of user charges.

CWA § 204(b) prohibits the EPA Administrator from approving any grant for the construction of POTWs under CWA § 201(g) unless the Administrator determines that the applicant has adopted or will adopt a system of charges to assure that each user of the POTW will pay a proportionate share of the operation and maintenance of the facility. Congress has not appropriated funds for the Title II construction grants program, which includes CWA § 201(g) grants, since 1990. See, e.g., CWA § 207. Instead, Congress has primarily supported wastewater infrastructure by funding the clean water state revolving fund (SRF) program of Title VI of the CWA. See, e.g., CWA § 607. The Clean Water Act applied the construction grant provisions of CWA § 204(b) to the SRF program, but only until 1994. CWA § 204(b) has not applied to the SRF program since fiscal year 1994. See CWA § 602(b)(6). Based on its experience implementing the Title VI SRF program, EPA does not expect Congress to appropriate any more funds for the Title II construction grant program.

Neither the construction grant requirements in 40 CFR Part 35 nor the requirements for minimum legal authority for state NPDES program in 40 CFR § 123.25 require states to have specific regulations requiring industrial users' compliance with user chargers costs under CWA § 204(b). Instead, the construction grant program required that EPA, or the state as its delegatee, ensure that the POTW that is receiving the grant have a cost sharing user fee system in an enforceable municipal ordinance. Before municipalities could receive additional Title II grants for the construction of their POTW, they had to get approval from EPA, or a delegated state, of their user charge system. EPA's Regulations for Grants for the Construction of Treatment Works are in 40 CFR Part 35, Subpart E. These regulations require that recipients of construction grants adopt in a municipal sewer use ordinance a user charge system that complies with CWA § 204(b). See 40 CFR §§ 35.927-4 and 35.929-2(e). Continued implementation of the approved system is made a condition of the treatment works grant. See 40 CFR § 35.929-3. See also, EPA guidance on Evaluating Municipal Wastewater User Charge Systems (September 1993).

Under CWA § 205(g) and the implementing regulations at 40 CFR § 35.912, EPA may delegate to states the Agency's responsibility for administering certain provisions of the construction grant program, including CWA § 204(b). EPA delegated grant administration to Alaska on December 7, 1978. Under this authority, Alaska assumed responsibility for insuring that grant recipients had an appropriate user charge system in

place. See, e.g., State/EPA Agreement Fiscal Year '89 between State of Alaska D.E.P. and U.S. EPA (June 1988).

At the time that the grants were issued to the POTWs in Alaska, EPA and Alaska ensured that adequate user fees were in place. Commenter does not allege, and EPA is not aware of, any problems enforcing lack of compliance with POTW user charge systems. Accordingly, EPA has not determined that adequate authority does not exist to ensure compliance with CWA § 204(b).

Comment 14 -- Cooling Water Intake Structures

Commenter: 69

"18 AAC 83.380(e)(2)(c) should include the last sentence of 40 CFR § 122.21(r)(4)(vii), which states, 'The study area should include, at a minimum, the area of influence of the cooling water intake structure.'"

Response to Comment 14

The last sentence of 40 CFR § 122.21(r)(4)(vii) is in fact included in the State regulations. It is located at 18 AAC 83.380(e)(2)(A), rather than at the end of 18 AAC 83.380(e)(2)(C). This minor difference has no effect on the meaning of the regulation; it is merely a slight reordering of the same sentence.

Comment 15 – Permit Application Review Process

Commenter: 69

Although 40 CFR § 124.3(d) and (e) are not required, they should be included in the APDES regulations since they provide clarity about what is required in the permitting review process and hold applicants accountable to that process.

Response to Comment 15

Although there is no requirement that the State adopt the conditions found in 40 CFR § 124.3(d) and (e) (see 40 CFR § 123.25), the State program does include comparable provisions. The requirement for a complete application, which 40 CFR § 124.3(d) addresses, can be found in Alaska's regulations at 18 AAC 83.110(d), which state in part, "An application for a permit is complete when the permit fee required under 18 AAC 83.905 is paid and the department, in its sole discretion, determines that the application form and any supplemental information are satisfactory." PD § 6.2.1 (¶¶ 6 and 8) sets forth the steps of the administrative and technical completeness reviews. Site visits, which 40 CFR § 124.3(e) addresses, are addressed in the State's Program Description (§ 6.2.2, ¶ 4), which considers their use a valuable tool when developing a permit.

Comment 16 -- Bias towards industry or industry influence on the State
Commenters: 12, 23, 28, 24, 13, 18

One commenter stated a concern that “so much money is at stake from mining, oil, and other industries that the temptation for the State agencies to look the other way involving so-called minor infractions is very possible,” and expressed a similar concern of “influences of industrial permittees on the legislature.”

Another commenter stated, “As enumerated in these points, ADEC proposes to implement a program that has a significant bias toward industry and the basic checks protecting water quality in Alaska will erode quickly.” The work group report demonstrates an “inappropriate and unseemly prioritization of expediency and industry wishes over careful deliberation and an equitable public process.” “Because in this state . . . we’ve seen this power and the corruption that industry brings with it.”

Response to Comment 16

Undue influence of interested parties that are affected by NPDES permitting decisions is a concern in any state. The Clean Water Act and its implementing regulations establish a number of mechanisms to ensure the integrity of the State's implementation of the NPDES program. The State plans to avoid conflicts of interest by implementing 18 AAC 83.170, as described in PD § 6.4.2.

First, the process and criteria that apply when determining whether a state program can be approved is the same for Alaska as it is for any other state. EPA may only approve a state's NPDES program if it meets all of the requirements set out in 402(b) of the Clean Water Act and the applicable EPA regulations at 40 CFR Part 123. EPA’s decision on Alaska’s application is subject to public scrutiny, comment, and appeal. This ensures that Alaska's NPDES program will meet the same substantive and procedural requirements of any other state's NPDES program.

Second, the APDES program is subject to significant public oversight. Alaska must follow a public review process on permitting actions, which includes public notice and an opportunity to provide comment, responses to public comments, and an opportunity for judicial review of permitting decisions. ADEC has developed a public participation document specific to the Alaska program that outlines how the public will be afforded opportunities for input on permitting decisions. The APDES program also allows for public involvement in the enforcement process.

Third, the APDES program is subject to significant EPA oversight. Individual permitting decisions are subject to EPA review, objection, and veto when unlawful. See MOA § 4.03, ¶ 11. EPA also retains the authority to take enforcement actions with regard to violations in Alaska that are not otherwise adequately addressed.

Finally, if State implementation of the NPDES program does not meet standards specified in the Clean Water Act and federal regulations, the State can be required to

revise its NPDES program in order to come into compliance. In addition, citizens may petition EPA to withdraw the State's authority to implement the NPDES program, and EPA, with or without a citizen petition, may withdraw that authority, through the process outlined in 40 CFR § 123.64.

Comment 17 -- Resources (including: funding, attracting and retaining qualified personnel, state expertise, comparison to other states)

Commenters: 43, 65, 58, 70, 28, 23, 25, 18, 29, 24, 22, 56, 57, 19, 64, 49, 60, 50, 62, 30, 42, 52, 1, 66, 53, 4, 67, 9, 19

A number of comments questioned whether the State funding and resources are adequate and whether the State has the expertise to properly manage the APDES program. Some stated that the State does not have the resources to implement the program. Some comments expressed the concern that the State will have fewer staff and less money than EPA has historically spent to implement this program. Some questioned whether ADEC can compete with the private and federal job sectors for qualified staff given State compensation. One commenter asked that EPA compare APDES resources with that of other states, and that EPA analyze ADEC's ability to attract and retain qualified personnel to implement the program given the State salaries and benefits. One commenter questioned the increase in permit fees and its impact on boroughs and villages and the impact to the State General Fund from the costs of supporting the program. The commenter suggested that permit costs to industry should be increased.

On the other hand, numerous comments asserted that the State has sufficient funding to administer the APDES program. Some comments stated that the legislature has confirmed its commitment to funding the program through a fiscal note that addresses funding the program through a combination of state general funds, federal grant funds, and permit fees. Many comments also recognized ADEC efforts to develop qualified staff through the development and implementation of the capacity building plan, which includes training, work share agreements, and the hiring of temporary staff from other states. One comment stated that Alaska industry has no ability to affect funding on the national level, but can help ensure effective funding on the State level after the State has the program. One commenter cited the drinking water program as an example of ADEC managing a complex program.

Some comments cited problems with EPA's historic level of funding of the NPDES program and expressed the view that it would be improved under the State program, arguing that EPA does not have adequate resources nor staff to work with industries in Alaska and address the unique problems there. EPA has had too great a workload to worry about permit renewals for minor facilities. Alaska has many smaller facilities that are currently unpermitted due to EPA's resource limitations. The long expiration of the log transfer facility general permit is an example of EPA not being able to address small dischargers.

Some commented that EPA and the State have worked out an approach to phase in the program and allow the State to develop expertise as the program grows. “We see every indication that the state intends to continue to provide the resources and expertise necessary to implement and administer the state’s APDES program.” The phasing program gives ADEC the opportunity to ramp up their capabilities appropriately as they assume the program.

Response to Comment 17

When ADEC decided to establish the APDES program, it applied three approaches to estimate the staff and funding resources needed to administer the program. First, ADEC used the “State Water Quality Management Resource Model” (version 3.16, September 2000) developed by EPA and the Association of State and Interstate Water Pollution Control Administrators. The model estimates the resource needs based on the number and types of permits, compliance and enforcement work, and other activities to support implementation of the NPDES program. The model suggested ADEC would need 43 full time equivalent (FTE) staff.

Second, ADEC compared the permitting and compliance staff levels of EPA in 2003 (while EPA was administering the NPDES program in Alaska) to ADEC’s proposed staff level, concluding that ADEC will have 24.5 FTE dedicated to permitting and compliance work, compared to the 18 FTE dedicated at EPA for these activities. *See State of Alaska’s Assumption of the National Pollutant Discharge Elimination System – A Report to the Alaska Legislature* (January 2004), Table 5, page 26.

Third, ADEC compared the proposed staffing and resource levels for the NPDES Programs in other states with NPDES programs, focusing particularly on a Pacific Northwest state in the same EPA Region (Washington), and on the most recent state to obtain NPDES authorization (Arizona). That analysis showed that, when calculated on a per-permit basis, ADEC’s estimated human resource needs for NPDES authorization are comparable to the human resource needs of two established NPDES states. *See the State of Alaska’s Assumption of the National Pollutant Discharge Elimination System – A Report to the Alaska Legislature* (January 2004), Table 6, page 27.

Based on the evaluation and comparisons, ADEC estimated needing a total annual budget of \$4.8 million and 43 FTE’s to implement the NPDES Program. ADEC requested this level of funding and FTE from the legislature, and these resources have been a part of ADEC’s annual base budget since FY 2006, demonstrating ongoing legislative support for Alaska to administer the APDES program. As illustrated in Table 6 of the Program Description, the 43 FTE will be divided among several sub-programs with the Wastewater Discharge Authorization Program and the Compliance and Enforcement Program being two of these sub-programs. According to Table 6, by the second year of the APDES program, ADEC will have 13.4 FTE in the Wastewater Discharge Authorization Program and 13.4 FTE in the Compliance and Enforcement Program.

