STATE OF ALASKA

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March 27, 2007

Mr. David Casey
U.S. Army Engineer District, Alaska
Nationwide Permits Re-Issue
805 Frontage Road, Suite 200C
Kenai, Alaska 99611

Dear Mr. Casey:

Subject: Nationwide Permits Re-Issue 2007
State ID No. AK AK0610-05J
Final Consistency Response – Concurrence

The Office of Project Management and Permitting (OPMP) has completed coordinating the State's review of the U.S. Army Corps of Engineer's (CoE), Alaska District's (Alaska District) proposed Regional Conditions (RC) for the 2007 Nationwide Permits (NWP) and associated general conditions and definitions. This State response incorporates general State comments and the State's consistency response regarding the CoE's determination for consistency with the Alaska Coastal Management Program (ACMP).

NWP reviews are always complex and most times controversial. We thank you and the Alaska District team for your significant efforts to provide additional backup material and documentation regarding the NWPs, datasheets to point out differences in the existing RCs and the proposed RCs and Preconstruction Notifications (PCN) and your efforts to meet with State and Federal agencies on several occasions. Your comprehensive work facilitated this complex review and exceeded all requirements. We appreciate these "go the extra mile" efforts.

On December 19, 2006 OPMP issued a proposed consistency determination. OPMP issued a corrected version on 12/20/06. On December 20, OPMP suspended the review per request from the Alaska District to allow time for you to consider the State's proposed consistency response. While the clock was stopped, we have continued to engage in informal discussions about Regional Conditions and State comments regarding the use of NWPs in Alaska. Additionally, the Alaska District met with State and Federal agencies on Monday, January 8 to discuss comments you received regarding the proposed Regional Conditions. At that meeting you

shared draft revised Regional Conditions (RC) that responded to the comments that the Alaska District received from the SPN 2006-216 dated September 26, 2006. The Alaska District also met with State and Federal agencies on March 8th and shared subsequent draft revised RCs that responded to comments at the Jan. 8th meeting and interim discussions with various agencies.

The final NWPs were noticed in the Federal Register on March 12, 2007 and are effective on March 19th. On March 19th, 2007 the Alaska District provided a final draft of the proposed Regional Conditions and requested that OPMP restart the consistency review. OPMP is thus issuing this final consistency response based on discussions during the interim, the Alaska District's informal reply to the State's December proposed consistency response, information provided at the January 8th and March 8th meetings, the CoE's final Federal Register notice for the NWPs on March 12th and the Alaska District's Final Draft of the Regional Conditions.

DESCRIPTION OF PROJECT AND SCOPE OF PROJECT SUBJECT TO REVIEW:
Nationwide permits are a type of general permit issued by the CoE that are designed to regulate certain activities that are subject to COE jurisdiction and that have minimal individual and cumulative impacts. They are issued on a nationwide basis and are intended to streamline the process for applicants and agencies and reduce procedural and time requirements. Regional Conditions may be imposed by district engineers to address regional differences and may also be added to the NWPs as a result of State water quality certifications and Coastal Zone Management Act consistency determinations. The State has worked with the Alaska District to include Regional Conditions that are necessary for the State to concur that the NWPs are consistent with the ACMP to the maximum extent practicable. The scope of the State's review included all CoE documentation and correspondence referencing the NWPs, posted Public Notices associated with the proposed NWP re-issue and proposed RCs, the January 8th and March 8th interagency meetings and agency and public comments.

CONSISTENCY STATEMENT: The format of the proposed, and now this final consistency response differs from the December proposed consistency response in that State comments are arranged in order of the proposed RCs. The State previously offered consistency comments on proposed Regional Conditions A—Bank Stabilization Projects, B—Agency Coordination, and F—Equipment Standards. We also offered comments regarding existing Regional Conditions R—Wastewater Discharge Permit and V—Sewage System Design Plan that were linked to our consistency comments regarding the consolidation of RCs. Consistency comments are specifically noted in the individual RC comments below.

