

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8017 HOUSE RESOURCES

282

## THE INTERAGENCY WORKING GROUP ON FEDERAL WETLANDS POLICY

The Administration convened the Interagency Working Group on Federal Wetlands Policy in early June with the goal of developing a package of Clinton Administration initiatives to end the wetlands wars, break the deadlock over Federal wetlands policy and develop a set of workable improvements to the program. The group has been chaired by the White House Office on Environmental Policy and has included the participation of the Environmental Protection Agency (EPA), the Army Corps of Engineers (Corps), the Office of Management and Budget, and the Departments of Agriculture (USDA), Commerce, Energy, Interior, Justice, and Transportation.

The working group sought the views of a broad range of stakeholders representing all perspectives in the wetlands debate. For example, the group has received presentations that have included: a bipartisan group of eight members of the U.S. Congress; representatives of State and local government; environmentalists; the development community; agricultural interests; scientists; and others.

After listening to this broad range of interests, the working group established five principles that serve as the framework for the Administration's comprehensive package of wetlands reform initiatives.

### FIVE PRINCIPLES FOR FEDERAL WETLANDS POLICY

- 1) The Clinton Administration supports the interim goal of no overall net loss of the Nation's remaining wetlands, and the long-term goal of increasing the quality and quantity of the Nation's wetlands resource base;
- 2) Regulatory programs must be efficient, fair, flexible, and predictable, and must be administered in a manner that avoids unnecessary impacts upon private property and the regulated public, and minimizes those effects that cannot be avoided, while providing effective protection for wetlands. Duplication among regulatory agencies must be avoided and the public must have a clear understanding of regulatory requirements and various agency roles;
- 3) Non-regulatory programs, such as advance planning, wetlands restoration, inventory, and research; and public/private cooperative efforts must be encouraged to reduce the Federal government's reliance upon regulatory programs as the primary means to protect wetlands resources and to accomplish long-term wetlands gains;
- 4) The Federal government should expand partnerships with State, Tribal, and local governments, the private sector and individual citizens and approach wetlands protection and restoration in an ecosystem/watershed context; and
- 5) Federal wetlands policy should be based upon the best scientific information available.

## A COMPREHENSIVE PACKAGE OF REFORMS

Building upon these principles, the working group has developed a comprehensive package of initiatives that will significantly reform Federal wetlands policy, while maintaining protection of this vital natural resource. This package includes regulatory reforms and innovative, non-regulatory policy approaches; it includes administrative actions that will take effect immediately, and legislative recommendations for Congress to consider during the reauthorization of the Clean Water Act. The Clinton Administration looks forward to working closely with the Congress to implement this new approach to Federal wetlands policy.

The reform package includes the following initiatives:

- To affirm its commitment to conserving wetlands resources, the Administration will issue an Executive Order embracing the interim goal of no overall net loss of the Nation's remaining wetlands resource base, and a long-term goal of increasing the quality and quantity of the Nation's wetlands;
- To increase fairness in the wetlands permitting process, the Corps will establish an administrative appeals process so that landowners can seek speedy recourse if permits are denied without having to go to court;
- To make sure that decisions are made without delay, the Corps will establish deadlines for wetlands permitting decisions under the Clean Water Act;
- To reduce uncertainty for American farmers, yesterday the Corps and EPA issued a final regulation ensuring that approximately 53 million acres of prior converted cropland — areas which no longer exhibit wetlands characteristics — will not be subject to wetlands regulations;
- To reduce duplication and inconsistency for American farmers, the Soil Conservation Service will be the lead Federal agency responsible for identifying wetlands on agricultural lands under both the Clean Water Act and the Food Security Act;
- To close a loophole that has led to the degradation and destruction of wetlands, yesterday the Corps and EPA issued a final regulation to clarify the scope of activities regulated under the Clean Water Act;
- To emphasize that all wetlands are not of equal value, yesterday EPA and the Corps issued guidance to field staff highlighting the flexibility that exists to apply less vigorous permit review to small projects with minor environmental impacts;
- To ensure consistency and fairness, the Army Corps of Engineers, the Environmental Protection Agency, the Soil Conservation Service, and the Fish and Wildlife Service will all use the same procedures to identify wetland areas;

- To increase the predictability and environmental effectiveness of the Clean Water Act regulatory program and to help attain the no overall net loss goal, the Administration endorses the use of mitigation banks;
- To reduce the conflict that can result between wetlands protection and development when decisions are made on a permit-by-permit basis, the Administration strongly supports incentives for States and localities to engage in watershed planning;
- To provide effective incentives for farmers to restore wetlands on their property, the Administration will continue to support increased funding for the USDA's Wetland Reserve Program; and
- To help attain the long-term goal of increasing the quantity and quality of the Nation's wetlands, the Administration will promote the restoration of damaged wetland areas through voluntary, non-regulatory programs.

## CONCLUSION

This package breaks the gridlock that has paralyzed wetland policy in the past and represents a major advance in reforming and improving the wetlands program nationwide. It reflects the President's broader commitment to "reinventing" government to make it more responsive, more effective and more efficient.

The critics of the wetlands regulatory program have performed a service to the country by highlighting the need for meaningful reform in the administration of wetland regulatory programs. Many of the much needed reforms contained in this package — such as permit deadlines, an appeals process, mitigation banking, and increasing the role of state and local government in wetlands regulation — have been proposed by those seeking improvements in the operation of the current regulatory program.

The supporters of wetlands protection have also performed a service by helping to inform the Nation of the environmental and economic importance of wetlands, a valuable natural resource that was once routinely destroyed. Their strong commitment to protecting and restoring this vital resource is also reflected in this package. For example, a loophole has been closed in Federal regulations that allowed the degradation and destruction of wetlands; the "Alaska 1% rule," which would have greatly relaxed wetlands protection in Alaska, will be withdrawn; and the Administration will draft an Executive Order affirming its commitment to the preservation and restoration of wetland areas.

By adopting an approach based upon the effective protection of an important natural resource in a manner that is fair and flexible, the Clinton Administration proposes a wetlands policy that recognizes both the value of wetland resources and the need to minimize regulatory burdens.

## WETLANDS REGULATORY FLEXIBILITY IN ALASKA

## ISSUE:

Concern has been expressed in Alaska that the Section 404 regulatory program is not responsive to the unique circumstances in the State. The "Alaska 1%" rule was proposed in November 1992 in part to address this concern. A review of the public comments on this proposal indicated that the proposal would not effectively address the perceived problems and, in fact, could cause serious impacts to critically valuable wetlands in Alaska and would contribute to significant problems in administration of the program. On August 24, 1993 President Clinton issued a comprehensive package of improvements to the wetlands program that included withdrawing the proposed "Alaska 1%" rule and initiating a process involving concerned stakeholders in Alaska to consider environmentally appropriate means of increasing regulatory flexibility in Alaska.

## GOAL:

Provide a process, involving the primary stakeholders in Alaska, for identifying and addressing Alaska's legitimate concerns with Federal regulation of wetlands in Alaska. Explicitly, the goal is to provide appropriate protection for Alaska's wetlands while eliminating unnecessary expense and administrative burden for those needing wetland permits.

## PROCESS OUTLINE:

- Identify stakeholders and allow them to identify representatives to participate in the consultive process.
- Process will involve meetings in Bethel, Fairbanks, Juneau and Anchorage carried out in two sessions. The two sessions will be about 60 days apart. All meetings will be open to the public and the press. While oral comments will be accepted only from representatives of the Stakeholder's Panel (See Attachment 1), the public will be invited to submit written comments. The headquarters components of the Corps and EPA will also be continuously apprised of the progress of the meetings.
- The first session will involve two meetings in two different formats on consecutive days at each of the specified locations. The meeting on the first day will involve presentations of not more than 20 minutes each by invited stakeholder representatives. Presentations will be made to the Stakeholder's Panel. This Panel will be co-chaired by the Corps of Engineers and the

Environmental Protection Agency. A representative of the White House Interagency Working Group on Wetlands will also attend all of the meetings. The purpose of presentations will be to document legitimate problems with the way the Section 404 program operates in Alaska and propose workable solutions to those problems. Presentations would also focus on aspects of the program that are working in a satisfactory manner that representatives would not like to see changed. The Panel co-chairs will ensure that points that are presented are clearly understood to facilitate discussion the following day. Panel members will reserve questions and discussion for the following day.

The meeting on the second day will involve the same invited representatives but will be conducted as a facilitated roundtable discussion. The purpose of this meeting is to allow more in-depth analysis of conflicting points of view which are expected to be identified in the meeting of the previous day. Out of this meeting, in addition to a better understanding of divergent points of view, may come areas of consensus on problems with the program that need to be dealt with, solutions to those problems, appropriate ways to measure program success, and perhaps also, parts of the program that are working well and should not be tampered with.

At the conclusion of the first session, all of the gathered information will be compiled and distributed by the Corps and EPA. The Corps and EPA, with the assistance of other Federal representatives, will then meet to evaluate the information and organized it into separate issue papers. Each issue paper will identify a problem raised, discuss options for resolving it, and present any preliminary recommendations that can be made. Both administrative and legislative options for addressing problems may be included. The draft issue papers will be distributed to the stakeholders (and available to the public) and will serve as the focus of the second round of meetings.

The second session will involve the same Stakeholders Panel (these meetings will again be open to the public) and will be held in the same four locations. The format for this round of meetings will be a one day facilitated roundtable. The purpose of this round of meetings would be to share and explain tentative findings of the Corps and EPA as articulated in the draft issue papers, and to get the benefit of the Stakeholder's opinion on how well their views on identified problems have been characterized and how

responsive the proposed solutions are to identified legitimate problems. Based on these discussions, the Corps and EPA will make appropriate further refinements to the issue papers and develop an action plan to submit to their headquarters components.

- The draft issue papers and action plan will be reviewed by the Corps and EPA headquarters components. The Corps and EPA will finalize the issue papers and action plan in coordination with the White House Interagency Working Group on Wetlands.
- The Corps and EPA will distribute their findings and implement the final action plan.

Attachment 1 (Stakeholder's Panel)  
Attachment 2 (Schedule)

ALASKA CLEAN WATER ACT SECTION 404  
PROGRAM EVALUATION WORKSHOPS  
SCHEDULES

Juneau

Meeting Dates: October 25 & 26, 1993

Meeting place: Gastineau Salmon Hatchery  
Visitor Center  
2697 Channel Drive  
Juneau, Alaska 99801  
Phone: (907)463-5114

Meeting times: October 25, 1993

9:00 - 9:30 am Welcome and process  
description

9:30 - 9:50 Presenter #1  
9:50 - 10:10 Presenter #2

10:10 - 10:30 Coffee break

10:30 - 10:50 Presenter #3  
10:50 - 11:10 Presenter #4  
11:10 - 11:30 Presenter #5  
11:30 - 11:50 Presenter #6

11:50 - 1:10 Lunch

1:10 - 1:30 Presenter #7  
1:30 - 1:50 Presenter #8  
1:50 - 2:10 Presenter #9  
2:10 - 2:30 Presenter #10

2:30 - 2:50 Coffee Break

2:50 - 3:10 Presenter #11  
3:10 - 3:30 Presenter #12  
3:30 - 3:50 Presenter #13

3:50 - 4:30 Closing comments and/or  
questions

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COMMISSIONER'S OFFICE

Juneau (Continued)

## October 26, 1993 Facilitated Roundtable Discussions

8:30 - 8:45 Opening an process description  
8:45 - 10:00 Facilitated Discussions  
10:00 - 10:20 Coffee Break  
10:20 - 11:50 Facilitated Discussions  
11:50 - 1:15 Lunch  
1:15 - 2:00 Facilitated Discussions  
3:00 - 3:20 Coffee Break  
3:20 - 5:00 Facilitated Discussions

ALASKA CLEAN WATER ACT SECTION 404  
PROGRAM EVALUATION WORKSHOPS  
SCHEDULES

Bethel

Meeting Dates: October 28 & 29, 1993

Meeting Place: Pacific Guest Hotel  
Box 1298  
Bethel, Alaska 99559  
Phone: (907)543-4305

Meeting Times:

9:30 -	9:50	Presenter #1
9:50 -	10:10	Presenter #2
10:10 -	10:30	Coffee break
10:30 -	10:50	Presenter #3
10:50 -	11:10	Presenter #4
11:10 -	11:30	Presenter #5
11:30 -	11:50	Presenter #6
11:50 -	1:10	Lunch
1:10 -	1:30	Presenter #7
1:30 -	1:50	Presenter #8
1:50 -	2:10	Presenter #9
2:10 -	2:30	Presenter #10
2:30 -	2:50	Coffee Break
2:50 -	3:10	Presenter #11
3:10 -	3:30	Presenter #12
3:30 -	3:50	Presenter #13
3:50 -	4:30	Closing comments and/or questions

ALASKA CLEAN WATER ACT SECTION 404  
PROGRAM EVALUATION WORKSHOPS  
SCHEDULES

Bethel (Continued)

October 29, 1993 Facilitated Roundtable Discussions

8:30 - 8:45 Opening an process description

8:45 - 10:00 Facilitated Discussions

10:00 - 10:20 Coffee Break

10:20 - 11:50 Facilitated Discussions

11:50 - 1:15 Lunch

1:15 - 3:00 Facilitated Discussions

3:00 - 3:20 Coffee Break

3:20 - 5:00 Facilitated Discussions

ALASKA CLEAN WATER ACT SECTION 404  
PROGRAM EVALUATION WORKSHOPS  
SCHEDULES

Fairbanks

Meeting Dates: November 2 & 3, 1993

Meeting Place: Captain Bartlett Hotel  
1411 Airport Way  
Fairbanks, Alaska 99701  
Phone: (907) 452-1888

Meeting Times:

9:00 - 9:30 am	Welcome and process description
9:30 - 9:50	Presenter #1
9:50 - 10:10	Presenter #2
10:10 - 10:30	Coffee break
10:30 - 10:50	Presenter #3
10:50 - 11:10	Presenter #4
11:10 - 11:30	Presenter #5
11:30 - 11:50	Presenter #6
11:50 - 1:10	Lunch
1:10 - 1:30	Presenter #7
1:30 - 1:50	Presenter #8
1:50 - 2:10	Presenter #9
2:10 - 2:30	Presenter #10
2:30 - 2:50	Coffee Break
2:50 - 3:10	Presenter #11
3:10 - 3:30	Presenter #12
3:30 - 3:50	Presenter #13
3:50 - 4:30	Closing comments and/or questions

ALASKA CLEAN WATER ACT SECTION 404  
PROGRAM EVALUATION WORKSHOPS  
SCHEDULES

Fairbanks (Continued)

November 3, 1993 Facilitated Roundtable Discussions

8:30 - 8:45 Opening an process description

8:45 - 10:00 Facilitated Discussions

10:00 - 10:20 Coffee Break

10:20 - 11:50 Facilitated Discussions

11:50 - 1:15 Lunch

1:15 - 3:00 Facilitated Discussions

3:00 - 3:20 Coffee Break

3:20 - 5:00 Facilitated Discussions

ALASKA CLEAN WATER ACT SECTION 404  
PROGRAM EVALUATION WORKSHOPS  
SCHEDULES

Anchorage

Meeting Dates: November 4 & 5, 1993

Meeting Place:	November 4	November 5
	Loussac Library	Egan Center
	3600 Denali	555 W. 5th
	Anchorage, AK	Anchorage, AK
	Phone:261-2916	Phone:263-2800

Meeting Times:

9:00 - 9:30 am Welcome and process  
description

9:30 - 9:50 Presenter #1  
9:50 - 10:10 Presenter #2

10:10 - 10:30 Coffee break

10:30 - 10:50 Presenter #3  
10:50 - 11:10 Presenter #4  
11:10 - 11:30 Presenter #5  
11:30 - 11:50 Presenter #6

11:50 - 1:10 Lunch

1:10 - 1:30 Presenter #7  
1:30 - 1:50 Presenter #8  
1:50 - 2:10 Presenter #9  
2:10 - 2:30 Presenter #10

2:30 - 2:50 Coffee Break

2:50 - 3:10 Presenter #11  
3:10 - 3:30 Presenter #12  
3:30 - 3:50 Presenter #13

3:50 - 4:30 Closing comments and/or  
questions

ALASKA CLEAN WATER ACT SECTION 404  
PROGRAM EVALUATION WORKSHOPS  
SCHEDULES

Anchorage (Continued)

November 5, 1993 Facilitated Roundtable Discussions

8:30 - 8:45 Opening an process description

8:45 - 10:00 Facilitated Discussions

10:00 - 10:20 Coffee Break

10:20 - 11:50 Facilitated Discussions

11:50 - 1:15 Lunch

1:15 - 3:00 Facilitated Discussions

3:00 - 3:20 Coffee Break

3:20 - 5:00 Facilitated Discussions

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

Attachment C

## DEPT. OF ENVIRONMENTAL CONSERVATION

OFFICE OF THE COMMISSIONER  
410 WILLOUGHBY AVENUE, SUITE 105  
JUNEAU, AK 99801-1795

Phone: (907) 465-5050  
Fax: (907) 465-5070

October 18, 1993

Alvin L. Ewing  
Asst. Regional Administrator  
U.S. EPA, Region 10  
22 West 7th Avenue, Room 537  
Anchorage, AK 99513  
FAX: 271-3424

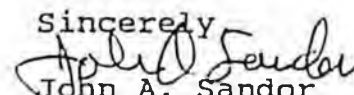
Robert K. Oja  
Chief, Regulatory Branch, COE  
Alaska District  
P.O. Box 898  
Anchorage, AK 99506-0898  
FAX: 753-5567

Gentlemen:

I appreciated talking with you today about the State of Alaska's strong objections to the October 12, 1993 announcement of the very restrictive public meetings planned for Oct. 25 - Nov. 5, 1993 on the Clinton Administration's intention to withdraw the "Alaska 1% (wetlands) rule" in the administration of Sec. 404 of the Clean Water Act in Alaska. Our primary objections are:

1. The inadequacy of public notice for the meetings.
2. The confinement of meetings to four Alaska communities with no teleconference linkage with other locations in the state.
3. The exclusion of many primary Alaska stakeholders from active participation in the "public meetings". Those excluded: Alaska State Legislature, Alaska Congressional Delegation, Alaska Native Regional and Village Corporations, Agriculture, small and rural communities, hard-rock and placer miners, home-owners and realtors, school districts, small businesses, subsistence users and many other stakeholders.
4. The prohibition of publicly expressed views at the "hearings" from anyone except the twelve designated stakeholders.
5. Consideration of only those written comments received by the Nov. 10, 1993 deadline. This restricts the solicitation of views to a period of twenty working days from the Oct. 12, 1993 announcement; two working days from the Nov. 5 meeting date.

These and other provisions are unacceptable, for they deny the vast majority of Alaskans any real opportunity to participate. State designees will attend the meetings, but we request you and the White House Wetlands Policy Group correct these deficiencies.

Sincerely  
  
John A. Sandor  
Commissioner

cc: Stakeholders with copy of Oct. 12 announcement



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 file  
 10/27/1993



U.S. ENVIRONMENTAL PROTECTION AGENCY  
 REGION 10

Alaska Operations Office      October 22, 1993  
 Room 537, Federal Building  
 222 W. 7th Avenue, #19  
 Anchorage, Alaska 99513-7588

DEPARTMENT OF THE ARMY  
 U.S. ARMY ENGINEER DISTRICT,  
 Alaska  
 P. O. Box 898  
 Anchorage, Alaska 99506-0898

John A. Sandor  
 Commissioner  
 Department of Environmental Conservation  
 Office of the Commissioner  
 410 Willoughby Ave, Suite 105  
 Juneau, AK 99801-1795

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 OCT 22 1993  
 ADEC  
 COMMISSIONER'S OFFICE

Dear Commissioner Sandor:

Thank you for your letter of concern regarding the upcoming federal Clean Water Act Section 404 program meetings to begin in Juneau on October 25th. We appreciate your concerns and would like to provide the following specific responses.

As we discussed, EPA and the Corps of Engineers, after consulting with various interest groups, as well as the State, developed a process to consider environmentally appropriate means to enhance regulatory flexibility in the Section 404 program in Alaska. We believe that this process provides the most effective opportunity to address the broad issues regarding this program that have been identified in a number of public forums in Alaska over the past several years. The message that we heard from the public is that they have spoken and now they want to see some action. That message was confirmed in the meetings EPA and the Corps held with interest groups here in Alaska in September of this year. We believe this process will allow refinement of our understanding of problems with the program and design of specific problem solutions.

We recognize the strong public interest in this process, and have done our best to provide adequate notice, while proceeding expeditiously in response to the Administration's plan. As you may be aware, we have placed public notices in the newspapers in the locations of the meetings. We have also mailed the notice to over 500 interested parties on the Corps mailing list. All meetings are open for public observation and to the press. Additionally we are encouraging written public comment that will assist us in our stated objective.

However, in response to your concern regarding the shortness of time allowed for written public comment, we will provide for a second round of public comment beginning about mid-December and running through most of January. The focus of the second round

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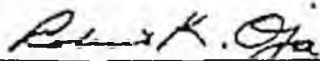
of public comments will be the draft issue papers resulting from the first round of meetings and public comment. In addition, to ensure that interested individuals have access to all discussions that occur, audio or written transcripts of each of the meetings will be prepared and available within two weeks of the last meeting.

We appreciate your thoughts on use of teleconferencing to allow broader public access to the meetings. Although we cannot make necessary arrangements for the first round of meetings, we are interested in talking with you about assistance the State might be able to provide to facilitate teleconferencing for the second round of meetings in January.


Considerable thought was given to selection of stakeholders with the objective of identifying those key groups who represent the major wetland interests in Alaska. Our goal of ensuring effective representation of Alaska interests was complicated by the competing need to keep the Panel small enough to achieve the focused discussion that will be necessary to refine the understanding of problems and to design workable solutions. We believe that we have not only achieved a reasonable balance of interest groups, but also as thorough a coverage of Alaska interests as was feasible. In fact most of the groups that you identified as being excluded, we believe are directly or indirectly represented. Miners, for example, will be represented as a part of development interests. The Alaska Miners Association will have a representative sitting on the Panel at one of the meeting locations. We are relying upon the Alaska Federation of Natives to insure that the broad range of Native interests are represented and we are confident that will be accomplished. The provision for written comments is intended to ensure that anyone who does not feel that they are otherwise represented will have an opportunity to express their views and to submit pertinent information.

Thank you for your interest in this process. We look forward to working with the State of Alaska to improve the Section 404 Program.

Sincerely,



Robert K. Oja  
Chief, Regulatory Branch  
Army Corps of Engineers  
Alaska District



Alvin L. Ewing  
Assistant Regional Administrator  
Environmental Protection Agency  
Alaska Operations Office

cc  
Stakeholders

WALTER J. HICKEL  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

Attachment D

P. O. Box 110001  
Juneau, Alaska 99811-0001  
(907) 465-3500

October 19, 1993

The President  
The White House  
Washington, DC 20500

Dear Mr. President:

*I strongly support your efforts to involve Alaskans in defining concerns and developing solutions for administration of the 404 permitting process in Alaska. The "Alaska Initiative" recommendation in the White House Wetlands Task Force Report was both appropriate and appreciated. However, the hearing process being proposed by the White House wetlands policy group through the Environmental Protection Agency and the Army Corps of Engineers is in stark contrast to your goal of inclusion.*

*Limited participation in the hearing process will significantly impair a fair, representative, and public process. Most notably omitted from the process are the most important stakeholders in Alaska, the people. The Alaskan people should be heard, not just a solitary spokesperson for a few specific interests. In the state's view, the format allowing only written comments from the public does not provide an opportunity for true public testimony.*

*Secondly, the identified stakeholder list has serious omissions. It overlooks Native corporations, subsistence users, rural communities, and mining interests. These and many other groups must be represented in the process.*

*Thirdly, I disagree with the characterization that the 1 percent rule does not effectively address perceived problems with wetlands permitting and results in serious impacts to critically valuable wetlands in the state. This simply is not true. Such mischaracterization only serves to create dissension between groups that must work together to resolve these issues. I have maintained from the first day of my tenure as Governor that valuable wetlands will be protected. The efforts to develop a state's wetlands program have focussed on ensuring that valuable wetlands would not be subject to unnecessary losses. This position has been presented to federal agencies in numerous correspondence and testimony.*

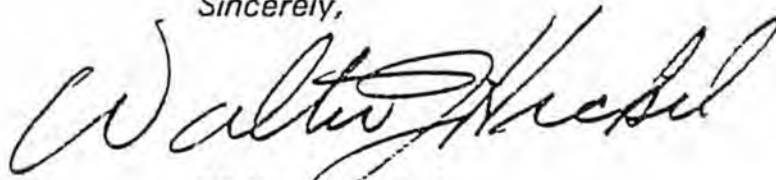
*President Bill Clinton  
October 19, 1993  
Page 2*

*Finally, if the goal is to truly identify and address legitimate concerns with federal regulation of wetlands, then the testimony and debate must include all facets of wetland regulation and potential solutions. Arbitrary constraints on issue discussion, concerns, or possible solutions will bias the resultant issue papers and severely limit the usefulness of this entire consultative process.*

*Again, I will ensure that the state fully participates in this process. Please give serious consideration to the damage that could result to Alaska by not allowing a truly cross-representative section of interests and viewpoints to participate. This is an issue vital to the future of all Alaskans.*

*With best regards.*

*Sincerely,*

A handwritten signature in black ink, reading "Walter J. Hickel". The signature is written in a cursive, flowing style with a large initial "W".