EPA believes this level of resources is adequate for ADEC to implement the permitting and compliance and enforcement programs, as well as the other activities that support the NPDES Program, i.e. data management and entry, water quality standards development, administrative support, and program development to address any future changes to federal law. *See Alaska Pollutant Discharge Elimination System, Program Description* (June 9, 2008), page 16, Table 6 and page 18, Table 8.

Comment 18 -- Improved efficiency/superior environmental protection

Commenters: 56, 40, 64, 60, 52, 67, 3, 9

Some comments stated that the State could run the program more efficiently than EPA, and this will greatly improve the ability to obtain permits in a timely manner; businesses will only have to work with one regulatory agency and will save costs and time. Consolidation of permitting in one agency will reduce confusion about permitting requirements. For years EPA has been unable to timely process permit applications, particularly for minor facilities. ADEC will be able to provide greater attention to some of the smaller dischargers. The facilities will receive more attention under a State program. Approval of the APDES program would alleviate EPA's permit backlog burden and afford greater environmental protection as State staffing levels increase. The State will have the ability to control the scheduling of the permitting process to the satisfaction of communities, the legislature, and the public.

Response to Comment 18

EPA acknowledges the comments regarding ADEC's ability to improve the efficiency of the NPDES program as stated. ADEC will have a greater ability to set priorities under the program and control scheduling of permit activities than it has had under EPA administration of the program. This prioritization, together with the resources described in the Program Description, should provide ADEC the ability to address the numerous minor facilities in the State.

Comment 19 -- Local Regulators; Accessibility; Familiarity with Alaska Conditions

Commenters: 56, 19, 40, 64, 49, 60, 50, 62, 30, 52, 68, 66, 53, 4, 9, 19, 17, 70

Many supporters of APDES program approval stated that Alaska-based ADEC personnel are best suited to administer the Clean Water Act requirements in the State of Alaska, and that the State can better address Alaska-specific issues that cannot be effectively addressed at the present time with EPA administering the program. APDES personnel are located in Alaska and would be more accessible to the regulated public. An APDES program will save travel costs by Alaska permit applicants and stakeholders not having to meet with permit personnel in Seattle. APDES personnel will be familiar with Alaska situations at the various sites. Alaskan facilities will be inspected and overseen by people who live in Alaska and have a good working knowledge of local conditions and issues. The public and the regulated community will have greater access to individuals who

administer the program. One party stated that EPA in Seattle is not so far away from Alaska that they are unfamiliar or out of touch with the priorities and needs of Alaskans.

Response to Comment 19

EPA acknowledges the comments cited above. EPA successfully operated the NPDES program since the mid-1970's with a mix of staff located in both Alaska and Seattle and recognizes the benefits cited by the comments of the NPDES permit staff being located in the State. EPA agrees, for example, that a program based in the State will increase accessibility of program staff to stakeholders, increase ability to conduct on site visits, and potentially reduce travel costs.

Comment 20 -- Phasing of the Program over three years

Commenters: 43, 9

Prince William Sound Regional Citizen Advisory Council supports the phased approach and delay of transition of the oil and gas sector to the final phase. The comment recommends a conditional approval where EPA would evaluate the State program and successful implementation of Phases I-III prior to the transferring of Phase IV. The comment also requests that EPA re-examine resource issues prior to implementation of the final phase given the complexity of the sector.

Response to Comment 20

Alaska's application for the APDES program was for full authorization with a phase-in schedule for various industrial sectors, including the oil and gas sector, not a request for partial program authority. EPA has determined that Alaska has met the criteria for full authorization with phasing of various sectors as provided in the application. EPA, however, has an oversight role and will be reviewing the APDES program as provided in the Memorandum of Agreement between the State and EPA. EPA will conduct oversight of the program including reviewing and commenting on Alaska permits to ensure the program is implemented as provided in the application consistent with federal requirements. See MOA §§ 4.03, 7.02 and 9.0.

Comment 21 -- Oil Pollution Act (OPA '90) Consultation

Commenters: 43, 48

Prince William Sound Regional Citizen Advisory Council (PWSRCAC) cited the Oil Pollution Act of 1990 (OPA '90), and the requirement that all federal agencies consult with the PWSRCAC with respect to matters governing the activities and actions of the Alaska Pipeline terminal facility in Valdez. PWSRCAC has requested through a letter to ADEC that Alaska, serving as the NPDES authority, assume the federal responsibility under OPA '90. PWSRCAC asks that the recommendation be formally recognized in State regulation and in the ADEC's *Public Participation in the APDES Permitting*

Process. The Council also requests that EPA direct ADEC to continue the Ballast Water Working Group on behalf of EPA.

Likewise, Cook Inlet Regional Citizen Advisory Council (CIRCAC) seeks to maintain its NPDES permit consultation right within its area of responsibility. CIRCAC asks that ADEC's *Public Participation in the APDES Permitting Process* be amended to include this role, and that CIRCAC's consultation status be included as part of State regulations.

Response to Comment 21

Pursuant to Section 5002(g) of OPA '90, 33 U.S.C. § 2732(g), the responsibility for consulting with Regional Citizens' Advisory Councils (RCACs) lies with the federal government, not the states. Therefore, EPA cannot require Alaska to take on the same responsibility as a condition of program approval.

EPA notes, however, that there are several opportunities for the RCACs to participate in ADEC's permitting decisions under the APDES program. ADEC will maintain membership in the RCACs, and is committed to attending membership meetings. Further, the Program Description specifically recognizes RCACs, and provides for them to be notified of the availability of preliminary draft, draft, and proposed final permits, fact sheets, Ocean Discharge Criteria Evaluations, and responses to comments. This notification is in addition to the formal notification that a draft permit is available for public review and comment (18 AAC 83.120). Finally, ADEC will revise the *Public Participation in the APDES Process* document to specifically recognize that RCACs will be notified to ensure early opportunities to engage in ADEC's oil and gas permitting work in their geographic areas.

Comment 22 – Water Quality Standard, Anti-backsliding Commenter: 43

PWSRCAC expressed appreciation for ADEC's response to PWSRCAC's concern on "anti-backsliding," which it had presented to ADEC in prior correspondence. PWSRCAC notes that ADEC has adopted federal requirements under Section 402 of the Clean Water Act pertaining to this issue.

Response to Comment 22

EPA acknowledges receipt of this comment.

Comment 23 – Water Quality Standard, Variances Commenters: 43, 65

One commenter (PWSRCAC) does not support the State's request for authority to grant variances under 18 AAC 83.160. The comment expresses doubt that ADEC staff have

the expertise to make the necessary determinations, and also whether ADEC has the ability to attract and retain staff with the necessary expertise. The comment also expresses concern that the State “will have difficulty in balancing variance requests from politically powerful sectors (oil and gas in particular) of Alaska’s economy.” The comment recommends that EPA retain this authority.

Another commenter, North Slope Borough (NSB), states that it is not clear under what circumstances a request for a variance from an applicable federal or state effluent limitation would be appropriate.

Response to Comment 23

In 18 AAC 83.160, Alaska has adopted the federal variance provisions of 40 CFR § 124.62, as required by 40 CFR § 123.25. These provisions outline the process for applying for a variance in certain circumstances. Specifically, for the State to grant a variance, the permittee would have to meet the requirements of 18 AAC 83.365 and 18 AAC 83.370, which correspond to the required federal regulations found at 40 CFR § 122.21(m) (variance requests by non-POTWs) and 40 CFR § 122.21(n) (variance requests by POTWs), respectively.

In addition, there are only two types of variances that the State may grant without concurrence or approval by EPA. The first allows extensions of construction deadlines for publicly owned treatment works under CWA § 301(i), and the second allows for thermal variances under CWA § 316(a). Under CWA § 301(i), the extension could only be granted if construction had commenced and would not finish on schedule, or if the facility had not received expected grant monies from the federal government. In order to grant either variance, the State would need to public notice a modified permit which would be available for public review and comment. As noted above, these two types of variances would be open to public scrutiny as well as EPA oversight, which will prevent any decisions without an adequate technical basis from becoming final.

The other variances allowed by the CWA require that the State either request concurrence from EPA, or concur with EPA's decision on the variance in question. These variances would also be open to public scrutiny during permit issuance, modification, or reissuance that would be necessary to implement the variance.

Comment 24 – Protection of Impaired Waters

Commenters: 43, 65

Several comments expressed concern that the program does not place sufficient priority on protection of impaired waters in Alaska. One comment requests that EPA provide a detailed analysis of State expertise and funding to address this issue. One comment stated that regulations were not specific enough regarding ADEC plans to accelerate action on impaired water bodies.

Response to Comment 24

EPA and State regulations require protection of impaired waters. Apart from NPDES program approval, the State is responsible for a separate program under the CWA which includes identifying and listing impaired waters, and developing Total Maximum Daily Loads (TMDLs) that will lead to the restoration of those waters. Every two years, the State must submit to EPA an Integrated Report that identifies impaired waters, and provide a schedule for preparing TMDLs for those waters. The State provides a public review opportunity for the Integrated Report, which includes the schedule for developing TMDLs for impaired waters.

The NPDES program, whether administered by EPA or the State, contains mechanisms, including implementation of TMDLs, for preventing impairment of water bodies, and for restoring those that are already impaired. First, EPA regulations at 40 CFR § 122.44 require permits to include conditions necessary to achieve water quality standards established under the Clean Water Act (i.e. avoid impairment). Second, the same federal regulation also requires NPDES permits to comply with any applicable TMDL established to restore and protect impaired waters. State regulations include both of these requirements at 18 AAC 83.430 through 83.510. Third, any NPDES permit, whether issued by EPA or by ADEC after program approval, must also comply with the State's federally approved antidegradation policy. These three mechanisms meet the CWA requirements for addressing impaired waters.

Comment 25 – Public Notification of Minor Modifications

Commenter: 43

PWSRCAC recognizes and appreciates the changes made to the proposed regulations regarding minor permit modification (18 AAC 83.145) that were raised in previous correspondence with the State.

Response to Comment 25

EPA acknowledges receipt of this comment.

Comment 26 – Best Available Technology for North Slope Operations

Commenter: 65

One commenter (NSB) requests that the state regulations include a requirement to meet best available technology (BAT) and Best Management Practices for oil and gas operations on the North Slope in order to protect subsistence resources. The comment expresses support for the disposal of waste via deep well injections at these facilities.

Response to Comment 26

The Clean Water Act and NPDES implementing regulations require that NPDES permits meet applicable state water quality standards and technology-based limits. The APDES program incorporates those requirements. While the availability of deep well injection might be considered in determining whether a zero discharge is feasible, NPDES permits do not prescribe the technology a permittee must use to meet its permit limits. EPA cannot require the State to adopt that requirement as a condition of approving the APDES program. The State can choose to consider this approach independent of the APDES program or in lieu of APDES permitting.