In addition to consistency comments the State requested two additional RCs and offered general comments regarding Proposed Regional Conditions D—Activities involving Trenching, E—Site Restoration for Projects with Ground Disturbing Activities and I—Mining. We also requested that the Alaska District retain current Regional Condition L regarding State land/water authorizations.

This final consistency response is based on the State's continuing evaluation of the CoE's NWPs, General Conditions, definitions and proposed Regional Conditions by the State resource agencies, Alaska Department of Natural Resources (DNR), Alaska Department of Fish and Game (DF&G), Alaska Department of Environmental Conservation (DEC), and the

participating coastal resource districts. The Alaska Department of Transportation and Public Facilities participated as well.

In response to comments received from Special Notice 2006-216, the State general comments and alternative measures proposed in the State's proposed consistency response and interim meetings the Alaska District modified the proposed RCs as attached. With the modifications to the proposed RCs the Alaska District has substantially addressed the State's consistency and general comments. We now concur with the CoE's consistency determination that the NWPs as modified by the RCs are consistent with the ACMP enforceable policies to the maximum extent practicable. Specific comments follow.

Consolidation of Regional Conditions. In previous consistency reviews, and through the 401 Certification in 2002, the State found that in order to ensure that the NWPs remain consistent, all RCs, including CoE proposed, State consistency, and 401 Certification should appear in one consolidated list. In our December proposed consistency response OPMP maintained that isolating/excluding the State's proposed RCs as proposed by the Alaska District was in violation of the Coastal Zone Management Act (CZMA) and the regulations at 15 CFR 930.31(d) and specifically, section 303 of the federal CZMA which states that federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone must comply with approved coastal management programs.

The Alaska District has agreed to consolidate the State's proposed RCs for the 401 Certification and the coastal zone consistency with the Alaska District RCs. The State can now concur with the CoE's consistency determination that the NWPs and associated RCs are consistent with the ACMP to the maximum extent practicable.

2007 Proposed Regional Conditions:
Proposed Regional Condition A – Bank Stabilization Projects (Consistency Comments)
This RC applies to all proposals for a nationwide permit that involve bank stabilization.

Discussion: The Alaska District modified Proposed Regional Condition A by amending the title to read *Additional Pre-Construction Notification (PCN) Requirements*. The RC was expanded to include additional PCN requirements and clarify the use of NWP 13. Specifically the Alaska District added a PCN requirement for NWP 6 for 3-D seismic surveys employing ocean bottom cables; you clarified that NWP 13 may be used for projects that do not use bioengineered techniques described in the Streambank Revegetation and Protection Guide (Guide), but that projects not described in the Guide require a PCN. You also added a PCN requirement for any activities that propose pile driving in marine waters, anadromous lakes or anadromous streams. At the January meeting, in the context of the State's alternative measure for Regional Condition A, we discussed whether State Sanctuaries, Refuges, and Critical Habitat Areas (CHA) are considered as special aquatic sites as referenced in NWP 13. There is also a reference to "special aquatic sites and other waters of the United States..." in General Condition 27 (b)(4). The State also expressed concerns about State marine parks in our proposed consistency response. The State wants to ensure that PCNs are required for all of these important areas. It seems clear that State Refuges and Sanctuaries are addressed within the context of the federal regulations and State marine parks are now addressed in proposed Regional Condition B; however the CHAs are

not as clear. There are approximately 17 designated CHAs in the State and these areas are important aquatic areas to the State of Alaska.

40 CFR 230.3 (q-1) reads: *Special aquatic sites means those sites identified in subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See Sec. 230.10(a)(3)).* At the January meeting you stated that the Alaska District believes CHAs are addressed within this regulation. Based on OPMP's reading of the federal regulation and the Alaska District's assurance, OPMP agrees with the interpretation that the CHAs are addressed as special aquatic areas in the Federal regulations. Therefore we will not request a separate RC to address CHAs.

Although the Alaska District did not adopt the State's Alternative Measure for Regional Condition A, your proposed modifications address the State's consistency comments. The State therefore concurs that Regional Condition A is consistent with the ACMP to the maximum extent practicable.