*Walter J. Hickel  
Governor*

*cc: Senator Ted Stevens  
Senator Frank Murkowski  
Representative Don Young  
Commissioner John Sandor  
Mr. John Katz  
Dr. Paul Rusanowski*

Statement of

**Tim Cook**

**Associate Director of Fisheries and the Environment  
Governor's Office Washington D.C.**

before the

**EPA/Corps of Engineers Juneau Wetlands Hearing**

My name is Tim Cook. I am the Associate Director for Fisheries and the Environment, and I am here today representing Governor Walter J. Hickel and the State of Alaska.

The State of Alaska would like to thank the President and through him the Environmental Protection Agency and the Corp of Engineers for holding this series of meetings as a means of examining the unique wetlands situation that exists in Alaska and the feasibility of, as President Clinton's August 24 Policy Statement put it, "alternative permitting procedure in Alaska."

It is exactly this concept of alternative permitting procedures that the State of Alaska seeks. It is clear that the lower 48 states have used and abused much of their wetlands- California, over 90% los., Ohio 90% lost, Alabama and Texas over 50% lost. The lower 48 states need to have regulations that are appropriate for the dire wetlands situations that they face. However, the wetlands regulatory and permitting process that is appropriate for the lower 48 states is wholly inappropriate for the State of Alaska. Therefore, the State of Alaska is adamant in its belief that an alternative permitting procedure for our State will effectively address the problems and concerns that we face in managing our wetlands.

Alaska is unique among all of the other states. It is the only State with an arctic and subarctic climate, and a geomorphology that includes tundra and permafrost. We have more Coastline than all of the other states combined. There are more glaciers, National Parks, federal lands, forests, cold temperatures, daylight and darkness than any other state. Our State parks are larger than the entire states of Connecticut, Delaware or Rhode Island.

The wetlands situation in Alaska is different in the extreme from the rest of the United States. There is not an exact survey of the wetlands in Alaska, estimates range from 130 to 300 million acres, with 170 million being most often quoted. To put this in perspective, Alaska has more wetlands than all of the other states combined. Furthermore, Alaska has lost only a miniscule portion of its wetlands, less than 1/1000th of our total wetlands.

Wetlands in Alaska occupy 60-70% of the land mass. The remaining area is mostly either mountains, glaciers, or lakes and rivers. There are relatively few suitable uplands available for development. Many times in the lower 48 States development can occur in areas that once were wetland, but have since been filled and converted to upland. These lost wetland areas also can be used for compensatory mitigation. In Alaska, with our relatively little development, we don't have converted wetland areas to use for future development or for compensatory mitigation. Unlike the lower 48 states we are at the development stage, not the "redevelopment" stage.

The threat to wetlands in Alaska is not the same as it is in the lower 48. Agriculture has destroyed more wetlands in the lower 48 states than any other activity, yet in Alaska agriculture is almost non-existent. The potential for industrial growth is not high in Alaska. The Corps of Engineers, whose campaigns to drain swamps all across the United States to reduce malaria infected mosquitos, is not likely to be reintroduced. In short the activities that have historically had the greatest impacts on wetlands are not present in the Alaska equation.

We applaud many of the initiatives that the President's policy embodies. In particular, we support changes that will: facilitate State Assumption of the wetlands program; provide deadlines for permitting decisions; create a single lead agency for wetlands permitting; and will simplify the general permitting process. However, we are disappointed that the one percent exception was withdrawn. Furthermore, the reasons articulated to support the withdrawal of the one percent exception add to our distress.

The reasons articulated for withdrawal of the 1% exception seem to indicate both a bias and a lack of understanding of the Alaska situation. The policy statement suggests that under the 1% exception there would no longer be any regulation of wetlands development.

This is completely incorrect. The one percent exception would have required federal permitting of wetlands projects. Furthermore, it retained the requirement to minimize impacts to wetlands. Moreover, State programs such as the Coastal Zone Management Plan (CZM) and the wetlands development plan- which has not yet been implemented because of withdrawal of the 1% exception, would have further regulated wetlands development.

To suggest, as the policy statement does, that 1.5 million acres of Alaska's wetlands would be destroyed, is absurd. To date, only about 80,000 acres have been lost. Future development is unlikely to proceed at a pace that would destroy 7.5 times what has been developed in the entire history of Alaska (both as a territory and after statehood). However, even taking the worst case scenario, where 1.5 million acres were used, when compared with the vastness of Alaska it is insignificant (less than 1/200th of the land mass). Comparing the loss of 1.5 million acres in Alaska to lower 48 states' wetlands loss, Alaska's situation would be enviable- Alabama 3.9 million acres lost, Florida 9.3 million acres lost, Texas 8.4 million acres lost. The lower 48 states have lost 117 million of the original 221 million acres of wetlands. Alaska has used 80,000 acres of its 170 million wetland acres.

The President's policy goes on to state that "potentially all of Alaska 345,000 acres of extremely valuable coastal wetlands" could be destroyed. This is patently absurd. Alaska has 33,904 miles of shoreline, and there are substantially more than 345,000 acres of coastal wetlands in Alaska. To suggest that all of Alaska's high value coastal wetland could be lost is wrong.

All coastal projects that would potentially impact wetlands must be approved through the Alaska Coastal Zone Management Plan (CZM). This is a comprehensive program that is designed to insure the integrity of Alaska's coastal environment. The CZM provides a high degree of protection to high value coastal wetlands. Additionally, the State has been working to develop a comprehensive wetlands program in anticipation of gaining additional responsibility over wetlands.

Another of the articulated reasons for withdrawing the 1% exception was the concept of compensatory mitigation. Although the President's policy recognizes that "in kind compensation is often not possible" it goes on to state that "opportunities do exist for

restoration or rehabilitation of disturbed areas". With less than 1/1000 of our wetlands lost where is the restoration and rehabilitation of disturbed wetlands going to occur?

The final articulated reason for abandoning the 1% exception actually goes to the heart of the wetlands problem in Alaska. The policy states that "of the approximately 4000 permit applications received by the Corps' Alaska District, only 108 (2.7 percent) were denied." This may be in fact true, however, it does not reflect the number of permit applications that were voluntarily withdrawn.

A voluntary withdrawal is, many times, the result of a landowner being coerced by the cost and red tape of the process. For many Alaskans it is an expensive, frustrating lesson in petty bureaucracy. Typically, a land owner sets up a pre-application meeting with the Corps. At that meeting low level representatives of the federal Corps. of Engineers, EPA, Fish and Wildlife Service, National Marine Fisheries Service, as well as State natural resource agencies discuss the permit with the land owner. To quote the words of some of those who have been through the process, "these people do everything they can to discourage you from applying for a permit. They are mean, nasty, arrogant, and intimidating."

If one goes forward and applies for the permit, these same agencies review the application and usually request clarification, alterations, or modifications. At this point, the Corps sends out a form letter asking if you would like to stop the "Official Clock" while you prepare responses to the various agencies. Faced with a mountain of paper work and wanting to avoid being penalized for not responding within the given time, the landowner stops the Official Clock. Now there is not any accurate means of determining how long it took for a permit to be acted upon. It is in effect, a kangaroo court, and many land owners will voluntarily withdraw a permit.

The voluntary withdrawal can also be a conscious decision by the landowner to avoid the financial ramifications of having the permit denied and the property delineated as a wetland. Either way, the end result is, that most permit applications that are withdrawn, are because of the negative implications of permitting. Therefore, the 2.8% denial rate that is reported is not a true picture of reality.

A review of the land ownership, geomorphology, and permitting procedures in Alaska paints a picture that does not fit well in to the borders of the 404 program.

Land ownership in Alaska is far different than in the lower 48 states. Only 1% of the state is in private ownership. Forty four million acres are owned by Alaska Natives, 51 million acres are under the National Park Service, the Bureau of Land Management controls 65 million acres, U.S. Fish and Wildlife 76 million, the State has dedicated 3.2 million acres to parks. There is a huge amount of area that is, in effect, under constraint from development.

In reviewing Native lands, the Congress, under ANILCA, conveyed land to the Alaska Natives to provide for their economic and social well being. In exchange for these lands, the Alaska natives gave up their aboriginal claim against the United States. Now, the economic value of these lands are being diminished because most of these lands, like most land in Alaska are wetlands. In effect, it is the same as what has happened to many of North America's native people- worthless land is promised to them, only to be withdrawn when gold, or some other valuable resource is discovered. Make no mistake, wetlands are valuable, and there many who are willing to make the Native Alaskan pay the economic price for protecting wetlands.

In a similar vein, the people of Alaska entered into a solemn compact with the federal government when we entered the Union. The federal government provided 104 million acres to the State of Alaska because the Congress recognized that Alaska did not have the infrastructure or economics to be on an equal footing with our sister states.

Alaska has been fortunate in having abundant natural resources, however, our infrastructure is almost non-existent compared to other states. We have communities where there is no safe drinking water in the entire village. Many communities have no running water and no sewer. Hepatitis is epidemic in the bush, and the bush is almost the entire state. Our road and rail system is pitiful when compared to other states. We can't drive from here to there- we fly or take a boat. It is easy for a bureaucrat based in Anchorage or Fairbanks or Juneau, who has at best only marginal contact with bush communities, to lose sight of the reality. Anchorage and Fairbanks and Juneau are modern cities, you can drive, you can flush, you can get a drink of water out of the tap. If it weren't for the mountains

and the temperature and the state legislature, it would be hard to tell them from any city in the lower 48. That is not a true representation of Alaska. Anchorage and Fairbanks and Juneau are the urban centers of the State, but there is substantially more to the State than these three cities.

The State of Alaska is 60-70% wetland. If an area is not a wetland, it is a mountain top, a glacier or ice field, or a lake or river. There just aren't many suitable upland areas for development. Therefore, when a project is to be built, whether it is a road, a school, a runway, a sewer, or a water system it will almost always be on a wetland. This means that for almost every project in Alaska a federal wetlands permit is required, and therefore, federal agencies are conducting local land use planning. Federal land use planning is unacceptable. It has in the past led federal agencies to recommend actions that would compromise public safety, degrade governmental authority, and reduce the social and economic standard.

The City of Juneau paid \$800,000 in off-site compensation to build a taxiway at the airport. Without the taxiway aircraft were forced to "back taxi" on the main runway, which can compromise flight safety. Furthermore, ducks frequently flew across the runway from a wetland on one side of the runway to the wetland that would be filled and eliminated by the taxiway. These ducks flying at low level across the runway created a substantial hazard to aviation. It is not debated that this was a biologically productive wetland, but with the abundance of wetlands in Alaska weighed against the danger to the public that this small wetland created, did the federal agency use wise judgement in applying the 404 program.

There was another incident in Juneau where federal actions impacted local land use. The City of Juneau needed a middle school to serve students of a specific area. After selecting a site, voter approval, and a bond issue, it was determined that the site selected was a wetland. During the permitting process federal agencies suggested that the school be built in a distant suburb located in a different school district, and that a no build alternative be considered. Determination of the need for or best location of a school are not areas of which the Corps, or FWS or EPA have any expertise in. Nor should they be involved in these types of decisions.

