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October 13, 2023

United States Environmental Protection Agency
EPA Docket Center
Docket ID No. EPA-HQ-OW-2020-0276
Submitted via regulations.gov

Re: EPA Proposed Rule to streamline and clarify Clean Water Act (CWA) Section 404 state and tribal program regulations

To Whom It May Concern:

The Alaska Miners Association (AMA) writes to comment on the U.S. Environmental Protection Agency (EPA) Proposed Rule to streamline and clarify Clean Water Act (CWA) Section 404 state and tribal program regulations.

AMA is a professional membership trade organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,400 members that come from eight statewide branches: Anchorage, Denali, Fairbanks, Haines, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, suction dredge miners, small family mines, junior mining companies, and major mining companies, Alaska Native Corporations, and the contracting sector that supports Alaska's mining industry.

CWA Section 404, the section that requires a permit before dredged or fill material may be discharged into waters of the United State, contains the provision Section 404(g) which gives states and tribes the option of assuming, or taking over, the permitting responsibility and administration of the Section 404 permit program for certain waters. The State of Alaska has recently pursued assumption of this program, given the unique aspects of Alaska's waters. Wetlands are ubiquitous in Alaska, covering some 50% of the State, largely undisturbed, and, with the exception of ANCSA lands, almost exclusively limited to public lands. The state has millions of lakes, rivers, and streams, and any water policy being considered for the nation will disproportionately impact Alaska.

To that end, AMA emphatically endorses the comments submitted by the Alaska Department of Environmental Conservation (ADEC). ADEC is comprised of Alaska regulators who live in the state and understand its unique characteristics, and more, care deeply about the land in which they work and play. There are no better personnel equipped to manage Alaska's waters and the 404 program than the Alaskans at ADEC.

AMA wishes to address the treatment of tribes as regulatory agencies as proposed in the rule. We strongly support ADEC's efforts to extensively engage with tribes. From their website:

“Government-to-government consultation” is a term of art created by federal law and executive order that requires the federal government to engage in certain processes in relation to sovereign tribes. Since this is a legal creation of federal law, it does not exist under state law. However, nothing precludes states from forming intergovernmental agreements and state-tribal compacts to promote positive state-tribal relationships and foster collaborative policy development.

DEC has a Tribal Government Liaison position that coordinates with divisions and other State agencies and works closely on tribal concerns. Additionally, DEC maintains a tribal relations [website](#) at that includes a 2002 policy statement describing the DEC’s tribal engagement process.

*The Division of Water also has a Local and Tribal Government Liaison that implements the Division’s communication and engagement processes established in the Program Description for implementing the CWA Section 402 Permitting Program, outlining the Department’s public participation guidance and strategies. Several paragraphs of the document discuss engagement efforts, including section 4.0 - Supplemental Communication Tools, which outlines a consultation process led by the Division of Water’s Local and Tribal Government Liaison. **This consultation and process is in addition to the routine public participation process available to the general public and takes place prior to issuance of a public notice of a draft permit.** Additionally, the Division of Water maintains a helpful document on our website titled [APDES Guidance for Local and Tribal Governments](#). As we develop the 404 Program for approval and prepare the Program Description, we anticipate a similarly structured engagement process for tribal organizations, which DEC will work to refine in communication and collaboration with Local and Tribal Governments.*

The APDES process for Local and Tribal government engagement was outlined in [Appendix H Public Participation in the APDES Process](#), in the Departments application to EPA for APDES Program primacy. Under the subsection Local and Tribal government consultation (page 8), it states:

“Consultation with local State-chartered and federally recognized Tribal governments, and RCACs is typically organized and led by a project liaison and can be organized as a single discussion with representatives of the local or Tribal government or a series of discussions prior to providing formal public notice of a draft permit. Consultation may be either face-to-face or by telephone depending on cost, staff availability, and other practical considerations. The consultation process is intended to provide for a meaningful and timely dialog with local and Tribal officials with open sharing of information, the full expression of local and state views, a commitment to consider local views in decision-making, and respect for local authority and knowledge. If necessary and requested by the Tribe, DEC will use a translator or facilitator to assist with this effort. Summaries of consultations will be entered into the permit record including DEC responses to substantive concerns.”

Lastly, DEC recently established ongoing quarterly meetings with the goal of improving DEC’s partnership and communication with Alaska’s Indigenous People. Our goal with these meetings is to establish a line of communication between DEC and the tribes and regional and village corporations; share and receive information; identify the efforts, activities, and permits that DEC is working on; and learn if there are areas of interest or concern that we can work together to address. The meetings are announced in an email to tribal organizations, shared on DEC’s website and social media, and are open to all tribes, regional and village corporations, and all others who are interested.

From an industry perspective, with close coordination between the State of Alaska, Alaska Native Corporations, and tribes, the process to regulate waters in Alaska is stringent, thorough, and robust. The

additional concept in the Proposed Rule to treat tribes as a regulatory agency brings uncertainty to the process. Project applicants deserve to know who the regulators are and a predictable process by government agencies with dedicated missions and mandates. Establishing tribes as regulatory agencies should be addressed in an across-the-board process for all aspects of the regulatory process and not just in this specific Proposed Rule.

The provision introduced regarding a five-year permit threshold should be removed. Project proposals like mines generally have a permit timeline of five years so that the mine can continuously be evaluated and practices changed for best management and performance. The requirement to do analysis for longer than five years is actually to the detriment of the environment, and should be discouraged. In addition, it brings risk of litigation to permit decisions.

Lastly, AMA advocates that when the assumption process is evaluated, a federal funding structure should be considered. Primacy programs, such as the 404 Program, are administered through cooperative federalism, meaning the federal law is established by national standards while states implement them within their borders. One of the key principles of cooperative federalism is that “states that choose to implement federal programs should be both adequately funded by the federal government to do so as Congress directed in authorizing statutes and should also invest state resources (either directly or through fees or other methods) sufficient to implement a successful program.” EPA should not propose changes and new requirements to the assumption process, including a discussion of incentives, without consideration of supplying states with additional resources.

AMA appreciates the opportunity to comment and looks forward to further working with AMA on this important issue.

Sincerely,



Deantha Skibinski
Executive Director