Proposed Regional Condition B – Agency Coordination (Consistency Comments)
This RC establishes geographic and habitat areas that will require agency coordination for projects that are less than ½ acre.

The Alaska District modified Proposed Regional Condition B by amending the title to read *General Permit Agency Coordination*; changed the GC 26 reference to GC 27, added wetlands in the Homer Wetland Functional Assessment, added anadromous lakes and marine waters to the list of geographic/habitat areas; established a 500 foot measurement for CoE jurisdictional areas for anadromous lakes or anadromous streams and accommodated the State's request to clarify the respective notices to the DNR, Office of Habitat Management and Permitting and DF&G.

Although the Alaska District did not adopt the State's Alternative Measure for Regional Condition B, your proposed modifications address the State's consistency comments. We therefore concur that Regional Condition B is consistent with the ACMP to the maximum extent practicable.

Proposed Regional Condition C – Wood Preservatives
Due to comments received since the September, 2006 SPN this proposed RC was significantly modified. OPMP did not comment on proposed Regional Condition C in our December, 2006 proposed consistency response as State agencies agreed with the proposed language. The RC now addresses new materials and previously used materials and contains specific requirements regarding the use of each type of material, method of application of the preservative and limitations to specific types of water, e.g. fresh waters and marine waters. It also references EPA requirements and best management practices published by the Western Wood Preservers Institute and other groups. The State concurs with this proposed RC and DEC will further address it in the 401 Certification.

Proposed Regional Condition D – Activities Involving Trenching
The State expressed concerns that permittees could use economic conditions as a reason that they were incapable of meeting the one year time limit to backfill the trench and achieve the original surface condition. We also requested clarification on the procedures for the proposed RC. After discussion at the January meeting you clarified that the Alaska District would develop a checklist for staff to complete for NWP verifications and would link proposed Regional Condition D with the revegetation process provided in proposed Regional Condition E. These modifications address the State's concerns.

Proposed Regional Condition E– Site Restoration for Projects with Ground Disturbing Activities
Proposed Regional Condition E is designed to supplement and enhance GC 12. In the State's proposed consistency response we requested that the Alaska District add language to clarify that disturbed areas must be revegetated in the same growing season as the disturbance. We recognize that site conditions may preclude immediate revegetation; our concern was that permittees could use economic conditions as a reason not to stabilize and/or revegetate immediately. The Alaska District modified the RC to address the timing of revegetation, added a reference to climatic conditions, added language that extra time for revegetation must be approved by the Alaska District and added a reference to erosion control. These modifications address the State's concerns.

Proposed Regional Condition F – Equipment Standards (Consistency Comments)
Regional Condition F augments proposed General Condition (GC) 11, Equipment. The Alaska District added mudflats to the areas that are subject to additional measures in proposed GC 11 and strengthened the "*minimize*" requirement in the GC to "*prevent*" in proposed Regional Condition F. In our proposed consistency response the State asserted that riparian management areas should be added to the list of the special aquatic areas in Regional Condition F in order to comply with the Habitat Standard at 11 AAC 112. At the January interagency meeting we discussed the CoE's jurisdictional limitations and rationale associated with proposed Regional Condition F.

In light of this discussion and the Alaska District's modifications to Regional Condition B (expanded agency coordination in marine waters and 500 feet of jurisdictional anadromous lakes and streams), the State concurs that proposed Regional Condition F is consistent with the ACMP to the maximum extent practicable.

Proposed Regional Condition G—Seasonal Docks Authorized by NWP 11, Temporary Recreational Structures.
NWP 11 enjoys very limited use in Alaska and the State did not previously comment on the proposed RC. During discussions at the January meeting OPMP requested that the Alaska District consider developing a Regional General Permit for docks, particularly in Big Lake and Campbell Lake. You agreed to check with appropriate staff.

Proposed Regional Condition H—NWP 40, Agricultural Activities
OPMP did not previously comment on this proposed RC. However, we agree with the Alaska District's modification to limit the use of NWP 40 within 500 feet of anadromous lakes or anadromous streams.