Comment 27 – Rural Alaskan Wastewater Facilities Commenter: 65

NSB recommends that regulations be amended to more specifically recognize the challenges faced by small, rural Alaskan wastewater facilities, especially those operating in the Arctic.

Response to Comment 27

Publically owned treatment works are required to meet technology-based requirements as specified in EPA NPDES regulations and adopted by Alaska regulation, and also must meet additional permit conditions as necessary to meet Alaska water quality standards. EPA recognizes significant challenges in meeting these requirements in rural Alaska. EPA encourages ADEC to continue to provide compliance assistance to these rural facilities, and to use existing tools such as compliance schedules and orders, as applicable, in order to bring these facilities into compliance with NPDES requirements. One example of an existing compliance assistance program is the ADEC Remote Maintenance Worker Program, described in PD § 9.2, which assists operators in rural Alaska. EPA supports continuation of this type of assistance for rural facilities across the State.

Comment 28 – Economic Capability Commenter: 65

NSB requests that ADEC define “economic capability” for determining whether an applicant has the economic capability to install control or monitoring equipment.

Response to Comment 28

CWA § 301(c) allows EPA to grant a variance from technology-based limitations based, in part, on economic capability. Although the CWA does not require concurrence of the State, the federal and corresponding State regulations allow the State to review a request for this type of variance, and to deny it or to pass it to EPA with concurrence or without comment.

Comment 29 – Cumulative Impacts
Commenter: 46

There is no discussion of whether cumulative impacts will be taken into account when a new development field, such as an oil/gas field or mining lease area, opens.

Response to Comment 29

There is no specific requirement under the Clean Water Act that a state NPDES program address cumulative impacts. Some aspects of the program do address this issue, in part, through protection of water quality standards, consideration of background conditions when determining effluent limitations, the mixing zone provisions of the state water quality standards, and compliance with the Ocean Discharge Criteria Evaluation requirements. Those aspects of the proposed APDES program meet CWA requirements.

Comment 30 – National Historic sites and Wild and Scenic Rivers
Commenter: 46

EPA is mandated to consider impacts to National Historic sites and to Wild and Scenic Rivers, while ADEC is not.

Response to Comment 30

EPA believes that historic properties within the State of Alaska will receive appropriate consideration under the proposed APDES program. ADEC will provide notice of all proposed APDES permits to a number of parties, including the State Historic Preservation Office (SHPO), as provided in the MOA. That office is charged with administering the Alaska Historic Preservation Act, AS 41.35.010 - .240, legislation designed to "preserve and protect the historic, prehistoric, and archeological resources of Alaska." See AS 41.35.010(a).

As described in MOA § 4.06 (Applicant Review and Federal, State and Tribal Notice), ADEC plans to notify the SHPO when it transmits the preliminary draft permit and fact sheet to the permit applicant for a 10-day review period. ADEC also plans to notify the SHPO at the start of the public review period and when it transmits the proposed final permit to the applicant for a 5-day applicant review. ADEC will also notify the SHPO when the permit is issued, and make a copy of the revised fact sheet and the response to comments available on ADEC's web page. EPA believes this will afford the appropriate opportunities to ensure that permits comply with applicable State laws that address historic properties.

With regard to Wild and Scenic Rivers, as with other federal obligations such as consulting under the Endangered Species Act, certain obligations apply to federal agencies that do not apply to states. In particular, states are not required to consult regarding Wild and Scenic Rivers, and such state consultation is not a pre-condition of

EPA's approval of a state's NPDES program. Nonetheless, pursuant to both the MOA and the Program Description, Alaska plans to notify state and federal natural resource agencies of the availability of the preliminary draft permit, draft permit for public review, and proposed final permit.

Comment 31 – State mandate to develop natural resources

Commenter: 46

The State of Alaska has a constitutional mandate to develop its natural resources, yet no mandate to balance this activity against other values such as subsistence use, conservation, and recreation. Alaska regulators lack the objectivity that a federal EPA can bring when reviewing permit applications.

Response to Comment 31

In addition to mandates to develop natural resources, Article 8 of the Alaska Constitution does include several sections addressing conservation and protection of resources, including water:

§ 1. Statement of Policy

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

§ 2. General Authority

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

§ 3. Common Use

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

§ 4. Sustained Yield

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Federal laws, like state laws, have multiple mandates that are expressed through the policy and mission statements of their respective agencies and departments. The Alaska Department of Environmental Conservation's policy is to "conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well being." That policy is similar to EPA Region 10's

mission “to protect and restore the environment of the Pacific Northwest and Alaska for present and future generations.”

Furthermore, after approval of Alaska’s NPDES program, EPA will oversee many aspects of ADEC’s NPDES program, to ensure that Alaska’s program implementation meets the requirements of the Clean Water Act and federal NPDES regulations. Examples of this oversight include permit reviews (and potential vetoes), federal NPDES enforcement in Alaska where appropriate, and the possibility of program withdrawal, as discussed in the Response to Comment 16.

Response to Comment 16 also addresses the concern about Alaska regulators’ objectivity.

Comment 32 – Inspection Frequency

Commenters: 43, 46

PWSRCAC recommends that ADEC’s goal of annual inspections of each major facility be in State regulation, in order to ensure State funding of the inspections as currently administered by the federal program. Annual inspections are not frequent enough for major facilities.

Response to Comment 32

40 CFR § 123.26(e)(5) provides “State NPDES Compliance evaluation programs shall have procedures and the ability for inspecting facilities of all major discharges at least annually.” Consistent with this federal provision, as the comment notes, ADEC intends to annually inspect all facilities classified as major dischargers. PD § 9.1.3. In addition, PD § 9.1.3 identifies other criteria that may influence the annual inspection schedule for both the wastewater discharge authorization program and the storm water program, which include (1) complaints, (2) modifications to permits, (3) permit violations, and (4) other factors at the Department’s discretion. Therefore if more frequent inspections of a major facility are warranted, ADEC may conduct additional inspections.

Furthermore, beginning in fiscal year 2009, EPA’s Compliance Monitoring Strategy includes a goal of inspecting major facilities permittees at least once every two years (October 17, 2007, US EPA Memorandum Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring Strategy for the Core Program and Wet Weather Sources).

The APDES program application demonstrates that ADEC has adequate resources to carry out inspections accordingly.

Comment 33 – Compliance Incentives
Commenters: 43, 65

The State proposes to use compliance incentives as discussed in the Program Description at § 9.3. Several comments state that the State does not describe the type of incentives, or how the program will be implemented. The comments request that EPA review the incentive program and ensure it complies with the Clean Water Act’s enforcement requirements.

Response to Comment 33

Compliance incentives are a set of policies and programs that eliminate, reduce or waive penalties under certain conditions for regulated facilities that voluntarily discover, promptly disclose, and correct noncompliance, and take steps to prevent future environmental violations. Compliance incentives are one tool of an enforcement program. In PD § 9.3, ADEC identifies the audit report privilege (AS 09.25.450), voluntary disclosures (AS 09.25.475), and the reduction of ambient water quality monitoring, as examples of compliance incentives. Since compliance incentives may be developed on an ongoing basis and with respect to specific noncompliance scenarios, EPA finds it appropriate for ADEC’s description to remain broad in nature to allow for flexibility in future development and utilization of this tool. The State’s compliance incentive program is not in conflict with any requirements of the CWA or EPA regulations.

Comment 34 -- Risk-Based Inspections
Commenter: 65

The NSB raised concerns about ADEC’s proposed risk-based inspection system and the proposition that ADEC will increase the number of inspections at minor sources, while decreasing the frequency of inspections at major sources. NSB recommends the State target facilities with the highest potential human health and environmental risk.

Response to Comment 34

ADEC’s intent is to inspect major discharges once annually. In addition, as described in PD § 9.1.3, ADEC will utilize the Division of Water, Wastewater Risk-Based Inspection Ranking Model (provided in Appendix L) to assist in inspection prioritization. Among the criteria that influence the model are compliance history, the cumulative effects from other discharges into an impaired water body, health effects from potential wastewater treatment process failure, and the type of receiving environment. Additional criteria that may influence the annual inspection schedule include significant environmental or human health problems, significant permit violations, and complaints of human health or environmental hazards. Overall, the intent of the model is to identify facilities that pose a higher risk to human health or the environment, as recommended by the commenter.

Comment 35 – Compliance Assistance to small operators
Commenter: 65

NSB recommends that State regulations include a compliance assistance program and annual training program for all small wastewater operators, in order to maintain compliance with their permits.

Response to Comment 35

As described in PD § 9.2, one compliance assistance program already in effect is ADEC's Remote Maintenance Worker Program, which assists operators in rural Alaska to operate domestic wastewater facilities. Although compliance assistance regulations specific to small operators are not a required component of a state NPDES program, EPA encourages the NSB to communicate directly with ADEC regarding changes to its regulations, and to make additional suggestions regarding compliance assistance activities to rural communities.

Comment 36 – Joint Agency Inspections
Commenter: 65

The NSB requests that the State regulations include a requirement that ADEC notify NSB of any proposed State-led inspections in NSB, so that NSB inspectors can participate in a joint agency inspection.

Response to Comment 36

The Clean Water Act does not include any requirement for a State program to notify other entities prior to conducting inspections. Whether ADEC elects to consider such an agreement with the North Slope Borough is ADEC's discretion, and is separate from EPA's approval decision on the APDES Program Application.

Comment 37 – State Compliance Program
Commenter: 58

The Aleutian/Pribilof Islands Association (APIA) asked a number of questions about the ADEC plans for its compliance program. Individual comments regarding compliance and enforcement are addressed below.

Question 37(a): What is the rate of compliance currently with facilities that have permits and how many unpermitted facilities exist? What is ADEC's plan to bring all facilities into compliance?

Response to Question 37(a)

The NPDES Program is largely a self-reporting program and thus rates of compliance are generally provided by the facility through permit deliverables, such as monthly discharge monitoring reports. Compliance rates documented through NPDES inspections conducted by EPA and ADEC are a snapshot of a facility's compliance at the time of the inspection. Furthermore, since permitted facilities are tracked at a facility level, EPA has not computed overall compliance rates across the 2,000+ permitted facilities within Alaska.

With respect to unpermitted facilities, EPA does not track them and therefore is unable to determine how many there are in Alaska.

ADEC describes its approach for compliance and enforcement throughout PD § 9, which acknowledges and addresses unpermitted facilities.

Question 37(b): What is the current cost to the permit holder for annual inspections? What will be the cost to the permit holder for annual inspections if ADEC has the ability to change their costs?

Response to Question 37(b)

EPA does not recover costs for annual inspections. Alaska statutes at AS 37.10.052 provide the authority for ADEC to establish wastewater discharge authorization fees based on direct costs to issue and maintain permits and conduct compliance work. Fees are averaged across each fee category. Staff time, inspection costs, and other costs directly attributable to each permit (e.g. public notices, laboratory tests, and inspection travel) are recoverable. The permittee is charged an annual fee that covers both the permitting and compliance costs. The statute requires ADEC to review the fees at least once every four years, identify any changes in the average actual and reasonable direct cost to issue and maintain a permit, and, by regulation, adjust the fees accordingly. Because fees will be based on actual costs not yet incurred, the amount of the future fees is not known at this time. ADEC has estimated that fees will increase to 20% - 80% above current levels, depending on the complexity of the discharge and the permitting issues it raises. Current individual and general permit fees are found at 18 AAC 72.956 and 18 AAC 72.957.