Although different organizations and agencies have tried to color the outcome of the Lemon Creek School to fit their goals, the point is that

federal agencies are not simply regulating wetlands. In Alaska they are setting local land use policy. Local land use planning is by its nature, the product and the will of the community, i.e. democracy. When federal agencies begin to substitute their beliefs in place of those of the community, it is a subversion of our entire democratic principle.

Governor Hickel is firmly committed to protecting Alaska's wetlands. They are important to this generation and the generations to come. However, there must be balance between the needs of people and need to protect our environment. The State wants to work with the President through the Corps and EPA to create a partnership and to develop a wetlands regulation program that will benefit both the environment and the people of Alaska. Only through "alternative permitting procedures" as noted in the President's policy, can this be accomplished. We look forward to helping rewrite the permitting procedures.

STATE OF ALASKA

Bill

WALTER J. HICKEL, GOVERNOR

Attachment F

**OFFICE OF THE GOVERNOR**

**OFFICE OF MANAGEMENT AND BUDGET  
DIVISION OF GOVERNMENTAL COORDINATION**

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STATE OF ALASKA COMMENTS  
BEFORE THE WETLANDS ROUNDTABLE IN ANCHORAGE  
SPONSORED BY  
ENVIRONMENTAL PROTECTION AGENCY AND CORPS OF ENGINEERS  
NOVEMBER 4, 1993

My name is Paul Rusanowski. I am the Director of the Division of Governmental Coordination in the office of the Governor. I am here today on behalf of Governor Walter J. Hickel representing the State of Alaska.

The State appreciates the recognition given to Alaska, and our unique wetlands concerns, in the Clinton Administration's proposed improvements to the federal wetlands program released August 24, 1993, which was the impetus to these wetlands roundtable meetings dealing with alternative permitting procedures for Alaska. However the meeting process being used is in stark contrast to the stated goal of inclusion of all stakeholders and points of view. It is clear from those attending the meetings that there was inadequate time to prepare for presentations or make arrangements for representatives to attend in person. Some of this concern has been alleviated by the provision of an open microphone at the meetings; but many stakeholders are still unaware of these meetings even taking place. It is essential that the people of the State have the maximum opportunity for input on wetlands regulation and policy improvements.

The State recommends that the EPA/COE distribute information to all 354 communities in the State, with populations greater than 25 residents, so that communities and citizens may have the opportunity to comment on wetlands concerns and proposing workable solutions. In order to accommodate such an effort the State recommends that the comment period also be extended for 60-90 days. The present scheduled comment deadline is just three working days after the end of the roundtable meetings. This schedule does not provide sufficient time for public input when word is still spreading of these roundtable meetings and the opportunity for public comment.

The timeline for response to the issue papers, scheduled for release on December 17, 1993 is also too short and occurs over a holiday period when many individuals will be

Extensive areas of coastal wetlands, including the largest blocks of vegetated estuarine wetlands, for example, the Yukon-Kuskokwim delta, Copper river delta, west side of Cook Inlet, and Izembek lagoon, have been preserved in these conservation system units. Inholdings in these areas are predominantly Native lands subject to use compatibility restrictions with surrounding refuge lands. It is true that salt marsh coastal wetlands are limited to less than 360,000 acres; but the largest and best blocks of that habitat have already been protected and are at no risk of loss. Approximately 65% of these wetlands (219,000 acres) occur in western and northern Alaska. The majority of the 107,000 acres of estuarine vegetated wetlands in southcentral Alaska occur within existing conservation system units. Only 19,000 acres of this wetland type occurs in Southeast Alaska, with the majority of it lying within existing conservation units or restricted development status through the Tongass Land Management plan.

Wetlands planning has also been a part of local community planning considerations for many years, long before it became a central focus of federal agencies. The Municipality of Anchorage, with almost one half of the State's population, finalized its first comprehensive wetlands plan in 1982. When wetlands losses for the municipality are examined in light of implementation of this planning process, we find that only 9% of the total wetlands losses occurred since 1982, and 91% prior to that date. This small amount of wetlands losses have followed the guidelines of the plan, resulting in development occurring in areas of low wetlands value within the Municipality. Several years ago the Municipality, working with the State, placed most of the Anchorage shoreline within the Potter Marsh game refuge, providing protection to more than 30 miles of estuarine wetlands. We think these actions set a standard unmatched by any other community of comparable size in the country.

Many other communities have also initiated wetlands planning efforts utilizing general permits, but successes have been mixed. Juneau has spent more than \$500,000 and six years to develop a plan that resulted in less than 400 acres being subject of local jurisdiction out of more than 3000 acres covered in the plan. Not many communities can afford to undertake such complicated and protracted efforts.

Protection is also provided to wetlands through the Alaska Coastal Zone Management program. There are presently 34 districts in the State which have approved local coastal management programs. These programs contain enforceable policies that can be more restrictive than either State or federal requirements. All of them contain language providing for avoidance and minimization of wetlands losses, as well as incorporating a public needs test for projects occurring within valuable riparian, wetland or wildlife habitat.

Despite these protections, and assurances we have heard during these roundtable meetings, there is considerable skepticism and distrust of the 404 permitting process. The success of the program cannot be measured merely by citing statistics of permits issued. The situation is far more complex. What actually happens during the permitting process is critical to understanding the perceptions extant in the regulated

provide for waste treatment and sewage lagoon facilities in western and northern Alaska.

- Develop an umbrella conceptual mitigation banking plan to provide this opportunity to communities throughout Alaska that wish to consider mitigation banking as a local tool for wetlands management.

- Build consensus for and implement a uniform classification system for Alaska wetlands that can be used as a basis to move forward on a functions and values analysis. To be successful this function and values system must extend across agency jurisdictions, political boundaries, cultures, and lifestyles.

- Pursue changes to the Clean Water Act that will support assumption of the wetlands permitting program by the State, allow exemptions for various activities and land status, and provide more federal support for State and local participation in management of wetlands.

The Clinton Administration has asked for "consideration of other environmentally appropriate means to assure regulatory flexibility and the feasibility of alternative permitting procedures in Alaska". Such a task is meaningless if the most appropriate means is taken arbitrarily out of consideration. The 1% rule was proposed as a means of responsibly dealing with the unique Alaskan situation. It represented a reasonable solution to address issues and concerns of its citizens with the 404 permitting process. That additional bounds were needed to address implementation of such a policy is not disputed. As numerous stakeholders have testified, some form of exemption of lands and activities is both practical and appropriate to consider in Alaska. Even President Clinton used an exemption for 53 million acres of converted agricultural lands within the proposed federal wetlands program. Yet the same exemption mechanism is not available to the State that has protected the most wetlands, impacted the least wetlands, and has virtually no opportunity to avoid wetlands impacts. Such an arbitrary decision makes a mockery out of a document entitled "Protecting America's Wetlands: a Fair, Flexible, and Effective Approach". Exemptions simply must be put back on the table for consideration, regardless of whether or not they comprise a part of the ultimate solution.

Work has begun on development of general permits and abbreviated permit processing. This work needs to move forward, but must incorporate local values and needs. The focus must be on problem solving with full local participation on an equal footing with other agency participants.

The 404 permitting process must be reevaluated to incorporate the guarantees provided to the citizens of the State through the State Compact with the federal government covering the terms and conditions for Alaska becoming the 49th State. The same approach must be used to ensure that the rights and guarantees promised Alaskan Natives within ANCSA and ANILCA legislation are preserved within the permitting process. The wetlands permitting program must build on this base of existing law, not ignore it.



US Army Corps  
of Engineers  
Alaska District

Attachment G

# News Release



OFFICE OF  
MANAGEMENT & BUDGET

DEC 22 1993

GOVERNMENTAL  
COORDINATION

CONTACTS

Robert K. Oja Chief, Regulatory Br. Corps of Engineers (907) 753-2712 or (800) 478-2712	Alvin L. Ewing Assist. Peg. Admin. EPA (907) 271-5083
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December 17, 1993

FOR IMMEDIATE RELEASE

Recommendations from a first round of public meetings, written comments and a state-wide teleconference, have been compiled into 11 issue papers that will be used to solicit final comments from Alaska citizens on how they think wetlands should be regulated in Alaska.

The 11 issue papers were made available today by the U. S. Army Corps of Engineers and the U.S. Environmental Protection Agency, the two federal agencies that are trying to make sure the wetlands program is responsive to the special circumstances of Alaska. The issue papers will be the basis for discussion at public roundtables scheduled over the next few weeks at the following locations:

Tuesday, January 4  
Centennial Hall  
101 Egan Drive  
Juneau

Thursday, January 6  
Kuskokwin Campus  
201 Akiak Drive  
Bethel

Tuesday, January 11  
Fireside Room  
Captain Bartlett Inn  
1411 Airport Way  
Fairbanks

Thursday, January 13  
Egan Convention Center  
555 West 5th Avenue  
Anchorage

Each of the meetings will consist of two sessions, a daytime (9 a.m. to 4 p.m.) roundtable discussion involving invited representatives of a number of interest groups, and an evening session (6 p.m. to 9 p.m.) for the general public. Both sessions are open to the public.

The comments made at those meetings will be used by the Corps of Engineers and EPA to recommend an action plan for implementing the federal regulatory program for wetlands in Alaska.

(more)

For persons who cannot or choose not to attend the meetings in Anchorage, Juneau, Bethel and Fairbanks, comments on the 11 issue papers may be submitted in writing between now and January 21, 1994. Copies of the issue papers are available upon request from the Corps of Engineers office in Anchorage, from EPA offices in Anchorage and Juneau, from city offices in Bethel and Barrow and from the office of the Alaska Village Council of Presidents.

Topics covered by the 11 issue papers include these questions:

- How can the goal of "no overall net loss" of the nation's wetlands be fairly applied in Alaska? How can the wetlands 404 program be best implemented to reflect the physical environment and wetland characteristics in Alaska?
- How can the wetlands program be best implemented in light of the Native Claims Settlement Act, Alaska National Interest Lands Conservation Act, and the Statehood Act?
- How can the role of state and local governments, and native interests be improved in the protection and regulation of Alaska's wetlands?
- How can the individual permit process be best implemented in a fair, flexible and efficient manner in Alaska? How can alternative permit processing procedures be best implemented?
- How can the mitigation sequence best be applied? How can compensatory mitigation be best implemented?
- How can advance planning and watershed management be best implemented to improve the predictability and effectiveness of the wetlands permitting process and the protection of wetland resources? How can wetlands inventory, classification and categorization be best implemented?

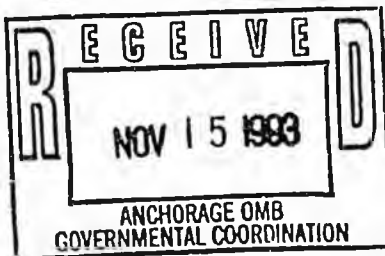
The 11 issue papers were derived from comments received from Alaskans during a first round of public forums, a state-wide teleconference and written comments received by the Corps of Engineers and EPA. The teleconference enabled people in 21 Alaska communities to offer their suggestions on how wetlands should be regulated.



US Army Corps  
of Engineers  
Alaska District

# Public Notice

Special Public Notice 93-17  
12 November 1993



SPECIAL PUBLIC NOTICE 93-17

ALASKA INITIATIVE

MEETING NOTICE

AND

REQUEST FOR WRITTEN COMMENTS

NOTICE IS HEREBY GIVEN that the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) will hold a "second round" of meetings on the Alaska Wetland Initiative. A successful and productive "first round" of stakeholder meetings were recently concluded in Juneau, Bethel, Fairbanks, and Anchorage. An integral part of the process is input from the public, both oral statements made at these meetings, and submittal of written comments for consideration by the Corps and EPA. All members of the public are invited to provide written comments that highlight concerns with the wetland program or that offer recommendations for addressing concerns. Any person who wants to present written comments may do so by submitting them to: Alaska Initiative, U.S. Army Corps of Engineers, Regulatory Branch, Post Office Box 898, Anchorage, Alaska 99506-0898; OR to U.S. Environmental Protection Agency, Alaska Operations Office, 222 W. 7th Avenue, # 19, Anchorage, Alaska 99513-7588, by NOVEMBER 24, 1993.

Issue Papers addressing the comments received from the "first round" of meetings will be available upon request from the Corps and EPA after December 17, 1993. Again, the public is invited to provide written comments. The comment period will start December 17, 1993, and end January 21, 1994.