Proposed Regional Condition I – Mining
In our proposed consistency response, the State requested that the Alaska District comport proposed Regional Condition I with current Regional Condition U which limits the application of NWP 44, Mining Activities, to hard rock mining *exploration* activities. We also requested that stormwater management and sediment and erosion controls be retained in proposed Regional Condition I. Through informal discussions and at the January meeting the State questioned why trenching and drilling were deleted from proposed Regional Condition I.

The Alaska District clarified that under GC 24, multiple NWPs may be used together, therefore NWP 43, Stormwater Management may be used with NWP 44 to address storm water issues. In response to a question at the meeting you clarified that NWP 44 could only be used once per project and would not be available for subsequent phases of a project. Additionally you clarified that NWP 6, Survey Activities, may be used for exploratory trenching and drilling.

According to the Alaska District's datasheet distributed at the meeting, NWP 44 has only been used three times in the last five years. With the information regarding the number of times the NWP has been used, your clarifications at the meeting regarding combining NWP 43 and 44 and that NWP 44 may only be used once per project, the State's comments have been addressed.

Proposed Regional Condition J—NWP 48, Existing Commercial Shellfish Aquaculture Activities
The State's December proposed consistency response alerted the Alaska District that we would most likely propose a RC to revoke the proposed NWP for Existing Commercial Shellfish Aquaculture Activities in the State. Proposed Regional Condition J addresses our comments. The State concurs that NWP 48 should be revoked in Alaska. Applicants are encouraged to apply for the current Regional General Permit for Mariculture Activities in Alaska.

State Proposed Additional Regional Condition
The State of Alaska requested an additional RC regarding the use of NWP 4 for fish monitoring weirs to simplify the permit process for a routine agency management project and clarify that these types of projects are within the parameters of NWP 4. At the January meeting you responded that fish monitoring weirs are not specifically excluded in NWP 4 and that the Alaska District would provide staff instruction to the effect that these types of projects would be allowed under NWP 4. The State concurs with this approach.

Advisory Information
The Alaska District currently posts a bulletin called *Advisory Information for All Nationwide Permit Activities (Advisory)* with the NWPs on your website. This *Advisory* is a valuable tool from the State and local perspective as it alerts applicants and permittees about necessary State and local permitting requirements in addition to the CoE's. The Alaska District has agreed to retain the *Advisory* for the 2007 NWPs and other permits.

2002 Regional Conditions not proposed for 2007.
The State previously commented on the following 2002 Regional Conditions.

Regional Condition R
The Alaska District has agreed to retain the *Advisory* that alerts permittees of the need to obtain appropriate state, local and authorizations. The State concurs with this approach.

Regional Condition V
The Alaska District has agreed to retain the *Advisory* that alerts permittees of the need to obtain appropriate state, local and authorizations. The State concurs with this approach.

Regional Condition L
The CoE has agreed to retain the *Advisory* that alerts permittees of the need to obtain appropriate state, local and authorizations. The State concurs with this approach.

Regional Condition Modification after Final Consistency Determination. The State has found the Alaska District's final proposed Regional Conditions consistent with the ACMP as provided by the Alaska District and attached to this Revised Proposed Consistency Response. We understand that the proposed Regional Conditions must ultimately be approved by the Pacific Ocean Division Office. If there are subsequent modifications to the proposed RCs that will cause substantially different affects on any coastal use or resource than originally described the Alaska District shall further coordinate with OPMP and prepare a supplemental consistency determination, per CFR 930.46.

ADVISORIES:
This consistency response may include reference to specific laws and regulations, but this in no way precludes an applicant's responsibility to comply with all other applicable State and federal laws and regulations.

Again we thank you for your extraordinary efforts to provide additional information for this review. Please contact Erin Allee at 465-8790 or me if you have questions.