Question 37(c): Should the State's application be approved, how will it show that it has been provided all applicable historical data, particularly previous enforcement actions for follow-up?

Response to Question 37(c)

MOA § 8.03 describes the transfer of files from EPA to ADEC, which includes historical information. In addition, EPA and ADEC will continue to closely coordinate their compliance and enforcement activities, as is currently done.

Comment 38 – Tools to Monitor Compliance

Commenter: 69

The PD does not describe how ADEC will monitor compliance with monitoring, sampling and reporting requirements outside of permits, or which enforcement tool it intends to use. Without this information it is impossible to determine if ADEC is able to adequately monitor for compliance.

Response to Comment 38

PD § 6.4.1 explains that the ADEC permit writer will include some monitoring, sampling, and reporting requirements in APDES permits, and will include others in separate orders or compliance agreements outside of permits. ADEC further clarifies that it may enforce monitoring, sampling, and reporting requirements in orders or agreements outside of permits as it can enforce any other lawful order (see AS 46.03.760(e) and AS 46.03.765). Furthermore, throughout PD § 9, ADEC includes permit-related orders in its compliance monitoring evaluations and compliance inspections, and addresses these orders specifically in the enforcement subsection. See PD §§ 9.1.1, 9.1.3 and 9.4.3.

Comment 39 -- Reliance on Database

Commenter: 69

One commenter noted that ADEC will rely heavily on the discharge results and online permit system (DROPS). There must be a certain amount of human oversight to ensure compliance. The compliance tracking system does not substitute for ADEC staff closely reviewing monitoring and data, rather than just noting that data was received.

Response to Comment 39

EPA agrees that adequate compliance monitoring requires staff oversight. As explained in PD § 9.1.1, ADEC staff will perform such oversight at least annually. The compliance evaluation described in § 9.1.1 includes a review of discharge monitoring reports, as well as other deliverables and monitoring information, a facility file review, and a review of the statewide public complaint database. In addition, EPA's generation of quarterly noncompliance reports (QNCRs) will provide ADEC with an opportunity to verify the information in DROPS. Furthermore, ADEC will conduct routine inspections to evaluate compliance of facilities.

Comment 40 – Administrative Remedies

Commenter: 69

This comment asserts that a statement from the Program Description regarding administrative remedies highlights the significant limitation in ADEC's enforcement

capabilities, since these remedies are a significant hurdle and give a significant amount of control to the permittee.

Response to Comment 40

This comment highlighted an error in the description of ADEC’s administrative remedies. Accordingly, ADEC has revised PD § 9.4.3 to clarify that “Administrative remedies usually require the violator to agree to undertake actions to correct the noncompliance and in the case of a compliance order by consent, to pay a stipulated penalty and/or reimburse reasonable agency costs.” This correction is meant to clarify that for administrative remedies other than compliance orders by consent, the three elements noted by the commenter are not required.

Comment 41 – Communication with Permittee Regarding Alleged Noncompliance Commenter: 69

This comment questions the need for the permittee to be apprised repeatedly of issues surrounding alleged noncompliance prior to proceeding to court to recover a penalty, as described in the PD on page 91.

Response to Comment 41

As stated in the Attorney General Statement, ADEC may pursue penalties in court without first seeking administrative remedies. AGS Part I, § 9.c. In some cases, it may be important for the permittee to understand the alleged violations, and could also be advantageous for ADEC to discuss the allegations and the enforcement process with the permittee. This type of communication may help provide clarity surrounding the alleged violations as well as further inform the permittee of ADEC’s expectations in the penalty process.

Comment 42 – Criminal Enforcement Commenter: 23

One comment asked questions regarding the State’s process for handling criminal enforcement cases.

Response to Comment 42

As described in PD § 9.4.1 of the Program Description, a member of the Environmental Crimes Unit will participate, when needed, in enforcement response discussions with ADEC’s Compliance Committee. ADEC identifies its criminal remedies in PD § 9.4.4, and further explains its procedures and processes for criminal actions in ADEC’s *Enforcement Manual* (Appendix I). These procedures include coordinating with the State’s Environmental Crimes Unit on criminal matters.

As noted in the Response to Comment 17, ADEC's budget for the APDES Program is \$4.8 million. The Environmental Crimes Unit is part of ADEC's Division of Information and Administrative Services, and therefore has a budget separate from the APDES program, which is part of the Division of Water.

Comment 43 – Enforcement at Red Dog Mine

Commenter: 12

One comment asked questions specific to enforcement at the Red Dog Mine facility.

Response to Comment 43

Since ADEC had not been authorized to administer the NPDES program at the time of violations that occurred previously, EPA was the lead for NPDES enforcement at Red Dog Mine. Furthermore, the Clean Water Act contemplates citizens taking suits against facilities and includes such a provision in CWA § 505. For both of these reasons, the fact that private citizens initiated a suit against Red Dog Mine is not an indication regarding a deficiency with ADEC's enforcement program.

Comment 44 – Government-to-Government Consultation

Commenters: 45, 6, 13, 47, 63, 58, 70, 51, 69, 28, 22, 26, 18, 24, 53, 60, 68

Numerous tribal governments and Alaska Native communities, associations, councils, and individuals expressed the concern that once Alaska receives authorization to administer the NPDES program, government-to-government (also referred to as "G2G") tribal consultation will no longer be required, and the tribes in Alaska will lose a significant avenue for providing input into permitting decisions. Tribes commented on the value of the existing G2G relationship with EPA, and of their concerns over how the loss of that relationship will affect them. They fear that without tribal consultation, the State will not understand the impacts of potential projects on the resources of the tribes and their members.

Comments asserted that the State of Alaska does not recognize tribal sovereignty and has no formal statutory mechanism for consultation and coordination with tribal governments. Other comments declared the State of Alaska has historically denied tribes a "voice in its decision-making processes." Some tribes expressed a lack of "confidence in the State to engage them in clear and open communication regarding the NPDES permitting process." Some representatives of tribes pointed to their previous experiences with recent mixing zone regulations, Alaska's adoption of "one of the lowest cancer risk level protection values in the country," and other water quality cases as examples of where the State failed to adequately consider tribal input.

Commenters wrote that EPA should not approve Alaska's NPDES program until and unless EPA can ensure that Alaska will consult with tribes G2G in a manner that provides

tribes a real, fair, and substantive opportunity and legal right to participate in the issuance of NPDES permits that impact tribal members, and the waters on which they depend.

An Alaska native regional corporation contended that ADEC's commitment to consult with tribes, as described in its program application, may be broader than EPA's proposed guidance on Executive Order 13175. Two mining companies noted the phased nature of the program authorization, and expect EPA will continue to offer tribal consultation prior to the State picking up the mining sector .

Response to Comment 44

EPA recognizes that the primary concern expressed by the many comments is that Alaska does not recognize the sovereign status of tribal governments in Alaska, and does not offer the type of government-to-government tribal consultation that EPA provides. During the process of working with ADEC as it developed its program application and implementation plans, EPA has stressed to Alaska the importance of including ways to seek the knowledge and perspectives of the tribes in Alaska and their members. As noted elsewhere, ADEC's *Public Participation in the APDES Permitting Process* guidance document ("Public Participation Guidance"), which is part of the APDES program, does specifically identify tribal governments for notice and involvement. See Response to Comment 45. While EPA recognizes that the Public Participation Guidance falls short of the G2G tribal consultation the tribes seek, and does not reproduce the consultation procedures that EPA would provide under federal policies, it does include procedures that are likely to result in tribes having early input into APDES permitting decisions. EPA finds that the State's Guidance meets the statutory and regulatory requirements that apply to State NPDES programs.

EPA appreciates that the tribes in Alaska have found value in the G2G tribal consultation that EPA regularly offers to tribes and will continue to offer tribes in Alaska. EPA Region 10 provides G2G tribal consultation in accordance with a number of Federal policies that are based on the Federal government's unique legal relationship with Indian tribal governments, as set forth in the Constitution of the United States, treaties, Federal statutes, Executive Orders, and court decisions. This relationship includes a recognition of the right of tribes as sovereign governments to self-determination, and an acknowledgment of the federal government's trust responsibility to tribes. In 1984, EPA established the EPA National Indian Policy, which states that the Agency will work directly with tribal Governments on a one-to-one basis in a government-to-government relationship. President Clinton issued a memorandum for the head of the Executive Departments entitled "Government-to-Government Relations with Native American Tribal Governments," April 29, 1994, which instructs EPA to ensure the Federal government operates with a government-to-government relationship with federally recognized tribes prior to taking actions that affect the tribes. EPA Reg. 10 established a tribal Consultation Framework, July 16, 2001, which describes a number of principles for EPA to follow to provide tribal consultation before EPA makes a decision or moves forward with an action that may affect a tribe or its resources. On November 6, 2000, President Clinton issued Executive Order 13175 Consultation and Coordination with

Indian Tribal Governments, which directs EPA to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

EPA has consulted with tribes in Alaska about the ADEC application to assume the NPDES program so that EPA can fully understand the concerns of the tribes before making a decision on the APDES program. EPA has put considerable effort into reaching out to tribes while Alaska developed its program application to ensure the tribes were meaningfully informed about the details of the process and that they had a number of opportunities to express their concerns and comments directly to EPA and ADEC. EPA has communicated with the tribal leaders by scheduling a number of consultation meetings that were attended by EPA managers and staff, providing written materials by mail, and having conference calls and other telephone communications.

Moreover, as described elsewhere, the program authorization that EPA has approved will be completed in stages. As it has always done, EPA will continue to offer opportunities for G2G tribal consultation during the process of issuing NPDES permits that are still the responsibility of EPA. In addition, the APDES program that EPA is approving does not extend into Indian country, as defined by 18 U.S.C. § 1151. So even after ADEC has assumed all of the NPDES program, EPA will continue to issue NPDES permits for discharges to waters of areas that the United States treats as Indian country. For example, EPA will continue to be responsible for any NPDES permits for discharges to waters of the Metlakatla Indian Community's Annette Island Reserve.

The situation will be different when ADEC is issuing the NPDES permits instead of EPA. As described above, the Federal policies based on the trust relationship direct EPA to conduct G2G tribal consultation so EPA can learn of the tribal perspective when EPA is preparing to make a decision or take an action. When ADEC assumes responsibility for issuing an NPDES permit, then EPA will not be responsible for that action or decision. Therefore, EPA will not itself have a reason to initiate G2G tribal consultation with regard to specific permits. EPA will continue to have an oversight role to ensure that the APDES program, as implemented, continues to comply with applicable requirements of the Clean Water Act and the related regulations. The CWA reserves substantial authority to EPA in states authorized to administer the NPDES program so that the Agency can oversee the state program and ensure its consistency with the CWA. The most obvious authority EPA retains is the ability to object to proposed state NPDES permits that EPA determines violate the CWA. Following an EPA objection, the state must either address EPA's concerns or EPA ultimately takes over issuance of the permit. 33 U.S.C. 1342(d)(2). Where states have authority to promulgate water quality standards, EPA is also charged with reviewing those standards and can object to any standards that do not meet the requirements of the CWA. Again, if the state does not address EPA's objection, EPA ultimately has authority to take over promulgation of such standards. 33 U.S.C. §1313(c)(3). These oversight mechanisms attach to any state program implementing the CWA. No state can claim to have jurisdiction under the CWA to issue NPDES permits that are inconsistent with the CWA or that are free from potential EPA oversight. EPA will continue to be available for government-to-

government tribal consultation at the request of a tribe during Alaska's implementation of the APDES program. For example, if a tribe is concerned about a particular NPDES permit application or draft permit, the tribe may contact EPA Region 10 to seek assistance.