The "second round" of meetings will be held in the following four locations on the identified dates:

Juneau, Alaska

Meeting Date: January 4, 1994

Bethel, Alaska

Meeting Date: January 6, 1994

Fairbanks, Alaska

Meeting Date: January 11, 1994

Anchorage, Alaska

Meeting Date: January 13, 1994

Public oral testimony will be taken during the evening hours. The exact meeting locations and times will be announced at a future date.

**NEWS RELEASE****State of Alaska****Office of the Governor**  
P.O. Box 110001  
Juneau, Alaska 99811**WALTER J. HICKEL**  
Governor**John Manly**  
Press Secretary**Brian Hart**  
Deputy Press Secretary**(907) 465-3500**  
**Fax (907) 586-8369**FOR RELEASE: December 17, 1993  
No. 93-265**RESOURCE AGENCIES REVIEWING EPA AND CORPS  
OF ENGINEERS WETLANDS RECOMMENDATIONS**

JUNEAU--Governor Walter J. Hickel said today that staff in the state's natural resource agencies are now reviewing recommendations on Alaska's wetlands, released today by the Army Corps of Engineers and the Environmental Protection Agency (EPA) as part of the Clinton administration's federal wetlands program.

"We have seen the recommendations, and they are a good start," said Dr. Paul Rusanowski, Director of the Division of Governmental Coordination. "We are encouraged that the White House is interested in Alaska wetlands problems, but the people of Alaska deserve more."

"We will be reviewing the details of the issue papers to learn what real improvements are proposed for problems faced by Alaskans. We will continue to participate fully in future efforts to improve the wetlands permitting process."

The Corps of Engineers and EPA have scheduled meetings around Alaska in early January as the next step in the Clinton program.

"We understand the issue papers address classification of high and low-value wetlands in Alaska," Rusanowski said. "We hope this will lead to strong recommendations to improve this component of wetlands regulations, as well."

The State of Alaska wants to establish a program to classify wetlands based on value, with the program protecting critical wetlands. The state is currently requesting release of EPA grant funds to establish and test a classification system.

2-2-2-2

93-265

Dec. 17, 1993

The state also wants general permits issued for local governments for activities that are critical to developing Alaska's infrastructure, such as rural sanitation, transportation, shipping, harbors, and routine housing developments.

While willing to work with the Clinton administration on specific differences, Governor Hickel believes a more complete solution would be federal legislation that provides for assumption of wetlands management by the state of Alaska, and to allow for relief from compensatory mitigation that often does not make sense for specific Alaska situations.

####

For more information, contact Dr. Paul Rusanowski at 465-3562.

## DRAFT

MEMORANDUM

STATE OF ALASKA  
Office of Management and Budget  
Division of Governmental Coordination

TO: Interagency Wetlands Policy Committee      DATE: 12/27/93

FROM: Paul C. Rusanowski *PCR*      TELEPHONE: 465-3562  
Director      FAX: 465-3075  
Division of Governmental  
Coordination

SUBJECT: Corps/EPA Issue Papers

The first meeting of the second round on the federal wetlands regulatory program is scheduled for January 4 in Juneau with subsequent meetings in Bethel, Fairbanks and Anchorage. Your input is needed for the State response to the subject papers by December 29. Please coordinate your comments with me or with Bill Lawrence of my staff at 465-8796.

The following is a starting place to respond to the 11 issue papers. The paragraphs focus on the Alaska Specific Actions. We have not responded to the analysis section of the papers.

The overall theme of the issue papers centers around the existing regulatory framework which is stated to have flexibility and capability to work better. The most notable shortcoming is that the State of Alaska is not named a player in most of the Alaska Specific Actions.

Some common threads run throughout many of the main papers. Specifically, general permits, including regional general permits and circle general permits, should be used more (Issue Papers 2, 3, 4 and 6). The Alternative Permit Process (APPs) is also emphasized (Issue Papers 2 and 6). Compensatory mitigation may not be required and "Minimization and Avoidance" can implement the No Net Loss Policy (Issue Papers 1, 5, 7 and 8). Advance planning is covered several places in the context of GPs/watershed management and specifically in two other papers (Issue papers 3 and 9). As such, it would seem reasonable to focus our response/testimony on these threads.

**Issue Number 1. No Net Loss**

The State of Alaska continues to believe that some form of exemption from compensatory mitigation is the most practicable and fair solution to the federal government's no net loss of

wetlands policy. The Clinton Administration, however, has withdrawn the 1% exemption. As such, in the absence of the 1% exemption, the State is generally supportive of the federal government's alternative proposal that "minimization" is the favored mitigation tool and that "avoidance" and "compensatory" mitigation will be required only when minimization is not practicable. In a situation where the Administration states that the existing wetlands regulatory framework has adequate flexibility to handle wetlands administration, the State expects to be made a full partner in developing the guidance identifying and implementing the minimization policy. We are concerned that only federal agencies are now specified as developing this guidance i.e. policy should be developed with state and stakeholder participation, not by the federal government for the State. Moreover, if the guidance is truly going to reflect unique regional circumstances, then the stakeholders who live and work in the regions must be brought into the process too.

#### **Issue Number 2. Special Alaska Circumstances-Legal Issues**

The State of Alaska is pleased that the existing regulatory framework offers opportunity for more flexibility. We are very encouraged that alternate permit procedures (APPs) will be used in situations where there are minimal impacts and adequate safeguards. The federal government must recognize the role of the State in developing these advanced permit procedures. We are further encouraged that more general permits will soon be proposed and that regionalized general permits will be developed in conjunction with comprehensive wetlands planning. However, our concerns are that complex wetlands management plans are appropriate in some areas, but are not practical or within reach of many smaller, remote and less sophisticated villages or regions of the State where wetlands are abundant. In fact in many of these locations wetlands are the predominant landform. It is precisely these kinds of places that need general permits the most. In fact in some of these locations, GPs may be more burdensome than necessary to protect and safeguard wetlands. We ask that wetlands planning in Alaska focus on protecting wetlands of critical value and their functions, not all wetlands regardless of function and value. (A NATIVE/VILLAGE CORPORATION VIEW IS NEEDED TO BETTER ADDRESS THIS ISSUE)

#### **Issue Number 3. Special Alaska Circumstances-Physical Environment**

The State of Alaska is extremely encouraged with the potential for regionalization of the 1987 wetlands delineation manual. This should expedite the development of regionalized general permits. Development of the hydrogeomorphic system will add to this effort. We are pleased that the State of Alaska will get priority for grants to develop comprehensive wetlands plans. As previously stated, we believe planning should focus on protecting critical high value wetlands. We expect to play a role in developing regional general permits. (JULES' #'S NEED TO BE USED HERE)

#### **Issue Number 4. State, Local and Native Roles**

Similar to issues 2 and 3 above, the State is highly supportive of regional general permits, but has reservations as to the extent of wetlands management planning that may be required in small, remote villages before the permits would be issued. The practicality and expense

of complex and sophisticated planning efforts is not commensurate with the level of wetlands development or conservation activities that would occur in the near future. The State believes that decisions affecting local communities need to be made at the lowest practical level, preferably at the local community level. We therefore strongly support the "Circle GP's" proposed for Alaska communities, particularly where the communities would administer the GPs, after an Advanced Identification (ADID) of wetlands has occurred. In these cases, for example the highest valued wetlands, say the top 25%, would be excluded from the GP process with proposed activities in these wetlands subject to the individual permit process. We remain concerned with the stated position of the federal government that "state assumption" is a routine process that is easily available and technically feasible. The fact of the matter is just the opposite. Under the current regulations, primacy is virtually impossible to achieve and the federal government's role would not be reduced. Assumption of the 404 permit program should be a reality in Alaska and many other states. The State will continue to seek legislative solutions to remedy this problem. (NATIVE AND LOCAL ROLE WOULD ADD TO THIS ISSUE)

#### **Issue Number 5. Individual Permit Process**

The State of Alaska is committed to preserving and protecting our wetland resources and accordingly believes that individual permit reviews are appropriate for activities proposed in the highest value wetlands. Concurrently, we believe there is room for much more GP activity statewide, especially in those areas "...where there is no significant or easily identifiable difference in functional value of the proposed discharge site when compared with other sites within the general vicinity and that compensatory mitigation would not normally be required for fill in areas with abundant low aquatic value areas." We think that one of the most meaningful things the Corps can do is to develop interagency guidance encouraging and supporting the application of general permits. Finally, use of GP's will conserve limited administrative resources for where they are most needed--protecting the highest value wetlands. Simply stated, there should be fewer individual permits, but they should protect the highest value wetlands; there should be more general permits issued for other areas. (THIS ISSUE DOESN'T OFFER A LOT OF ROOM FOR COMMENT. THE CORPS IS SAYING THEY ARE DOING A GOOD JOB ADMINISTERING THE PROGRAM, BUT WANT TO IMPROVE THEIR INTERNAL PROCESS, BUT THIS WILL TAKE MORE RESOURCES ETC.)

#### **Issue Number 6. Alternative Permit Processing Procedures**

The State of Alaska encourages the Corps to take advantage of the opportunities offered to use APP's, Letters of Permission, Regional General Permits and joint procedures. The partnering agreement now in place between the Corps and Division of Governmental Coordination is a good example. More use of this type of regulatory flexibility would go a long way to solving problems of Alaskans. The Corps' and EPA's commitment to expedite action on Public Health Service and Village Safe Water projects will significantly contribute to improve the infrastructure and the standard of life in many Alaska villages. The commitment to propose additional general permits statewide and circle general permits to communities will also greatly improve the regulatory process. The State of Alaska should be

a partner in developing any regulatory scheme for Alaskan communities. (WE SHOULD SUPPORT THIS, BUT ASK/DEMAND TO BE A FULL PARTNER)

#### **Issue Number 7. The Mitigation Sequence**

The State of Alaska agrees that there is flexibility in the existing requirement for mitigation. As stated earlier, the 1% exemption is the fairest, most practical solution to the mitigation problem. Given the federal Administration's position that no exemption is required and that one will not be granted, we ask the Corps and EPA to issue and implement guidance that minimization of impacts will be the primary form of mitigation in the Alaska permit program. We support inclusion of minimization as the primary mitigation tool in revision of the Executive Order. We ask that minimization be used in those cases where impacts on the wetland and aquatic resources would be significant and compensation be limited to impacts to truly remarkable wetlands where avoidance and minimization fail to adequately address wetland losses. We ask to be included in the development and implementation of the guidance; as presently proposed, the effort will be conducted entirely by the federal government.

#### **Issue Number 8. Compensatory Mitigation**

As previously stated, with reservations, the State of Alaska can support minimization as the primary tool of mitigation. There are approximately 174 million acres of wetlands (48% of the State). At a worst possible case approximately 200,000 acres (0.1%) of wetlands have been lost. This coupled with the fact that 93,000,000 acres (53%) of the State's wetlands are in a federal government protected status and only 190 thousand acres (0.1%) are in private, non-Native ownership, compensatory mitigation is not a good solution except in some cases where there is no alternative but to develop truly remarkable wetlands. Also, some towns and villages in Alaska are located in wetlands and are totally surrounded by wetlands. To force these communities to create more wetlands as compensatory mitigation is not practical, and represents poor public policy. The State of Alaska expects to be involved in developing and implementing policy specifying when and where compensatory mitigation will be required.

#### **Issue Number 9. Advance Planning**

The State of Alaska supports advance planning so as to avoid case-by-case decisions on wetlands. We have supported the development of numerous coastal management programs and wetland management programs that have resulted in protection of high value wetlands. We are pleased that the federal government is placing a high priority on this component of wetlands management and look to better working relationships in our planning efforts. We are always ready to participate and contribute to advance planning efforts and to incorporate the results into 404 regulatory program. We remain hopeful that the Corps Headquarters will allow the Alaska District to issue a general permit implementing the Juneau Wetlands Management Plan. (HERE THE CORPS, EPA, FWS AND NMFS ARE THE BIGGEST STUMBLING BLOCKS. THE CORPS IS PREVENTING THE JUNEAU PLAN FROM

BEING IMPLEMENTED {by holding up the GP}, AND THE OTHERS HAVE ARGUED AGAINST SEVERAL OTHER ATTEMPTS)

**Issue Number 10. Wetlands Inventory, Classification and Categorization**

The State of Alaska agrees that more data is needed to fully address wetland functions and values. The state is requesting release of funds, from a grant previously awarded, to work on the classification problem. We strongly believe that there needs to be more emphasis on inventory, classification and categorization with the results being fewer conflicts over wetland functions and values. Further, there must be involvement at all levels of government and not just at the federal level. Local input into wetlands values is critical. We look forward to cooperation in this area.