FINAL CONSISTENCY RESPONSE PREPARED BY:
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Joe Donohue
Joe Donohue

Attachments: Final Proposed Regional Conditions

REGIONAL CONDITION A - Additional Pre-Construction Notification (PCN) Requirements[1]

1. NWP 6, Survey Activities: 3-D seismic surveys employing ocean bottom cables.

2. NWP 13, Bank Stabilization: Projects require a PCN when specified by NWP 13 and/or the proposed methods and techniques are not included in Streambank Revegetation and Protection: A Guide for Alaska Revised 2005 (Walter, Hughes and Moore, April 2005) (Guide) or its future revisions.

The Guide is available at http://www.sf.adfg.state.ak.us/sarr/restoration/techniques/techniques.cfm

Furthermore, applicants proposing projects not contained in the Guide may still qualify for NWP 13 but they shall provide an alternative analysis to the district engineer with the PCN consisting of the bioengineered methods that were considered and rationale as to why these alternatives are not in the applicant's preferred alternative. Applicants subject to the PCN due to a design that is not included in the Guide are encouraged to include measures that minimize impacts to the aquatic environment including methods that improve fish habitat such as vegetated riprap.

3. Any activity proposing pile driving in marine waters, anadromous lakes or anadromous streams.

[1] Where required by the terms of the NWP or Regional Condition A, a prospective permittee must notify the district engineer by submitting a preconstruction notification (PCN) as early as possible. See General Condition 27 of the NWPs for the contents of the PCN or visit www.poa.usace.army.mil/reg/NWPs.

REGIONAL CONDITION B – General Permit Agency Coordination

This Regional Condition establishes geographic and habitat areas that will require agency coordination for projects that are less than 1/2 acre.[1]

For projects requiring a Pre-Construction Notification (PCN) and occurring within any of the following geographic/habitat areas, the Corps will conduct agency coordination with the appropriate agencies according to General Condition No.27, regardless of the amount of loss of waters of the U.S.

1) The Municipality of Anchorage.
2) Areas designated as "A" or "B" wetlands in the Juneau Wetlands Management Plan.
3) Areas designated as "High " or "Moderate" value wetlands in the Homer Wetland Functional Assessment.
4) Anadromous lakes or anadromous streams including, but not limited to catalogued streams identified in the *Catalog of Waters Important for the Spawning, Rearing, or Migration of Anadromous Fishes* (available at http://www.sf.adfg.state.ak.us/SARR/FishDistrib/anadcat.cfm)
5) Jurisdictional areas within 500 feet (measured from OHW or HTL) of anadromous lakes or anadromous streams as identified above.
6) Marine waters.

Local, State or Federal applicants may choose to conduct agency coordination in accordance with this regional condition for projects in the above geographic areas having less than 1/2 acre loss of waters of the U.S. The documentation of agency coordination shall be supplied with the PCN and if the Corps determines the applicant's proposal adequately addresses agency concerns, the project will not be coordinated again.

The Corps (or local, State or Federal applicant, as described above) will coordinate such projects with the Environmental Protection Agency, U.S. Fish and Wildlife Service, National Marine Fisheries Service and State Historical Preservation Officer or Tribal Historical Preservation Officer. Additionally, project coordination will occur with the State of Alaska's Department of Natural Resources, Office of Project Management and Permitting for projects that are within the coastal zone or when outside the coastal zone, coordination will occur with the Department of Environmental Conservation, the State of Alaska's

Department of Natural Resources, Office of Habitat Management and Permitting, and the Department of Fish and Game for activities within State Refuges, Critical Habitat Areas and Sanctuaries.

[1] For activities requiring a PCN that result in the loss of greater than 1/2-acre of waters of the U.S., agency coordination will occur according to general condition 27(d) but also include the agencies as specified above.

REGIONAL CONDITION C - Wood Preservatives

This Regional Condition applies to all NWPs when the regulated activity involves the use of wood preservative products in waters of the U.S.[1]

1. For new materials[2]:

a) Preservatives for wooden structures shall be applied by pressure treatment.

b) In fresh waters, wood structures treated with creosote or pentachlorophenol preservative shall not be used.

c) In marine waters wood structures treated with pentachlorophenol preservative shall not be used.