EPA lacks the authority to withhold approval of the APDES program until Alaska recognizes the tribal governments and establishes procedures for G2G consultation. EPA's review of the APDES program application is limited to the requirements set forth in CWA § 402(b) and the related EPA regulations at 40 CFR Part 123. EPA must approve the State NPDES program if it satisfies those requirements. One of the requirements in CWA § 402(b)(3) is that the State ensure public notification and opportunities for public participation. Alaska's Public Participation Guidance addresses this requirement. But there is no authority for EPA to require Alaska to recognize tribal governments, or to establish a G2G relationship with the tribal governments, as a precondition to approval of the APDES program.

See also Responses to Comments 45 and 49.

Comment 45 – Inadequate Public Participation Guidance for the APDES program
Commenters: 56, 57, 49, 1, 66, 53, 4, 60, 68

One comment states that under the State's Public Participation Guidance for the APDES program, tribes have no more rights or considerations than the rest of the public, which is a significant change from the relationship that currently exists with EPA in NPDES permitting issues. Some comments commended the State for developing communication tools and outreach plans in the proposed APDES Public Participation Guidance, but state that this can not replace the G2G process that currently exists with EPA.

Other comments state that the ADEC Public Participation Guidance requires early participation by the tribes and specific notification, both of which are not now required by EPA. Some disagree with the argument that APDES will provide less access and consultation for the tribes. Some stress that the tribes retain their existing relationships with EPA, and that ADEC has made a firm commitment to ensure the State's process extends consultation opportunities to tribal governments. One comment expresses the understanding that APDES will extend consultation opportunities to tribal governments as outlined in the Public Participation Guidance, and that it is of "paramount importance" that Native interests and concerns are addressed throughout the NPDES permitting process.

Response to Comment 45

See Response to Comment 44. As discussed in that response, the State is not required to comply with policies and requirements that govern federal or EPA consultation with tribes. The State's NPDES program is, however, subject to a number of public participation requirements that are expressed in CWA § 402(b) and 40 CFR

Part 123. The Public Participation Guidance is intended to address public participation issues that are particular to the State of Alaska, in view of its size and the geographical isolation of many communities. EPA consulted with Alaska tribes and worked with the State to ensure that the Guidance provided for effective means of public participation by tribes, although as noted above, EPA had no authority to require the State to comply with federal guidance and requirements regarding tribal consultation. See also Response to Comment 49, below.

Comment 46 – Workgroup/Program Development Process

Commenters: 13, 46, 25, 24, 56, 57, 19, 64, 52, 1, 66, 53, 4, 67, 17

Numerous tribal comments stated that the process followed by Alaska to develop the APDES program did not include tribes specifically, that the State’s NPDES Workgroup did not include tribal representation, and that the Workgroup was biased towards industrial interests. One comment suggested that EPA mandate a “remedial work group based process” that includes a more “balanced consideration” of tribal and other interests.

In contrast, other comments expressed the opinion that ADEC has provided extensive opportunities for public input, including rural and Native Alaskan perspectives, to ensure this program will benefit all Alaska water users. “The process leading up to the State’s application has been robust and inclusive.” Comments also state that the Work Group meetings conducted by ADEC during the development of the program involved all interests, including environmental groups and tribal representatives, and that the process was open and attended by a wide range of interests. “ADEC has worked diligently to address the concerns of all stakeholders.”

Response to Comment 46

Senate Bill 110 passed the Alaska legislature in 2005. Section 5(b) of the bill states:

The Department of Environmental Conservation shall establish a workgroup that includes representatives of permittees affected under the National Pollutant Discharge Elimination System and the United States Environmental Protection Agency to meet and confer as needed during the period that the Department of Environmental Conservation is designing its permitting program and seeking approval of the program by the United States Environmental Protection Agency. The workgroup will provide public notification of its meetings and will make available to the public minutes of its meetings.

ADEC established a workgroup with representatives from the timber, mining, seafood processing, oil and gas, and construction industries, and large and small municipal wastewater facilities. ADEC hosted 16 meetings and seven teleconferences from November 2004 to present. All meetings were public noticed, and ADEC sent an

email announcement of every meeting via the NPDES electronic mailing list, which is open to the public. ADEC provided time on the agenda at every meeting for public comment, posted a summary of the meetings on the NPDES web page, and transmitted an email announcement via the electronic mailing list when the summary was available on the NPDES web page. In addition to public input during workgroup meetings, there have been multiple other opportunities for public input into development of Alaska's program:

Legislation. The legislature considered and passed four separate bills addressing NPDES authorization for Alaska, all which had opportunities for public comment through multiple legislative hearings:

- SB 326 – Develop a report to evaluate the benefits and consequences to assume primacy (2002)
- HB 546 – Authorizes 'partial' or timber primacy (2004)
- SB 110 – Authorizes ADEC to pursue full NPDES primacy (2005)
- HB 149 – Amendments to ADEC authority (2008)

Regulations. Alaska adopted regulations changes three times to accommodate NPDES authorization, each time providing public notice and opportunity for comment:

- Original APDES Program regulations on 45-day public notice (March 2006) with three public meetings (Anchorage, Fairbanks, and Juneau) and one public hearing (April 2006).
- APDES regulation amendments with 30-day public notice (March 2007)
- APDES regulation amendments (#2) with 30-day public notice (Aug/Sept 2008)

Other public involvement/information opportunities:

- ADEC posted Annual Reports to the Legislature on progress to obtain NPDES program approval (January 2006, 2007, and 2008). All Annual Reports have been posted on the NPDES web page, and notice of their availability transmitted via the electronic mailing list.
- ADEC transmitted a June 2006 program application to EPA and posted the entire application on its NPDES web page.
- ADEC attended several conferences to provide information/updates on its program application, including Alaska Water and Wastewater Managers Association SE Conference, Alaska Forum on the Environment (twice), Erosion Control & Stormwater Protection Training.
- NPDES transmitted Application #2 (May 2008) to EPA, posted it on ADEC's NPDES web page, and gave notice of it via ADEC's electronic mailing list.

Separately, EPA provided for tribal consultation and public review:

- EPA consulted with tribal governments on six occasions. Part of the consultation format included an informational session on the NPDES program with ADEC participation (Louden Tribal Council via teleconference, Sun'aq Tribe via teleconference, in person consultation in Dillingham, Kotzebue, Sitka, and Bethel).
- EPA held three public meetings in mid-July 2008 in Anchorage, Fairbanks, and Juneau, provided public notice of a 45-day review period for the entire NPDES application, and conducted three public meetings and hearings where formal testimony was taken.

The public notification and public review opportunities described above fully meet the regulatory requirement for public notification and review.

Comment 47 – National Environmental Policy Act (NEPA)

Commenters: 13, 47, 69, 28, 26, 25, 24

Numerous comments noted that if Alaska receives authorization, the NPDES permits issued by ADEC would not require environmental review under the National Environmental Policy Act (NEPA), which is currently the case for some NPDES permits issued by EPA. Comments expressed concern that NEPA has been a useful tool for tribes in that it ensures an opportunity to participate in a public process. Some comments noted that for some major projects, federal actions by agencies other than EPA may trigger NEPA, but expressed concerns that the NEPA review would be less rigorous than when EPA is the lead agency, and that other federal agencies may not have the same tribal consultation commitment demonstrated by EPA. One commenter stated that loss of NEPA protections means that the APDES program can not offer an equivalent or greater level of environmental protection, “as required by the CWA.” (AITC)

Response to Comment 47

Although EPA appreciates the concerns expressed, 40 CFR § 122.29(c)(1)(ii) specifically states that “The issuance of an NPDES permit to new source by an approved State is not a Federal action and therefore does not require EPA to conduct an environmental review [under NEPA].” Neither NEPA nor the CWA requires states to comply with NEPA, or have comparable state programs.

EPA Region 10’s experience indicates that major projects that require NPDES permits frequently also include other federal actions that trigger NEPA requirements. It is highly likely that major new mining and oil and gas projects will continue to require NEPA compliance due to other federal agency action. EPA may be involved in those NEPA processes, either through the review process under Section 309 of the Clean Air Act, or as a cooperating agency in any Environmental Impact Statement.

Comment 48 – Subsistence
Commenters: 65, 58, 23

The NSB commented that the proposed regulations do not provide specific protection for subsistence resources, and requests that the State regulations be amended to require applicants to demonstrate that subsistence resources will not be adversely impacted by permitted discharges. The comment references studies conducted on Arctic subsistence resources. Other tribal interest comments ask how the State will ensure subsistence food safety (Aleutian/Prib).

Response to Comment 48

Under the Clean Water Act, states develop water quality standards, subject to EPA review and approval (or disapproval). The standards must identify the beneficial uses of each water body (such as salmon spawning, aquatic life, drinking water, etc.), and must contain criteria for the water bodies that will protect those uses. NPDES permits must contain limits that will ensure that the receiving water meets these federally approved water quality standards. This is true whether the permit is issued by EPA or by a state with an approved NPDES program. EPA’s approval of Alaska's NPDES program will not change or alter any of these requirements.

In its development of water quality standards, the State has the discretion to establish designated beneficial uses that are more protective than what the federal criteria require. For example, if a subsistence use is more sensitive than an existing beneficial use (i.e., salmon spawning, or protection of cold water aquatic life), the State has the ability to adopt a more stringent standard. However, that activity is outside the scope of the NPDES program approval action, and outside the scope of NPDES permitting.

Under the Public Participation Guidance for the APDES program, the State has committed to “early collection of traditional knowledge, subsistence information, and other information important to residents and local or tribal governments” to allow the permit writer to address them during permit drafting. ADEC has numerous resources across departments available to assist in the identification and consideration of subsistence concerns during permitting. The Alaska Department of Fish and Game (ADFG) Division of Subsistence experts, research, and publications are available for consultation. ADFG also maintains an online Community Subsistence Information System (CSIS) that stores information about communities’ harvest of wild foods. The Alaska Department of Commerce, Community, and Economic Development (DCCED) maintains an online Alaska Community Database with contacts and information for rural communities. Alaska Coastal Management Program coastal district representatives provide local subsistence expertise for large areas of the state. ADEC maintains Most Environmentally Sensitive Area (MESA) and Environmentally Sensitive Index (ESI) maps that document the areas of the state where resources, including subsistence resources, are sensitive to development. Additionally, local subsistence users may provide information about subsistence resources directly to ADEC during the development of an APDES permit.