**Issue Number 11. Outreach and education**

The State supports efforts to inform the public about the 404 permit program. However, we think the overall program needs to be solution oriented as well as telling Alaskans about the program. We also believe that there is a great disparity between how the program is implemented in various communities. Specifically, a high level outreach program is not necessary in bush Alaska communities that are surrounded by wetlands. Education and outreach are most needed where development pressures are greatest. In summary we strongly urge the federal government to be flexible in program implementation and encourage flexibility throughout the State.

CC:

Commissioner Sandor

Tim Cook

Nelson Angapak

# STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

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Jan. 3, 1994

## ALASKA WETLANDS INITIATIVE

In preparation for the second series of roundtable meetings on the Alaska Wetlands Initiative, the resource agencies have been analyzing the 11 issue papers released by the Corps of Engineers (COE) and the EPA on December 17, 1993. The Administration is pleased that the federal government is making a good start in developing an action plan for the Alaska Wetlands Initiative. The COE and EPA are to be commended for the effort they have put forth so far, and for incorporating many of the concerns expressed by various stakeholders at the first series of roundtable meetings. The State is looking forward to continued productive dialogue and interaction with the COE and EPA as an action plan is developed for the Alaska Wetlands Initiative.

However, after participating in the first series of roundtable discussions, and preliminary analysis of the issue papers, the State remains convinced that fine tuning, clarifying and providing guidance to the present 404 wetlands program is a good start, but is insufficient to address all of the State's concerns. This is largely due to the unique factors in Alaska which prompted both the exemption policy of the previous administration and the Alaska Wetlands Initiative undertaken here by the Clinton Administration.

The State is encouraged by several of the recommendations coming from the COE and EPA. Particularly noteworthy are:

- *Discussion of flexibility in implementing a "No Net Loss" policy based on regional differences. A strictly interpreted "No Net Loss" policy is simply not a viable option for Alaska.*
- *Recognition of the role of minimization as a primary tool in mitigation sequencing is also welcomed. Compensation should be used for those truly remarkable wetlands where avoidance and minimization fail to adequately address wetlands losses.*
- *The emphasis on alternative permitting procedures, general permits and circle permits is also encouraged. These measures recognize the unique circumstances that exist in the State. Where appropriate, their use should be maximized. However, the paperwork associated with obtaining and administering such programs is beyond the reach of many communities without financial and technical assistance.*
- *Recognition of the need for a regionalized wetlands delineation manual, perhaps for several regions in Alaska, along with support for inventory and classification, are longer term solutions which will do much to reduce wetlands controversy in the State. More emphasis should be placed on this aspect to ensure that necessary tools are available to all parties as part of the Alaska Wetlands Initiative.*

The Alaska Wetlands Initiative must deal with the many truly unique features of the State in establishing a fair, flexible and effective action plan.

- The State has more than 174,000,000 acres of wetlands; with historical cumulative losses of less than 200,000 acres.

- Most wetlands are still in public ownership (federal, 114 million acres; State, 40 million acres); Native wetlands comprising less than 20 million acres, and private non-native wetlands less than 200,000 acres.
- More than 63 million, of the 174 million acres of wetlands in the State, have already been placed in protected status by State and federal land use designations.
- The State is dominated by arctic and subarctic climatic zones which occur nowhere else in the U.S. Permafrost is common throughout most parts of the State and is the dominant lowland feature in Northern and Western Alaska.
- Most communities in the State are small, rural and widely dispersed throughout the State. A few communities account for most of the 550,000 population; with 75% of the people living in 38 communities, and almost 50% living in the Municipality of Anchorage; only 25% of the population lives in the approximately 300 remaining communities.
- More than 60% of the rural communities still depend on a honeybucket system for sewage disposal, and lack community water distribution systems to individual homes.
- Most communities are not connected by roads, but are dependent on water and air transportation modes. Small community size, remoteness, lack of easy access and harsh climates make the costs of providing basic services extremely expensive. In fact, all construction and building efforts are minimized due to the cost factor alone.
- The State is highly dependent on natural resources for both its economic welfare and that of its citizens. Most rural areas are highly dependent on subsistence for both economic and cultural survival. Native lands must be used to support both traditional lifestyles and to generate income to provide basic health and community services to shareholders.

While we have made a good start on recognizing and discussing important issues on wetlands, an essential component that must be fully realized in an action plan is development of an effective partnership between federal and State permitting authorities, as well as the Native community. The State expects to participate as a full partner in developing the action plan for the Alaska Wetlands Initiative and sharing in the responsibility for its success.

The success of this initiative and current recommendations is critically dependent on full participation by both State and Native interests. Programs, such as advanced identification of wetlands, circle general permits, and watershed planning, cannot be successful if they do not incorporate local and regional values, and accommodate community needs. Responsible stewardship involves a balancing of community needs, resource values, and environmental management that is supported by consideration of multiple issues, rather than a single issue, no matter how compelling that issue might be. The balancing and consideration of all relevant issues and points of view in this process will foster cooperation and public support for requisite regulatory programs and overall success of the Alaska Wetlands Initiative.

The second series of roundtable meetings will begin on Tuesday, January 4, in Juneau, and continue on the 6th in Bethel, the 11th in Fairbanks, and conclude on the 13th in Anchorage. An opportunity for the public to comment on the issue papers and Alaska Wetlands Initiative is being provided in the evening, from 6 to 9 p.m., of each roundtable meeting. The public is encouraged to attend and express their views on this important topic.

Statement of

Tim Cook

before the

Corps of Engineers/EPA Wetlands Taskforce  
(Juneau - January 4, 1994)

**DRAFT**  
REV 3

My name is Tim Cook. I am the Associate Director for Fisheries and the Environment for the State of Alaska in Washington, D.C., and I am testifying today on behalf of Governor Walter J. Hickel, and the State of Alaska.

The State would like to thank President Clinton for recognizing the unique wetlands situation in Alaska. In his policy statement of August 24, he recognized that the wetland situation in Alaska is "found in no other State." Because of our unique situation, the President directed that the Corps of Engineers and the Environmental Protection Agency to develop "appropriate means to assure regulatory flexibility and [consider] the feasibility of alternative permitting procedures in Alaska."

The State supports most of the suggestions that the Corps of Engineers and the Environmental Protection Agency have developed. We wish to thank both agencies for the diligence they have shown in attempting to address some of the inadequacies of the existing program. However, the State does have some concerns. First and foremost is the need for a close partnership between the State, local governments, Alaska Native entities, and the Corps of Engineers and the EPA. President Clinton and Administrator Browner have articulated the need for a partnership between Federal, State, and local governments. Yet, in none of the suggested solutions is there any meaningful partnership between the Corps or EPA and state or local governments.

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It is the State's position that it is of paramount importance that a full partnership between the State of Alaska, the Corps of Engineers, and the Environmental Protection Agency be instituted with regard to wetlands. We envision a partnership where the Federal agencies and the State and local governments work together, as co-equals, to develop the guidance necessary to implement solutions to Alaska's wetlands situation. Moreover, this partnership would be expanded to share responsibility and oversight of permitting of wetlands in Alaska.

Governor Hickel and Administrator Browner have advocated greater assumption of wetlands programs by the states. Unfortunately, under existing law, it is unlikely that the State of Alaska will assume jurisdiction for the wetlands program because of restrictions on wetlands adjacent to navigable waters and other significant issues. However, with President Clinton, Administrator Browner, and Governor Hickel all advocating a greater role for states and local governments in wetlands management, a partnership between the State of Alaska, the Corps of Engineers, and the EPA seems appropriate.

The formation of a partnership between the State of Alaska and these Federal agencies must not suggest Federal control over local land use. This partnership is intended to retain local control over local lands. In some instances, Federal wetlands permitting will be required for some projects. However, with Bob Oja's observation at the first of these hearings, "that virtually every developable acre in Alaska is a wetland", it is clear that Federal agencies have become intimately involved in local land use.

With Alaska having a limited infrastructure, a resource based economy, and a dire need for water and sanitation in most of our Bush communities, there is a need for the least intrusive permitting procedure possible. By entering into partnership with the Corps and EPA, the State and local governments can help fashion acceptable permitting procedures, that ensure the goal of wetlands protection

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and the needs of the State. The suggestions that the Corps and EPA have previously proposed are a step toward finding feasible solutions to Alaska's unique situation. To briefly overview the State's reaction to some of the proposals:

**No Net Loss-** with over 170 million acres of wetlands, and less than 1/1000 of Alaska wetlands having been disturbed, and in view of the considerations cited above, an inflexible no net loss policy is unacceptable.

**Alternative Permitting Procedures-** the existing permitting program is overly complex and burdensome. The State supports APP's, as one means of improvement. However, complex management plans and advance planning may not be appropriate for many parts of the State.

**Special Circumstances/Physical Environment-** the State supports regionalization of the delineation manual.

**Mitigation Sequencing-** the State supports the concept of minimization as the primary mitigation tool.

**Classification and Inventory-** the State supports both classification and inventorying of wetlands with emphasis on community and population centers.

The State of Alaska has an outstanding record of protecting its wetlands and it is committed to continue protecting its wetlands resources. However, the State also recognizes that some use of wetlands must occur. To achieve the goal of protecting our wetlands in a cost effective manner, the State supported the 1% exemption. We still believe that by capping total growth to less than 1%, while simultaneously limiting development on high value wetlands and protecting vast amounts of acreage in conservation units, as has already been done, is a valid approach. Unfortunately, there has been such hyperbole and misinformation that the 1% exception has been

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withdrawn. Nevertheless, the State is encouraged by the suggestions put forth by the Corps and EPA.

The State would like to thank both Agencies for their review of the program and their suggestions on how the program might be better adapted to Alaska. These are positive steps forward and reflect the sincerity of concern that these agencies have toward the Alaska wetlands program. The State looks forward to entering into a partnership with both the Corps and the EPA to develop the specific written guidance necessary for implementation of these ideas.

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**ALASKA WETLANDS INITIATIVE  
PUBLIC REVIEW DRAFT ISSUE PAPERS  
DECEMBER 17, 1993**

**THIS DOCUMENT WAS PREPARED TO FACILITATE DISCUSSION  
IT DOES NOT REPRESENT AGENCY CONCLUSIONS**

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**PREFACE**

As a part of the Clinton Administration's August 24, 1993, Wetlands Plan, the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) commit to meet with interest groups in the State of Alaska to identify and address concerns with the Clean Water Act Section 404 program in Alaska. Specifically, the Plan states that the agencies would "initiate meetings with the Federal resource agencies, State and local government agencies, representatives of native villages, industry groups including oil and fishing interests, and environmental groups, to consider other environmentally appropriate means to assure regulatory flexibility and the feasibility of alternative permitting procedures in Alaska."

On October 12, 1993, the agencies in Alaska invited a diverse and comprehensive group of stakeholders to participate in a series of independently facilitated meetings in Juneau, Bethel, Fairbanks, and Anchorage in late October and early November. The two-day meetings offered the opportunity for stakeholders to make uninterrupted presentations as well as to discuss concerns in a roundtable format. The public was invited to attend these meetings, to submit written comments, and to participate in a Statewide videoteleconference held in 20 locations throughout Alaska. Approximately 75 Alaskans took advantage of these public comment opportunities. Furthermore, approximately 1,500 letters were mailed to Alaskans who, over the last five years, had applied for Section 404 permits, to survey their opinion regarding experience with the regulatory program. Over 400 responses have been received to date.

The following series of draft issue papers for public review was developed by EPA and the Corps, in conjunction with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, as a result of the meetings held and public comments received. Each draft issue paper includes a general background discussion of that issue, a summary of the stakeholder and public comments received, and an analysis and, for purposes of discussion, a set of proposed recommendations that seek to address the concerns. This series of draft issue papers will serve as the focus of discussion at the final set of stakeholder meetings in January. The Corps and EPA will seek the input of the stakeholders on how well the draft issue papers characterized their concerns and how well the proposed recommendations for discussion respond to those concerns. The public is again invited to these meetings and is also invited to comment on the draft issue papers through January 20, 1994.