2. For the reuse of previously treated wood products in marine waters the wood preservative product's use shall be consistent with its original use and may not be treated with any additional wood preservative. (e.g. the reuse for dock piling of creosote treated wood for dock piling is allowable, the reuse for a retaining wall of creosote treated railroad ties is not allowed, etc.).

[1] Wood preservative products allowed for use in the aquatic/marine environments is determined by the Environmental Protection Agency.

[2]Treated wood products are produced and installed in accordance with the "Best Management Practices for the Use of Treated Wood in Aquatic and Other Sensitive Environments" (August 2006), including amendments published by the Western Wood Preservers Institute (WWPI) (www.wwpinstitute.org) including the standards set forth by the American Wood-Preservers Association (AWPA) (www.awpa.com), the Timber Piling Council (TPC) (www.timberpilingcouncil.org) and/or the American Lumber Standards Committee as appropriate.

REGIONAL CONDITION D - Activities Involving Trenching

Trenches cannot be constructed or backfilled in such a manner as to drain waters of the U.S. (e.g., backfilling with extensive gravel layers, creating a french drain effect). Ditch plugs or other methods shall be used to prevent this situation.

Except for material placed as minor trench over-fill or surcharge necessary to offset subsidence or compaction, all excess materials shall be removed to a non-wetland location. The backfilled trench shall achieve the original surface condition, within a year of disturbance unless climatic conditions warrant additional time and is approved by the Corps.

Revegetation of the trench should follow the process outlined in RC E.

REGIONAL CONDITION E - Site Restoration for Projects with Ground Disturbing Activities

Disturbed areas shall be stabilized immediately after construction to prevent erosion. Revegetation of the site shall begin as soon as site conditions allow and in the same growing season as the disturbance unless climatic conditions warrant additional time and is approved by the Corps. Native vegetation and soils removed for project construction shall be stockpiled separately and used for site rehabilitation. If soil

and/or organic materials are not available from the project site for rehabilitation, other locally-obtained native materials may be used. Other topsoil or organic materials (including seed) may be used only if identified in the PCN and approved in the NWP verification. Species to be used for seeding and planting shall follow this order of preference: 1) species native to the site; 2) species native to the area; 3) species native to the state. Revegetated areas eventually shall have enough cover to sufficiently control erosion without silt fences, hay bales, or other mechanical means.

REGIONAL CONDITION F - Equipment Standards

Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures (e.g. ice roads, compacted snow, low psi ground bearing weight, etc) must be taken to prevent soil disturbance.

REGIONAL CONDITIONS G - J APPLY TO SPECIFIC NWPs.

REGIONAL CONDITION G- Seasonal Docks Authorized by NWP 11, Temporary Recreational Structures

Small, seasonal docks shall not extend more than 50 feet waterward of the ordinary high water mark or mean high water mark, or exceed more than 25 percent of the width of the waterbody, whichever is less.

REGIONAL CONDITION H – NWP 40 Agricultural Activities

The following activities are not authorized by NWP 40: a. Drain tiles, ditches, or levees or; b. Mechanized land clearing and land leveling in wetlands within 500' of anadromous lakes or anadromous streams.

REGIONAL CONDITION I – NWP 44 Mining Activities

Placer mining activities are excluded from coverage by NWP 44 (Mining Activities). Placer mining may be authorized by Regional General Permit 2006-1944. In Alaska, NWP 44 will only authorize the following activities:

1. Hard rock mining, not including trenching, drilling, or access road construction. Applicable to Section 404 only.

2. Temporary stockpiling of sand and gravel in waters of the U.S., limited to seasonally dewatered unvegetated sand/gravel bars. Stockpiles shall be completely removed and the area restored to pre-project contours within one year, in advance of seasonal ordinary high water events, and/or prior to equipment being removed from site, whichever comes first.

REGIONAL CONDITION J – NWP 48 Existing Commercial Shellfish Aquaculture Activities

NWP 48 is revoked in Alaska. Applicants seeking authorization for this work are encouraged to apply for Regional General Permit 1991-7-P, Mariculture Activities in Alaska.