Comment 49 – Public Involvement with Inupiat
Commenter: 65

One party requests that ADEC’s public involvement methods address the need to communicate information and decisions to the Inupiat residents and tribes. The material must be understandable by the public. Translators must be available to translate documents and facilitate communication at public settings.

Response to Comment 49

ADEC has developed a “Public Participation in the APDES Permitting Process” document that describes how ADEC will provide for public participation when making permitting decisions. In that document, ADEC has committed to using supplemental communication tools in situations where permits “may raise significant local concerns or are complex or controversial.” In that document, ADEC describes how it will seek to inform and engage federally recognized tribal governments in the permitting process and obtain their input, including the use of translators or facilitators (see pg. 1, ¶ 4). Furthermore, in response to this comment, ADEC revised the guidance to reiterate the commitment to use a translator or facilitator when necessary to assist with tribal communications (see pg. 8, ¶¶ 2 and 3). ADEC has sought input from tribes regarding the APDES public participation document, and has indicated that it will continue to adjust the document in response to comments.

EPA will transmit to ADEC any requests to provide translators when needed to effectively communicate between a tribal government and ADEC. However, the Inupiat Tribe is also encouraged to make its comment on the need for translators directly to ADEC.

Comment 50 – Alaska Coastal Management Program
Commenters: 45, 13, 10, 25

EPA should suspend the decision until local and tribal governments are able to seek changes to the ACMP giving coastal districts greater say in management of the coastal resources (BBNA, NCAI). State changes to CZMA during the Murkowski administration shifted power away from impacted coastal zone communities with further loss of protection posed by the State permitting authority (AITC).

Response to Comment 50

After a state develops and submits an NPDES permit program for EPA approval, CWA § 402(c)(1) directs EPA to suspend the issuance of NPDES permits as to those discharges subject to the State program, unless EPA determines that the State program either does not meet the minimum program requirements of CWA § 402(b), or does not conform to guidelines that EPA has issued under CWA § 304(i)(2). Consideration of a state's NOAA-approved coastal zone management program is not within the minimum

requirements of CWA § 402(b) and the state NPDES program guidelines published under CWA section 304(i)(2). Therefore, even if EPA were to defer action on approval of the Alaska NPDES program pending further action on the Alaska Coastal Management Program, EPA would lose authority to issue NPDES permits in Alaska. Therefore, EPA does not accept the comment's suggestion that EPA defer action on the Alaska NPDES program pending further action on the Alaska Coastal Management Program.

Comment 51 – Mixing zone rule, antidegradation policy, ACMP, estuaries
Commenters: 45, 22

BBNA requests (1) that EPA “suspend” a decision until there is an implementation guidance developed for the State’s antidegradation policy, (2) that EPA issue a final decision on Alaska’s mixing zone regulations, and (3) that changes be made to the ACMP program prior to the authorization decision. Another commenter made similar comments during the Anchorage public hearing regarding the mixing zone rule, the antidegradation policy, and the lack of attention to estuaries in the application.

Response to Comment 51

Antidegradation Implementation Guidance. Alaska water quality standards contain an EPA-approved antidegradation policy. If the State were to issue a permit that does not comply with that policy, then the public could challenge (or EPA could object to, or veto) that permit as not complying with State water quality standards. But the absence of antidegradation implementation guidance does not make it impossible for the State to issue an NPDES permit that complies with the antidegradation policy, and the absence of that guidance is not a basis for disapproving the State’s NPDES program application. If the absence of antidegradation guidance makes the State’s *antidegradation policy* (as opposed to its NPDES program application) deficient, that bears on the approvability under CWA § 303(c) of the State’s antidegradation policy, rather than the adequacy of the State’s NPDES program application under CWA § 402(b). The adequacy or inadequacy of Alaska’s water quality standards is the same whether it is EPA or the State issuing the NPDES permits.

Mixing Zone Regulation Approval. In evaluating a state’s application for authorization to implement the NPDES program, EPA is required to apply the criteria set forth in CWA § 402(b) and the implementing regulations. Decisions regarding water quality standards, such as the mixing zone rule, are separate decisions outside the purview of EPA’s decision on the NPDES application; they follow an independent and separate regulatory process outlined in CWA § 303(c) and 40 CFR Part 131, which requires the State to submit water quality standards revisions to EPA for review and approval or disapproval. This process would not be affected by EPA approval of the APDES program. ADEC’s request to revise its mixing rule is currently before EPA for review under CWA § 303(c).

ACMP Issues are addressed in the Response to Comment 50.

Estuaries. ADEC's mixing zone regulations at 18 AAC 70.255(e) establish criteria for sizing a mixing zone in an estuary. APDES permits would have to protect estuaries potentially affected by a discharge by including permit limits that implement any water quality standards applicable in the estuary.

Comment 52 – Environmental Justice

Commenter: 13

Federal agencies have developed guidance and standards to address environmental justice under Executive Order 12898. No such protections exist under Alaska law. This comment suggests that the State develop a similar program prior to transfer of NPDES permitting authority to the State.

Response to Comment 52

In evaluating a state's application for authorization to implement the NPDES program, EPA is required to apply the criteria set forth in Section 402(b) of the Clean Water Act and the implementing regulations. Once a state demonstrates that it has met the criteria and has adequate authority to run the NPDES program, EPA must approve the program. Whether a state has an environmental justice policy is not a requirement that EPA has the authority to require as a condition of approving a state's NPDES program.

Comment 53 – Federal trust responsibility

Commenters: 2, 5, 6, 7, 8, 11, 13, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 44, 51, 59, 61, 63, 70

A number of comments by tribes and tribal representatives reference the United States' trust responsibility to tribes. Many of those comments assert that EPA's trust responsibilities to tribes prohibit EPA from approving the APDES program unless EPA can ensure that Alaska will provide G2G tribal consultation and address other shortfalls identified in tribes' and tribal representatives' comments. One comment states that until all of the concerns expressed in its comments have been adequately addressed, approval of the APDES program "would represent a blatant abrogation of EPA's trust responsibility to Alaska Native Tribes."

Response to Comment 53

EPA agrees that, as a Federal agency, it has a trust relationship with the federally recognized tribes in Alaska. The Federal trust responsibility arises from the historical relations between the United States and tribes, as established through treaties, Federal statutes, Executive Orders, and court decisions. EPA's National Indian Policy recognizes that special relationship, and states that EPA, in keeping with the Federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions or decisions may affect the tribes. The existence of that trust

responsibility is not in question, as it has been affirmed in a number of decisions by the United States Supreme Court, and a number of Federal statutes reaffirm the trust relationship. As described in Cohen's Handbook of Federal Indian Law (2005) at p. 425, "A great number of Federal statutes and regulations addressing many aspects of the Federal-Tribal relationship often provide the basis for substantive claims for relief in cases seeking equitable relief."

While the precise legal contours of the federal trust responsibility have not been fully defined, EPA describes the trust responsibility in terms of its *general* and *specific* components. The *general* component of the trust responsibility relates to the United States' unique legal and political relationship with federally recognized Indian tribes. It informs federal policy and provides that the federal government consult with and consider the interests of tribes when taking actions that may affect tribes or their resources. Courts have not required particular procedures, but generally have looked to see whether federal agencies have sought the views of tribes and considered their interests. The Supreme Court has noted that the federal government, as trustee, is "charged with moral obligations of the highest responsibility and trust." Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

To fulfill this consultation responsibility, EPA has provided G2G tribal consultation about the ADEC application to assume the NPDES program, so that EPA can fully understand the concerns of the tribes in Alaska before making a decision on the APDES program. EPA has put considerable effort into reaching out to tribes while Alaska developed its program application to ensure the tribes were meaningfully informed about the details of the process, and that they had a number of opportunities to express their concerns and comments directly to EPA and ADEC. EPA has communicated with the tribal leaders by scheduling a number of consultation meetings that were attended by EPA managers and staff, providing written materials by mail, and having conference calls and other telephone communications. See also Response to Comment 44. EPA believes that it has fulfilled its responsibilities to consult with tribes in Alaska on a government-to-government basis prior to making a decision on the APDES program.

The *specific* component of the trust responsibility ordinarily arises only from some formal action of the United States, such as a Federal statute or regulation, treaty, or Executive Order. In a series of decisions, the courts have ruled that the applicable statutes, regulations, treaties, and executive orders define the contours of the United States' fiduciary responsibilities. See United States v. Navajo, 537 U.S. 488, 502 (2003). In that decision, which concerned a tribe's claim for monetary damages, the U.S. Supreme Court wrote "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." See id. In a recent case before the U.S. Circuit Court of Appeals for the Ninth Circuit, the tribe could not point to a specific duty in a statute or regulation, but contended that the government still maintains a general trust responsibility that exists for any Federal action that relates to Indian tribes. In that decision, the court cited an earlier 9th Circuit case that stated "unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is

discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." Gros Ventre Tribe v. U.S., 469 F.3d 801, 810 (9th Cir., 2006), quoting Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998).

For the reasons above, EPA disagrees that the Federal trust responsibility to tribes in Alaska alone authorizes it to withhold approval of the APDES program. EPA must apply the trust responsibility consistent with applicable federal law. See Shoshone-Bannock Tribes v. Reno, 56 F.3d 1482 (D.C. Cir. 1995); State of California v. Watt, 668 F.3d 1290, 1324 (D.C. Cir. 1981). As discussed in EPA's responses to a number of other comments, our review of the APDES program application is limited to the statutory requirements set forth in CWA § 402(b) and EPA's NPDES regulations. EPA must approve the APDES program if it meets those requirements.

Comment 54 – Endangered Species Act

Commenters: 20, 15, 25, 24

Several comments expressed concern that the Endangered Species Act will not be considered when the State is authorized to run the program, and expressed more general concern over protection of fish and wildlife.

Response to Comment 54

While Endangered Species Act (ESA) § 7(a)(2) requires EPA to consult with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or both, over certain permitting decisions, the ESA does not impose that obligation on states. The absence of that consultation obligation in a state NPDES program is not a factor that EPA can consider in deciding whether to approve a state's NPDES program application. In National Association of Home Builders, et al. v. Defenders of Wildlife, 127 S.Ct. 2518 (2007), the U.S. Supreme Court determined that EPA *must* approve any state NPDES program that meets the nine criteria under CWA § 402(b). Those criteria do not include the requirement that a state consult with federal natural resource agencies regarding ESA-listed species when making permitting decisions. The Supreme Court held that the ESA does not establish a "tenth criterion" that EPA may consider in deciding whether to approve a state's proposed NPDES program. *Id.* at 2532-2533.

ADEC has, however, committed to coordinating with the federal and State natural resource agencies, notifying them of permitting actions, and providing them with the opportunity to comment on permit decisions. The procedures for this coordination are described in PD §§ 6.2.3, 6.2.4, 6.2.5, and 6.2.6, and MOA § 4.06.

In addition, in overseeing APDES permits, EPA intends to follow the Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding *Enhanced Coordination Under the Clean Water Act and Endangered Species Act (2001*

EPA/Services National MOA), 66 Fed. Reg. 11,202, 11,215-16 (February 2001). See Response to Comment 63, below.