Following the January meetings and public comment period, the agencies will revise the draft issue papers in coordination with the Clinton Administration's Interagency Working Group on Wetlands Policy. A final report and an implementation plan is scheduled to be issued in early March 1994. Please direct any inquiries, including comments, on this Alaska Wetlands Initiative to the Corps' Alaska District office at (907) 753-2712 or the EPA's Alaska Operations office at (907) 271-5083.

ALASKA WETLANDS INITIATIVE  
ISSUE PAPER - 1

**SUBJECT:** No Overall Net Loss of Wetlands Goal

**ISSUE:** How can the goal of "no overall net loss" of the Nation's wetlands be fairly applied in Alaska?

**BACKGROUND:**

**General**

In 1980, the Environmental Protection Agency (EPA) published the Clean Water Act Section 404(b)(1) Guidelines [Guidelines]. The Guidelines are the substantive criteria used by the Corps of Engineers (Corps) in evaluating permit applications for the discharge of dredged or fill material into waters of the United States, including wetlands. The mitigation requirements of the Guidelines outline a process that includes avoiding wetland losses where practicable, minimizing wetland impacts where avoidance is not practicable, and compensating for impacts to the extent appropriate and practicable. The term practicable is defined as "available and capable of being done [by the applicant] after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Such terminology affords discretion and flexibility to the Corps to craft day-to-day decisions for highly diverse environmental, economic, and geographical conditions.

In 1987, the National Wetlands Policy Forum, a diverse group of environmental, business, government, and academic leaders, was convened, "to address major policy concerns about how the nation should protect and manage its valuable wetlands resources." In their 1988 final report, the Forum recommended that "the nation establish a national wetlands protection policy to achieve no overall net loss of the nation's remaining wetlands base, as defined by acreage and function, and to restore and create wetlands, where feasible, to increase the quality and quantity of the nation's wetland resource base." The Forum noted, however, that "the goal does not imply that...the no-net-loss standard should be applied on an individual permit basis" and that "the goal may have to be implemented at different rates in various regions of the country to reflect regional wetlands needs, conditions, and types. For example, continuous arctic or high latitude wetlands underlain by permafrost pose unique scientific challenges to successful restoration and creation."

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In February 1990, EPA and the Department of the Army (Army) signed a Memorandum of Agreement (MOA) on Mitigation, which clarified the Guidelines mitigation requirements and adopted a goal of no overall net loss of wetlands. The MOA recognized that the goal would not be met on every permit action. In addition, the MOA contained qualifying language that stated the goal was not practicable in areas where wetlands are abundant. Furthermore, in January 1992, EPA and Army issued joint guidance further clarifying the Guidelines and the MOA with respect to Alaska which emphasized "that there are areas, including many locations in Alaska, where it may not be practicable to restore or create wetlands; in such cases compensatory mitigation is not required under the Guidelines," and that "[w]here there is a high proportion of land in a watershed or region which is wetlands, it is likely that avoiding impacts to wetlands will not be practicable depending on project size and other logistical considerations."

In November 1992, EPA published the proposed rule "Exception from Wetlands Mitigation Sequence for Alaska" (known as the "Alaska 1%" Exemption) in the Federal Register. The rule proposed to exempt Section 404 permit actions in Alaska from the avoidance and compensatory mitigation provisions of the Guidelines until one percent of Alaska's wetlands acreage was developed. Over 6,500 written public comments were received on the proposal, of which approximately 83% of the comments were opposed to its finalization.

Wetlands issues have engendered a degree of confusion and anxiety within the regulated community in Alaska regarding wetlands regulation. The specific application of the no overall net loss of wetlands goal is among these wetlands issues of concern.

#### Stakeholder and Public Comments

A number of observations, concerns, and recommendations in regard to how the goal of no net loss is and could be applied in Alaska were raised by the stakeholders and public commentators. The divergent comments included those that stated the goal of no net loss should not be applied to Alaska to those that stated the current regulatory program is so flexible that too many losses are allowed. The comments are summarized as follows:

- Of concern to many was the potential for a strict application of the no net loss goal on a permit by permit basis (i.e., acre-for-acre or value-for-value restoration or creation required for each permit).
- The abundance of wetlands in Alaska prompted some commentators to note there is little justification for the no net loss goal, particularly for proposed discharges associated with basic infrastructure and residential development. There was strong disagreement among commentators whether Alaska National Interest

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Conservation Lands, as well as those lands protected to some degree in Federal and State ownership, should be "credited" toward meeting the no net loss goal.

- The commentors had divergent viewpoints regarding the capacity of compensatory mitigation to achieve the no net loss goal (see Compensatory Mitigation Issue Paper). Some felt restoration of disturbed wetlands after a "temporary" discharge for a project should satisfy any compensatory mitigation requirements to achieve the no net loss goal. Others felt that only in-kind, on-site compensatory mitigation (e.g., restoration of a wetland of the same type and in the same area as that lost) should be used to satisfy compensatory mitigation requirements. Some commentors expressed fear that compensatory mitigation to offset losses in Alaska could be required in the lower 48 States, if suitable sites were not available in Alaska.
- Some commentors emphasized that recent statistics on the level of compensatory mitigation required to offset permitted wetlands losses in Alaska reveal significant flexibility in the existing Section 404 regulatory requirements. Cited were Corps statistics which indicate that between January 1991 and January 1992, only 0.8% of 794 projects were required to accomplish some form of compensatory mitigation.
- Some commentors felt that due to the abundance of wetlands in Alaska (approximately 45% of the State's surface area is wetlands) and the relatively small percentage of land that has been developed, that neither avoidance of wetlands nor compensatory mitigation for wetland impacts are ever practicable. Completing the November 1992 proposed "Alaska 1%" exemption rulemaking was recommended.
- Some commentors believed the current regulatory program performance measurements fail to credit some applicants for avoidance and minimization achieved through pre-project planning. In their view, a no net loss equation which did not recognize those efforts would be disproportionately weighted toward environmental conservation.
- Some commentors maintained that no uniformly accepted method has yet been applied to characterize wetland functions and values, which would be necessary to consistently evaluate "value-for-value" replacement of lost wetlands. Commentors noted that such characterization, even in selected areas of the State, would take significant amounts of time and money.
- Several commentors attributed the loss of property values, and the reluctance of the regulated community to apply for permits, in fear of the no net loss of

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wetlands goal.

- Some commentors felt their uncertainty over the no net loss goal and compensatory mitigation would be relieved by codifying the 1990 Mitigation MOA and 1992 supplemental guidance, which contain qualifying language for their application in Alaska.
- Many commentors felt that all things considered, the existing approach to mitigation in Alaska would be preferable to a strict no net loss of wetlands policy. Others expressed the concern that the existing approach is too flexible, and thus not protective enough of the environment.

**ANALYSIS AND PROPOSED RECOMMENDATIONS FOR DISCUSSION**

The record of the Section 404 program in Alaska relative to the goal of no overall net loss of wetlands demonstrates the flexibility of the goal to reflect the circumstances of the State. For example, in Fiscal year 1993, the Alaska District Corps authorized the filling of 1,343 acres of wetlands while only 333 acres of compensatory mitigation were required. This amounted to a net loss of 1,010 acres of wetlands. Experience has demonstrated that Alaskan climate and geography, among other factors, generally preclude attainment of no net loss of wetlands through restoration and creation of wetlands. Therefore, identifying and implementing practicable forms of impact avoidance and minimization that work best in Alaska are the primary means by which wetlands losses are reduced. However, there remains a perception to be addressed that the no net loss of wetlands goal must be met on a permit by permit basis or must be met as a whole for the State.

Several provisions of the Administration's August 24, 1993, Wetlands Plan address concerns relative to the no net loss of wetlands goal. In addition, there are specific actions that the Federal agencies in Alaska recommend to address issues relative to the no net loss of wetlands goal.

**Administration Plan**

- Develop improved analytical tools for wetlands functional assessment. The Federal agencies will expedite development of a new approach for wetland functional assessment known as the Hydrogeomorphic Classification System (HGM). The HGM methodology is being developed by the agencies and the academic community as an improved analytical tool to make timely and accurate assessments of wetlands functions.

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- Endorse the use of mitigation banking under the Section 404 regulatory program. The Administration endorses the concept of mitigation banking -- the restoration, creation, enhancement, and, in certain circumstances, preservation of wetlands expressly for the purpose of providing compensatory mitigation, in advance of discharges into wetlands authorized under the Section 404 regulatory program.
- Issue mitigation banking guidance. EPA and the Corps, in coordination with U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the Soil Conservation Service have issued guidance to their field staff to clarify the manner in which wetlands mitigation banking is appropriately used within the Section 404 regulatory program.
- Issue mitigation planning guidance. The Corps, in coordination with EPA, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, will issue guidance to their field staff to clarify the requirements for developing compensatory mitigation conditions in Section 404 permits.

Alaska Specific Actions

- Develop interagency guidance to clarify how physical circumstances in Alaska such as the extent and type of wetlands affect the determination of "practicability" under the Guidelines mitigation requirements. The Corps and EPA, in coordination with the U.S. Fish and Wildlife Service and National Marine Fisheries Service, would develop guidance that clarifies existing mitigation requirements under the Section 404(b)(1) Guidelines as they apply in Alaska. The guidance would explicitly consider how circumstances in Alaska, such as the extent of wetlands and the relative opportunities to restore wetlands, affect the determination of "practicable" under the Guidelines. The guidance would reflect experience in Alaska that demonstrates that minimization of impacts is the primary mitigation tool and that avoidance and compensatory mitigation are required only where practicable, consistent with the clarification of this term for Alaska.
- Recommend that the Executive Order on wetlands articulate the flexibility in implementing the Administration's goal of no overall net-loss of the Nation's wetlands to reflect particular circumstances in Alaska. The Federal agencies in Alaska would recommend to the Administration's Interagency Wetlands Working Group that the Executive Order on wetlands under development contain appropriate language relevant to implementing the National goal of no overall net loss with regard to the regulatory program in Alaska. Similar to the text contained in the National Wetlands Policy Forum, language for the Executive Order recommended by the Federal agencies in Alaska would emphasize that the

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goal of no overall net loss should be implemented in a manner that effectively reflects regional circumstances.

- Develop Interagency Guidance to Clarify how Circumstances in Alaska such as the Abundance of Wetlands can Reduce Opportunities to Avoid Impacts to Wetlands and Affect how Rigorously Alternatives are Evaluated. The August 24, 1993 flexibility guidance should be shared with potential applicants to remove unnecessary fears and apprehension of the regulatory program. The Corps and EPA should clarify the guidance for Alaska by specifying when detailed alternative information is not required for the 404(b)(1) analysis (for example when there is no significant or easily identifiable difference in functional value of the proposed discharge site when compared with other sites within the general vicinity) and that compensatory mitigation would normally not be required for fill in areas with abundant low value aquatic areas.
- Develop accelerated restoration program for oil and gas projects. Accelerated restoration or rehabilitation prior to the deadline built into standard permits is a concept which would be further considered, particularly for the oil and gas industry (see Mitigation Sequence Issue Paper).
- Recommend written partnerships be established between the Corps and all interested stakeholders on Section 404. These documents would capitalize on the positive communications established during this Initiative, by clearly expressing mutually agreeable expectations and commitments associated with the Section 404 regulatory program. They would also describe communication networks to be established to better inform all constituencies of the purposes and procedures of Section 404.

ALASKA WETLANDS INITIATIVE  
ISSUE PAPER - 2

**SUBJECT:** Special Alaska Circumstances -- Legal Issues

**ISSUE:** How can the Section 404 program be best implemented in light of the Alaska Native Claims Settlement Act (ANCSA), Alaska National Interest Lands Conservation Act (ANILCA), and Statehood Acts?

**BACKGROUND:**

**General**

The Alaska Native Claims Settlement Act (ANCSA) (43 USC 1601) was signed into law on December 18, 1971. This statute gave 44 million acres of land to Alaskan Natives as part of a settlement of claims made by Alaskan Natives against the Federal government. In essence this settlement was to be accomplished without establishing any permanent racially defined institutions, rights, privileges or obligations, without creating a reservation system, and without adding to the categories of property and institutions enjoying special tax privileges or to legislation establishing special relationships between the U.S. Government and the State of Alaska. This statute was very specific to ensure that no provision of the statute would replace or diminish any right, privilege, or obligation of Natives as citizens of the U.S. or of Alaska.

