



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

AUG 01 2006

Reply to
Attn Of: RA-140

The Honorable Frank H. Murkowski
Governor of Alaska
P.O. Box 110001
Juneau, AK 99811

Dear Governor Murkowski:

The U.S. Environmental Protection Agency (EPA) received Alaska's three-volume National Pollutant Discharge Elimination System (NPDES) Program Authorization application on July 5, 2006. We congratulate Alaska on the effort and work product generated in an extremely short time frame.

EPA is required by NPDES regulations to make a completeness determination on such applications within 30 days of their submission. While we appreciate the effort made by the State, our review has identified a number of inconsistencies with the minimum requirements prescribed in 40 CFR Part 123. These include both statutory and programmatic issues described below. Therefore, in accordance with EPA regulations at 40 CFR 123.21(b)(1), EPA has determined that Alaska's NPDES Program Authorization application is incomplete.

The time frame for submission of the application has challenged both EPA and the Alaska Department of Environmental Conservation (ADEC). In prior state approval processes, EPA and the states had the advantage of several years of working together to craft approvable state programs, but in the case of Alaska, our teams made substantial progress in *less than one year*. However, EPA's most recent experience in authorizing the NPDES programs in Arizona and Maine indicates that it is critical for EPA and the state to engage in thorough discussions and issue resolution on the entire application. The Maine and Arizona approvals were preceded by lengthy joint regulatory efforts and extensive discussions that resulted in substantial agreement on and improvement of the content of the applications prior to submission. That was not possible with the Alaska program.

Alaska and EPA have a mutual interest in working together to ensure that Alaska's NPDES Program is robust, defensible and protective of Alaska's waters. We believe more time is needed to work collaboratively together to achieve this goal.

One of our most urgent concerns with the application is the apparent lack of statutory authority to regulate all of the discharges of pollutants that are subject to the NPDES program. EPA provides the following two examples:

- Discharges excluded from permit requirements: Approved state NPDES programs must prohibit all point source discharges of pollutants except as authorized by an NPDES permit or excluded by EPA's NPDES regulations. EPA's NPDES regulations exclude from permitting requirements the introduction of sewage into publicly owned treatment works, but this exclusion does not apply to discharges through pipes, sewers, or other conveyances not leading to treatment works. AS 46.03.100(e)(1) excludes from permit requirements "a person discharging only domestic sewage into a sewerage system." The Alaska Statute defines sewerage system as a collection system and does not refer to any treatment system. The Attorney General Statement on page 3-4 of Part I notes that the statutory exclusion appears to be overly broad and goes on to say that the issue is clarified by the regulation at 18 AAC 83.015(b)(3). That regulation, however, only clarifies which industrial users require permits, and it does not address the discharge of domestic sewage into a sewerage system.
- Authority over discharges of "munitions": Munitions are defined as pollutants under the CWA and therefore potentially subject to the requirements of the NPDES program. But AS 46.03.100(e)(7) denies to ADEC the power to regulate the discharge of munitions on active ranges. In an attempt to close that authority gap, the Commissioner of ADEC has promulgated a *regulation* that purports to repeal or amend the *statutory* exemption. The authority to amend or repeal AS 46.03.100(e)(7) rests solely with the Alaska Legislature. The legislature has granted the Commissioner broad authority to take administrative steps to gain EPA approval of Alaska's NPDES program. However, in EPA's opinion, the Application does not include information sufficient to conclude that the legislature authorized the Commissioner to amend or repeal statutes or promulgate regulations that contradict existing statutes.

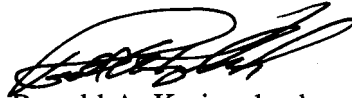
In addition to statutory obstacles outlined above, EPA is unable to accede to the terms of the submitted Memorandum of Agreement (MOA). Alaska is required by 40 CFR 123.24 to include in its application an MOA with the Regional Administrator, which must serve as the framework for how EPA and Alaska will work together to implement our respective roles once the state is authorized to administer the NPDES program. Since Alaska has proposed phasing its assumption of the NPDES program over a period of time, it is of crucial importance that this framework, and the standards and procedures contained within it be fully discussed and agreed to in the MOA before an application can be deemed complete. EPA and ADEC had limited opportunity to negotiate the terms of this important agreement and we are not in agreement on key elements of the proposed MOA.

Another identified area of concern involves public participation. EPA regulations require that state NPDES programs make sufficient provision for public participation in the permitting process, particularly the judicial review phase of that process. Lack of clarity in the areas of judicial review, standing, public notice, and public participation is currently a basis for numerous NPDES program withdrawal petitions to EPA, specifically in Nevada, Florida, Tennessee, Virginia, Kansas, Indiana, Alabama, Michigan, Louisiana, Washington and Oregon. Alaska's Attorney General Statement does not fully explain how the State provides sufficient opportunity for a person to obtain review of a permit, nor does it make clear who can challenge a permit decision. It is important for Alaska to begin implementation of an NPDES program on a solid footing. We would like to work with Alaska to clarify this critically important area that is of high interest to many public stakeholders.

Furthermore, we need clarification on and resolution of a number of other issues, such as additional explanation and clarity on NPDES permitting, compliance, and enforcement procedures. EPA believes that the prudent course at this time is to develop a schedule for our collaboration on Alaska's NPDES Authorization application. We are prepared to provide Alaska with a comprehensive list of comments on the entire application by the end of October, our goal being to minimize if not eliminate the chance that late-discovered issues will delay the process. We are eager to then work with Alaska to resolve all outstanding issues. We propose to jointly arrive at a program review, issue discussion, and a program approval schedule that will allow us to foster a strong partnership as the foundation for a robust NPDES program.

In closing, EPA looks forward to working with Alaska on its application for NPDES program authorization. Please call me at (206) 553-0454 if you wish to discuss this matter. ADEC's program managers and staff can also contact our Office of Water and Watersheds Director, Mike Gearheard, at (206) 553-7151, or his Deputy, Christine Psyk, at (206) 553-1906.

Sincerely,



Ronald A. Kreizenbeck
Acting Regional Administrator

cc: Jim Clark, Governor's Chief of Staff
Kurt Fredrickson, Commissioner, ADEC
Dan Easton, Deputy Commissioner, ADEC
Lynn Tomich Kent, Director, Division of Water, ADEC
Cam Leonard, Alaska Attorney General's Office