Comment 55 – Three year permit plan
Commenter: 22

EPA has a three-year permit plan that is shared with the tribes and others. The State proposes a one year plan, a shortened period of time of notification.

Response to Comment 55

Although EPA has provided three-year plans in the past, EPA believes that a one-year plan could have the advantage of more accurately reflecting the work that will actually be performed during the following year. Since a permit plan is not a required component of the program, EPA cannot compel the State to produce a plan of any particular duration. The State, however, has updated the PD to include a three-year plan, updated annually.

Comment 56 – Elimination of need for permits
Commenters: 22, 16, 25

The CWA set the goal of eliminating the discharge of pollutants in the nation’s water by 1985. Elimination is part of the NPDES program and there should be a way to stop the permitting process or the need for permitting through elimination. “There shouldn’t be any discharge of any pollutant of any sort into any water.”

Response to Comment 56

EPA acknowledges the comment regarding the goals and principles established by the CWA. Although the goal to eliminate the discharge of pollutants into navigable waters by 1985 has not been realized, it remains a fundamental principle for establishing NPDES permit requirements. In addition, it is difficult to quantify projects that were not pursued due to inability to obtain a permit or meet requirements. Likewise, many of the existing NPDES general permits in Alaska specify areas in which discharges are prohibited, or that contain seasonal limitations. In other circumstances operators are unable to obtain a permit, or to comply with permit conditions, and seek other options such as reinjection (oil and gas sector), land application, water reuse (in arid areas of Western U.S. for example), or transport to a facility for reuse (fish meal plants), treatment or other disposal options.

Comment 57 – Reports submitted at the Anchorage Hearing
Commenters: 16, 23

At the Anchorage public hearing on this program, a number of individuals submitted reports for the record to support oral testimony. One such document, entitled “Alaska’s Marine Wildlife and Fisheries Decline,” argues that “state and the federal have mismanaged our resources.” Other submittals include “Termination of Village Water and Sewer Projects in Rural Alaska by the State of Alaska”; “Lacking alternatives, villagers can’t kick soda habit,” Anchorage Daily News (ADN) 7/20/08; ADN editorial 7/20/08, “After Monegan”; Alaska Inter-Tribal Council 6/17/08 Arctic Offshore Oil and Gas Activities in Alaska Report.

Response to Comment 57

EPA acknowledges receipt of these reports at the Anchorage hearing. EPA will include them in the administrative record for this EPA action.

Comment 58 – Timing of application with major projects
Commenters: 26, 18, 23

“I question the timing of this application which coincides suspiciously with the testing and upcoming permits for the Pebble Mine project . . .” Similar questions of timing of the application with current resource development projects were raised including the Pebble Mine, offshore drilling, and oil exploration in ANWR.

Response to Comment 58

The state’s formal evaluation of NPDES program authorization began in 2002 with legislative direction to evaluate the costs and benefits of a state NPDES program. The actual application process began with passage of Senate Bill 110 in the 2005 legislative session, so the application has been under development for nearly six years. These actions were all initiated well before some of the more recent development projects that have been proposed in Alaska.

Comment 59 – Examples of State Permits More Lenient than EPA
Commenters: 18, 24, 29, 23

Some testified in the public hearings for this program that EPA maintains more stringent *fecal coliform* criteria and a different mixing zone definition than the State of Alaska, and that the Anchorage Water and Wastewater Utility (AWWU) provides less wastewater treatment than other similar facilities, demonstrating that Alaska will write permits that are more lenient than the EPA’s. Others expressed concern regarding water treatment of waste and sewage in Cook Inlet.

Response to Comment 59

Permits issued under CWA § 402 are required to comply with the federally approved Alaska Water Quality Standards (AWQS) that are in effect at the time of permit issuance. This is required whether EPA or the State issues the permit. The AWQS do contain provisions for mixing zones, zones of deposit, and other site-specific exemptions from statewide standards, so while every permit, whether issued by EPA or the State, must comply with AWQS, not every permit will contain the same conditions.

As for the AWWU permit, that particular facility is regulated by an EPA-issued (not a State-issued) NPDES permit, and has been granted a waiver from secondary treatment under CWA § 301(h). This type of waiver cannot be authorized by a state, so EPA will continue to retain jurisdiction over this permit even after authorization of the APDES program.

Comment 60 – Comment Period

Commenters: 20, 22, 14, 23, 21, 25

A number of tribal governments stated that the public comment period does not provide a reasonable time frame for Alaska tribes to absorb and respond to this critical matter. Similar comments were submitted during the public hearing.

Response to Comment 60

Opportunities to review and provide input on Alaska's application have been available for much longer than the official public comment period. EPA began providing information to the tribes and the public at large about Alaska's application request as early as October 6, 2005, where the Agency gave an overview of the State's request at the Alaska Tribal Conference on Environmental Management. Subsequently, EPA presented information at the February 2007 and the February 2008 Alaska Forum on the Environment. EPA also published numerous informational articles regarding the application in the Region 10 Tribal Newsletter. The current application has been available to the public since May 1, 2008, and earlier versions of the application have been available since 2006, along with EPA's comments. Additionally, EPA coordinated and began consultation with Alaska tribes much earlier than the start of the official public comment period. EPA received comments prior to the official public comment period, and accepted comments even after the close of the official public comment period. Consequently, there have been extensive opportunities for input on Alaska's program which are described in more detail in Response to Comment 46.

Comment 61 – Water Rights

Commenter: 2

The U.S. can not grant the State of Alaska all authority over “Water Rights” within the State without some equal jurisdictional oversight by the tribes of Alaska.

Response to Comment 61

“Water rights” generally refers to the right to remove and use water from rivers, lakes, and aquifers. The NPDES program regulates the discharge of pollutants into water, but does not affect water rights, so approval of the APDES program would not affect Alaska’s authority over water rights. Water rights are generally already governed by state law rather than federal law. EPA’s decision to grant ADEC authority to implement the NPDES program would not grant the State any new authority over water rights in Alaska.

Comment 62 – Waiver of EPA Review

Commenter: 54

USFWS suggest that the MOA include an additional exception in Section 4.04, specifying that EPA does not waive the right to review permits that allow for discharges within the range of ESA-listed species.

Response to Comment 62

The existing language in the MOA already provides EPA the opportunity to review, to comment on, and to object to any permit. MOA § 4.04, ¶ 3, provides that EPA reserves the right to terminate, at any time, any waiver of review. Therefore, the existing language in the MOA will allow EPA to review any permits that allow for discharge within the range of ESA-listed species, as USFWS recommends.

In accordance with MOA § 4.04, ¶ 1, on an annual basis, ADEC will make available to the Services (including USFWS) an annual Permit Issuance Plan that will identify the permits ADEC intends to issue during the upcoming year. EPA encourages USFWS to review the plan and inform EPA and ADEC which permits are of interest for USFWS review. EPA recommends that USFWS be engaged early on in the permit development process, including providing information to ADEC on federally-listed species and any designated critical habitat relevant to those permits, working with ADEC to share information on the permits and raising issues and concerns regarding impacts of the discharge to threatened or endangered species or designated critical habitat.

The MOA § 4.04, ¶ 1, identifies the permits for which EPA cannot waive its review. This list of permits is consistent with 40 CFR Part 123.24(d). MOA § 4.04, ¶ 4, allows EPA the right to terminate the waivers in Section 4.04, in whole or in part, at any

time. Therefore, if the USFWS identifies a permit of interest, EPA encourages the USFWS to communicate that interest to EPA.

Comment 63 – Endangered Species

Commenter: 54

USFWS suggest that the MOA contain a provision that reinforces the authority of EPA to object to permits that would jeopardize any and all endangered species in order to ensure protection of listed species and critical habitat.

Response to Comment 63

In overseeing APDES permits with regard to endangered species, EPA intends to follow the procedures specified in the *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act (2001 EPA/Services National MOA)*, 66 FR 11,202, 11,215-16 (February 2001). This agreement describes the manner in which EPA and the Services will work together to ensure that States administering the NPDES program protect listed endangered and threatened species.

Under the *2001 EPA/Services National MOA*, EPA has agreed to utilize its oversight authority in a specific manner to protect listed species and critical habitat. Implementation of the procedures will ensure that the USFWS has an opportunity to review and comment on draft APDES permits, and to work with ADEC and EPA to address potential effects on listed species and critical habitat associated with the permits. As stated in the *2001 EPA/Services National MOA*, where EPA determines that exercise of its objection authority is appropriate to protect endangered and threatened species, EPA will act pursuant to its existing authorities under the CWA, which are also reflected in the MOA. Further, EPA will use the full extent of its CWA authority to object to a permit where EPA finds that the permit is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

Comment 64 – Review timeline

Commenter: 54

USFWS recommends that the timelines for Service review be extended to provide sufficient time for meaningful review and comment. The Service recommends the 10-day pre-public review period be extended to at least 30 days for the Service when there may be opportunity to modify actions to minimize adverse effects on trust resources, including listed species.

Response to Comment 64

The EPA intends to adhere to the timelines in the existing EPA/ADEC MOA to allow ADEC to be effective in issuing permits within a reasonable time frame. EPA believes that the existing procedures in place will provide the USFWS ample opportunity for meaningful review and comment of APDES permits.

In accordance with MOA Section 4.04, ¶ 1, on an annual basis, ADEC will make available to the Services an annual Permit Issuance Plan that will identify the permits ADEC intends to issue during the upcoming year. EPA encourages the USFWS to review the plan and work with ADEC early on in the permit development process to share information on the permits that may raise issues regarding impact to threatened or endangered species or designated habitat.

In accordance with MOA Section 4.06, ¶ 1, during the 10-day applicant review period, ADEC will notify the USFWS that the preliminary draft permit, fact sheet, and an Ocean Discharge Criteria Evaluation, if applicable, are available for review and comment. At the start of the public review period, ADEC will notify the USFWS that the draft permit, fact sheet, and Ocean Discharge Criteria Evaluation, if applicable, are available on ADEC's web page for review and comment.

APDES regulations, like federal NPDES regulations, require that copies of draft permits be provided to federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources, which would include the USFWS. See 40 CFR § 124.10(c)(1)(iii), 18 AAC 83.120(c)(1)(C). APDES regulations, like federal regulations, also invite these same agencies to submit comments on the draft permits, and to submit written notice if the imposition of specified conditions in the permit is necessary to avoid substantial impairment of fish, shellfish or wildlife resources. See 40 CFR § 124.59(b), 18 AAC 83.120(f). Like EPA, the State may include these specified conditions in a permit to the extent they are determined necessary to carry out EPA's authority under the Clean Water Act. Moreover, EPA will coordinate its own review of the draft permits with USFWS to ensure that USFWS concerns are addressed to the extent of EPA's authority under the Clean Water Act, as set forth in the 2001 EPA/Services National MOA.

Water quality standards, which are constantly under review as additional data are gathered, are designed to be protective of all species, including threatened and endangered species. The *2001 EPA/Services MOA* calls for additional steps to verify that surface water quality standards are and remain protective of endangered species, including a national consultation on EPA's existing CWA § 304(a) aquatic life criteria, which form the basis of most states' water quality standards, including Alaska's. See 66 Fed. Reg. at 11,212. When combined with EPA's oversight authority and coordination with USFWS, these protections should mean that discharges permitted by ADEC will not adversely affect listed species.

Further, in ADEC's *Public Participation in the APDES Permitting Process* document, ADEC describes the process for supplemental public processes. In deciding to

supplement permit communications, ADEC will also consider the views of the applicant and other state and federal agencies. ADEC notes that they will also strive to schedule communication processes so that they do not adversely affect permit development schedules.

Comment 65 – Endangered Species, State procedures

Commenter: 54

USFWS recommends that a procedure be established for APDES permit writers to assess the potential impacts of a permit action to species protected under the ESA. USFWS offers to work with EPA and ADEC to develop this type of procedure.

Response to Comment 65

EPA agrees that specific procedures laid out in a guidance document for APDES permit writers would be useful. EPA recommends that the State consider ways in which the Services can provide meaningful input into permits as the State develops future permit writing guidance. As described in Response to Comment 62, EPA encourages USFWS participation and input on the State's implementation of the NPDES program.

Comment 66 – The Program Does/Does not Meet CWA Requirements and the Intent of Congress

Commenters: 56, 57, 19, 64, 62, 30, 42, 66, 4, 19, 17, 69

Many comments state that the original intent of Congress was that the states would assume responsibility for implementation of the NPDES program. Others state that the APDES program application fully meets the CWA criteria, and therefore that EPA must approve the APDES program. A few parties commented that they believe that the APDES program is at least as stringent as EPA's program.

Trustees for Alaska states that, as demonstrated in comments submitted, ADEC does not meet the minimum requirements of the CWA, nor demonstrates its commitment to meet them, and therefore that EPA must not approve the APDES program.

Response to Comment 66

EPA has analyzed all specific comments submitted concerning the adequacy or inadequacy of the APDES program, and responds to them individually in this document. EPA has concluded that the APDES program as a whole meets the requirements of the CWA and the applicable regulations.

Comment 67 – Mixing Zones

Commenter: 57

Mixing zones are a widely used regulatory tool discussed in EPA guidelines and included in State Water Quality Standards. Mixing zones are designed and implemented to protect the water resources of Alaska. The mixing zone process will not change under the APDES program.

Response to Comment 67

EPA acknowledges the comment and agrees that mixing zones are part of Alaska's State Water Quality Standards. As such, NPDES permits issued either by EPA or by ADEC must be issued consistent with the standards and should therefore be consistent regardless of the permitting authority.

Comment 68 – EPA Oversight

Commenters: 19, 64, 52

It should be noted that the APDES program is subject to continuing EPA oversight and enforcement authority. EPA oversight will ensure that the State program maintains or improves upon environmental protection required by EPA.

Response to Comment 68

EPA acknowledges the comment and does intend to provide oversight of the State program, including review and comment on Alaska-issued permits. Review procedures are specified in the EPA/ADEC Memorandum of Agreement.

Comment 69 – Mining companies

Commenters: 60, 68

Donlin Creek LLC expects to work initially with EPA as the agency processing the NPDES application, and expects that EPA would conduct a review of the application as part of the NEPA process, taking a lead role while working with the Corps of Engineers as that agency reviews any project permit application under CWA § 404. Similar comments regarding the proposed Pebble Mine.

Response to Comment 69

If a facility applies for an NPDES permit requiring a NEPA evaluation before the State is authorized to issue mining sector permits, then EPA most likely would be the lead agency in the NEPA process *only if* the permitting and NEPA processes would be completed before the State obtains the authority to issue mining sector permits. Once the State obtains that authority, 40 CFR § 123.1(d)(1) prohibits EPA from issuing a mining

sector permit, so EPA would have no federal action, and therefore no Record of Decision (ROD) to issue. Under those circumstances, EPA could elect to participate in the NEPA process because of any particular expertise the Agency may have to contribute, but it would be highly unusual for an Agency with no federal action, and therefore no ROD, to act as the lead agency for NEPA compliance purposes.

**Alaska NPDES Program Application
Response to Comments**

Index of Comments Received

**Appendix to Response to Comments Document
October 31, 2008**

Committer Identification Number	Date Rec'd	NAME	ORGANIZATION	Written Comments	Transcript Testimony Anchorage, Fairbanks, & Juneau (A, F, J) + Page(s) #	T=Tribal;TR=Tribal Resolution
1	6.23.08	Mary McDowell	Pacific Seafood Processors Association	X		
2	6.25.08	Thomas Tilden, Chief	Curyung Tribal Council	X		TR
3	7.14.08	Mead Treadwell	Treadwell, Mead	X		
4	7.16.08	Phil St.George	Millrock Resources, Inc.	X		
5	7.17.08		Tuluksak Native Community	X		TR
6	7.18.08		Chevak Native Village	X		TR
7	7.18.08		Native Village of Alakanuk	X		TR
8	7.21.08		Native Village of Eek	X		TR
9	7.21.08	Michael R. Pollen	Pollen, Michael R.		F--7	
10	7.22.08		National Congress of American Indians	X		T
11	7.22.08		Organized Village of Kwethluk	X		TR
12	7.22.08	William Sheetz	Sheetz, William		J--8	T
13	7.23.08	Mike Williams, President	Alaska Inter-Tribal Council (Mike Williams, President)		A--14 & 58	T
14	7.23.08	Roberta Chavez	Association of Village Council Presidents, (Roberta Chavez)		A--18	T
15	7.23.08	Joel Blatchford	Blatchford, Joel		A--22	T
16	7.23.08	Delice Calcote	Calcote, Delice		A--30	T
17	7.23.08	Deantha Crockett	Crockett, Deantha		A--39	
18	7.23.08	Brad Garness	Garness, Brad		A--45	T
19	7.23.08	Sami Glasscott	Glasscott, Sami		A--20	T
20	7.23.08	Sam Jackson	Jackson, Sam		A--7	T
21	7.23.08	Jess Lanman	Lanman, Jess		A--34	T
22	7.23.08	Billy Maines	Maines, Billy		A--11 & 50	T
23	7.23.08	Olga M Malutin	Malutin, Olga M.		A-23 & A--26	T
24	7.23.08	Nikos Pastos	Pastos, Nikos		A--59	T

Committer Identification Number	Date Rec'd	NAME	ORGANIZATION	Written Comments	Transcript Testimony Anchorage, Fairbanks, & Juneau (A, F, J) + Page(s) #	T=Tribal;TR=Tribal Resolution
25	7.23.08	Bob Shavelson	Shavelson, Bob		A--41	T
26	7.23.08	Brenda Trefon	Trefon, Brenda		A--38	T
27	7.23.08	Kimi Trefon	Trefon, Kimi		A--49	T
28	7.23.08	Ashley Rosen	Trustees for Alaska (Ashley Rosen)		A--9	T
29	7.23.08	Carl Wassilie	Wassilie, Carl		A--54	T
30	7.23.08	John J. Williams	Kenai Peninsula Borough	X		
31	7.25.08		Chignik Bay Tribal Council	X		TR
32	7.25.08		Native Village of Nightmute	X		TR
33	7.25.08		Native Village of Tununak	X		TR
34	7.25.08		Orutsaramiut Native Council	X		TR
35	7.28.08		Algaaciq Tribal Government	X		TR
36	7.28.08		Native Village of Kwinhagak	X		TR
37	7.30.08		Association of Village Council Presidents	X		TR
38	7.30.08		Native Village of Napakiak	X		TR
39	8.01.08		Native Village of Mekoryuk	X		TR
40	8.04.08	Wayne A. Stevens, President/CEO	Alaska State Chamber of Commerce	X		
41	8.04.08		Atmautluak Traditional Council	X		TR
42	8.11.08	Bob Taylor, Vice President Operations North America	Kinross Gold USA, Inc.	X		
43	8.11.08	John S. Devens, Ph.D, Executive Director	Prince William Sound Regional Citizens Advisory Council	X		
44	8.11.08		Village of Kotlik	X		TR
45	8.12.08	Susan Flensburg	Bristol Bay Native Association	X		T

Committer Identification Number	Date Rec'd	NAME	ORGANIZATION	Written Comments	Transcript Testimony Anchorage, Fairbanks, & Juneau (A, F, J) + Page(s) #	T=Tribal;TR=Tribal Resolution
46	8.12.08	Kendra Zamzow	Zamzow, Kendra	X		T
47	8.14.08	Hazel Smith, Natural Resources Coordinator	Maniilaq Association	X		T
48	8.15.08	Michael Munger, Executive Director	Cook Inlet Regional Citizens Advisory Council	X		
49	8.15.08	Les Cronk	Cronk, Les	X		
50	8.15.08	Paul S. Glavinovich	Minerals Consultant	X		
51	8.15.08		National Tribal Water Council	X		T
52	8.15.08	Rick Van Nieuwenhuyse, President and CEO	NovaGold Resources Inc.	X		
53	8.15.08	Richard P. Harris, Executive Director	Sealaska Corporation	X		
54	8.15.08	Elizabeth L. Smith, Acting Director, FWS	U. S. Department of the Interior, Fish & Wildlife Service	X		
55	8.18.08	Kate Troll, Executive Director	Alaska Conservation Alliance	X		
56	8.18.08	Steven C. Borell, P.E., Executive Director	Alaska Miners Association, Inc.	X		
57	8.18.08	Marilyn Crockett, Executive Director	Alaska Oil and Gas Association	X		
58	8.18.08	Dimitri Philemonof, President/CEO	Aleutian/Pribilof Islands Association, Inc.	X		T
59	8.18.08		Community of Nunapitchuk	X		TR
60	8.18.08	Douglas C. Nicholson, President/General Manager	Donlin Creek LLC	X		
61	8.18.08		Georgetown Tribal Council	X		TR
62	8.18.08	Bob Hoekzema	Hoekzema, Bob	X		
63	8.18.08		Kenaitze Indian Tribe I.R.A.	X		T

Committer Identification Number	Date Rec'd	NAME	ORGANIZATION	Written Comments	Transcript Testimony Anchorage, Fairbanks, & Juneau (A, F, J) + Page(s) #	T=Tribal;TR=Tribal Resolution
64	8.18.08	Rose Barr, Resources Manager	NANA Regional Corporation	X		
65	8.18.08	Johnny Lee Aiken, Director	North Slope Borough Planning and Community Service Department	X		
66	8.18.08	Deantha Crockett	Resource Development Council	X		
67	8.18.08	Jim Kulas, Mgr. Environmental and Public Affairs	TeckCominco Alaska Incorporated Red Dog Operations	X		
68	8.18.08	Ken Taylor, Vice President-Environment	The Pebble Partnership	X		
69	8.18.08	Victoria Clarke, Legal Director	Trustees for Alaska	X		
70	8.18.08	Clarence Alexander, YRITWC Executive Board Chair	Yukon River Inter-Tribal Watershed Council	X		T
71	9.18.08		Native Village of Nunam Iqua -- Sheldon Point	X		TR