With approximately 209 rural Alaska villages, most of which are only accessible by air or water, infrastructure development such as potable water and sanitation systems, roads, housing, schools, medical and transportation facilities are basic or non-existent. Combined with this lack of basic services and facilities, the isolated nature of these communities and the unavailability of acceptable building sites has caused difficulties associated with public health and sanitation, transportation opportunities, and economic development.

Permit records for the past ten years of activities requiring Corps individual permits where the applicant was a Native corporation, village, or individual shows that of 195 individual permit applications evaluated, 184 were issued, 10 were withdrawn, and one was denied without prejudice. None were denied with prejudice. Denial without prejudice means the applicant failed to obtain some other permit or authorization, and therefore could not receive a Section 404 permit. In addition, during this same period of time, over 440 discharges of dredged and/or fill material were authorized in Native

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communities by nationwide and regional general permits.

The Alaska National Interest Lands Conservation Act (ANILCA), passed in 1980, set aside 100 million acres for conservation system units within Alaska. ANILCA provisions on regulation of public lands generally address lands reserved for protection under the Act. When Federal regulation of those lands is addressed, it is in the context of fish and wildlife resources (and not other environmental laws) and to ensure that subsistence rights will be protected.

Section 6 of the Statehood Act (48 USC 21) entitled the State of Alaska to select lands for the purpose of furthering the development and expansion of communities. These lands were to be adjacent to established communities or suitable for prospective community centers and recreation areas. The Statehood Compact (Section 4 of the Statehood Act) deals with submerged lands and their conveyance to and ownership by the State of Alaska.

Due to Alaska's unique climatological and physiographic conditions, approximately 174.6 million acres (45.5%) of the State's 384 million surface area acres are classified as wetlands by the U.S. Fish and Wildlife Service (USFWS). Although no comprehensive wetlands mapping effort has been completed for the state, estimates of wetlands acreage on public and private lands have been made based on a USFWS statistical study of wetland acreage. Approximately 154.9 million acres (88%) of Alaska wetlands are under public management with 114.6 million acres managed by the Federal government in national wildlife refuges, national parks, national forests, and other Federal lands, and 40.3 million acres managed by the State of Alaska.

Wetlands in both public and private ownership are subject to Corps jurisdiction under Section 404. Many wetlands on public lands are subject to various development pressures. In fact, permits are issued on a regular basis for a variety of projects within these areas. Privately owned wetlands total 19.7 million acres including Alaska Native lands parcels. The State of Alaska estimates that 49 million acres (13%) of the total State's surface area is privately owned, including Native corporation lands. Approximately 104 million acres (28%) of Alaska's surface area is owned by the State.

**Stakeholder and Public Comments**

A number of commentators representing diverse interests noted that because of compacts between the Federal government and the State, and the Federal government and Native landowners, there should be an exemption(s) from compensatory mitigation or all requirements of Section 404. In general, however, commentators felt that the current process, in light of the Alaska specific statutes, is flexible enough to allow development and provide adequate protection of wetlands. The comments are

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summarized as follows:

- Some commentors stated that because ANCSA required certain lands be selected in core village townships and around rural Native village areas (that in many cases were predominantly wetlands), it was not fair or consistent with the compact to require Native Corporations to provide compensatory mitigation to fulfill a "no-net-loss" policy. The basic concern is that since providing rural Alaska with the necessities of public health, sanitation, housing, and transportation is difficult enough, it should not be further complicated with compensatory mitigation requirements, that only add costs to development and may have questionable environmental benefits.
- Exempt ANCSA lands from Federal wetlands management restrictions or provide additional land and compensation to ameliorate the impacts of wetland restrictions resulting from a possible future strict no net loss policy.
- Exempt ANCSA Corporations from all wetland restrictions except for rare and highest value wetlands.
- Require ANCSA Corporations to meet wetlands avoidance and minimization requirements but exempt ANCSA Corporations from any wetland sequencing strategy that includes compensatory mitigation, mitigation banking, or other compensatory consideration.
- Alaska Native landowners should be represented at the local, state, and Federal levels in the development of any statutory or regulatory process affecting wetlands policy on ANCSA lands.
- National wetlands policy is so egregious to ANCSA Corporations that it is necessary to reevaluate the Federal philosophy that ANCSA Corporations must assimilate the entire cost of environmental laws without adjustments to the ANCSA settlement.
- The Section 404 permitting process must be reevaluated to incorporate the guarantees provided to the citizens of the State through the State Compact with the Federal government covering the terms and conditions for Alaska becoming the 49th State.
- Compensatory mitigation constitutes an unfair taking of native lands. Regulations should recognize and protect the property rights of private property owners.
- Regulations should not conflict with the economic goals and the multiple use

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promise of ANCSA.

- Protection of wetlands should not impede small villages and communities from attaining safe water and sewage systems, lengthening air strips, expansion of port facilities, building schools, clinics, and housing.
- There should be a total exemption from the Section 404 process for Statehood Compact lands and/or lands set aside under ANCSA, or one that would exempt the affected parties of the requirement for compensatory mitigation.
- Application of an exemption to ANCSA and/or State lands according to wetland values (low value wetlands exempted).
- An exemption for native villages and/or Capital Improvement Projects in rural Alaska communities.
- Requiring the Federal government to pay for compensatory mitigation costs.
- The Federal government should pay monetary compensation to Native villages and/or corporations for economic benefits not realized due to stringent wetland regulations.
- The Federal wetland policy plan is going to make compensatory mitigation and sequencing, in general, more flexible.
- The current program couldn't be any more flexible.
- If there is no present requirement and there would not be a future requirement for across-the-board compensatory mitigation on low value wetlands, then there isn't a problem.

**ANALYSIS AND PROPOSED RECOMMENDATIONS FOR DISCUSSION**

The Clean Water Act Section 404 requirements apply to all waters of the U.S., including wetlands, regardless of ownership. Authorization from the Corps is required under Section 404 for any project that involves the discharge of dredged or fill material into waters of the U.S., including wetlands. However, individual permits are not always required for discharges of dredged or fill material. The Corps has the authority to issue general permits (GP) on a nationwide, regional, and State basis for those categories of activities in wetlands and other waters of the U.S. that are similar in nature and that will have only minimal adverse environmental effects, either individually or cumulatively. They also are used to avoid unnecessary duplication of regulatory control exercised by

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another agency, provided that the environmental consequences of the action are individually and cumulatively minimal.

Although land ownership in Alaska does not convey an exemption from provisions of the Clean Water Act, the general permitting process offers opportunities to minimize the extent to which individual permits are required for regulated activities on these lands. The Alaska District Corps has issued 21 GPs for Alaska. Residential construction in virtually all rural villages is authorized by GP and road building is authorized in many. Some towns and villages have GPs for both residential and commercial fills. If an activity is authorized by a GP, work can proceed, without first applying for an individual authorization, as long as it complies with the conditions of the GP. However, some GPs have a preproject reporting condition.

Although no specific provisions of the Administration's August 24, 1993, Wetlands Plan address concerns relative to Alaskan specific statutes, two principles of the Plan are relevant and are noted below. There are specific actions that the Federal agencies in Alaska recommend to address issues relative to Alaskan specific statutes.

#### Administration Plan

The Administration's August 24, 1993, Wetlands Plan established five principles to guide the specific provisions of the Plan. Two of these principles which are pertinent to this issue are:

Regulatory programs must be efficient, fair, flexible, and predictable, and must be administrated in a manner that avoids unnecessary impacts upon private property and the regulated public, and minimizes those effects that cannot be avoided, while providing effective protection for wetlands. Duplication among regulatory agencies must be avoided and the public must have a clear understanding of regulatory requirements and various agency roles; and

The Federal government should expand partnerships with State, Tribal, and local governments, the private sector and individual citizens and approach wetlands protection and restoration in an ecosystem/watershed context.

#### Alaska Specific Actions

- Increase use of Alternate Permit Procedures (APP). The Alaska District Corps would increase the use of APPs, which may be applied in those instances where there are minimal impacts and/or adequate environmental safeguards in order to reduce delays and/or avoid duplication of efforts with other agencies with

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programs that regulate activities also regulated by the Corps. (see Alternative Permit Process Issue Paper)

- Propose the development of additional General Permits (GP). The Alaska District Corps would propose GPs for log transfer facilities statewide, residential and community fills, float camps associated with logging activities, residential fills in Klawock, and fills for oil and gas activities on the North Slope. The Alaska District would identify and develop additional GPs with appropriate environmental conditions to streamline authorizations for discharges into waters of the U.S. (see Alternative Permit Process Issue Paper)
- Continue to consider the public interest in Section 404 permit actions. The Corps and EPA would continue to consider the basic public interest for rural Alaska needs for basic services and facilities, subsistence rights, and Capital Improvement Projects in permit decisions and regulate in a manner which is reasonable and appropriate (e.g., propose general permits for health related activities).
- Continue to develop regionalized General Permits based on comprehensive wetlands plans. The Corps and EPA would continue to develop additional regionalized general permits for areas with abundant "low value" wetlands, based on wetlands management plans conducted on a watershed basis.

ALASKA WETLANDS INITIATIVE  
ISSUE PAPER - 3

**SUBJECT:** Special Alaska Circumstances -- Physical Environment

**ISSUE:** How can the Section 404 program be best implemented to reflect the physical environment and wetland characteristics in Alaska?

**BACKGROUND:**

General

The Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) jointly define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas". The Corps and EPA currently utilize a three parameter approach based on hydrology, soils, and vegetation to identify and delineate jurisdictional wetlands as described in the Corps 1987 Wetlands Delineation Manual. The wetland criteria for the three parameters are applicable to all areas of the country. At the request of the U.S. Congress, the National Academy of Science's National Research Council has established an 18-member committee to review and evaluate the scientific aspects of wetland identification and characterization which may include regionalization. Two representatives of the committee are from Alaska. The committee's report is expected by September 30, 1994.

Alaska wetlands account for 63% of the Nation's wetlands acreage. Due to Alaska's unique climatological and physiographic conditions, approximately 174.6 million acres (45.5%) of the State's 384 million surface area acres are classified as wetlands by the U.S. Fish and Wildlife Service (USFWS). Most of Alaska's wetlands (98.7%, or 172.5 million acres) are classified as palustrine wetlands. Palustrine wetlands are non-tidal wetlands dominated by open water, aquatic beds, trees, shrubs, persistent emergents, mosses and/or lichens. Alaska palustrine wetlands types include bogs, marshes, swamps, muskegs, moist and wet tundra, and forested wetlands. The majority of Alaska wetlands (114.5 million acres) are shrub type wetlands. Forested wetlands in Alaska account for 13.3 million acres. Over half of Alaska wetlands are underlain by permafrost. In contrast, the lower 48 states' palustrine wetlands comprise 97.7 million acres. The majority of palustrine wetlands in the lower 48 states are forested (51 million

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acres) and only 15 million acres are shrub type wetlands.

The distribution of wetlands in Alaska varies considerably within the State's physiographic regions. For example, the following areas contain these wetland percentages (percent of total land area) as estimated by the USFWS: Arctic Coastal Plain (83%); Yukon-Kuskokwim Delta (78%); Yukon Flats (38%); Southeast Alaska lowlands (35%); Cook Inlet - Susitna Lowland (28%); Alaska Range (7%); and, Southeast Alaska Mountains (1%). Some wetland types are relatively rare. For example, coastal salt water marshes in Alaska comprise only 360,000 acres and are considered important habitat for fish and wildlife species. In addition, permanently flooded grass marshes cover approximately 2% of the Arctic Coastal Plain and are particularly important as feeding areas for migratory waterfowl.

Alaska's wetlands provide many benefits such as food and habitat for wildlife, fish, and shellfish species, natural products for human use and subsistence, shoreline erosion and sediment control, flood protection, and opportunities for recreation and aesthetic appreciation. It is recognized, both in Alaska and nationwide, that not all wetlands perform all these functions, but most wetlands contribute to one or more in varying degrees, resulting in varying degrees of social value, importance, and ecological significance.

According to the USFWS's report on the "Status of Alaska Wetlands" (in press), high-value tundra wetlands in northern and western Alaska are prime breeding grounds for many shorebirds. Waterfowl species which are dependent on Alaska wetlands include more than 70 thousand swans, one million geese, and 12 million ducks. This includes more than half the continental populations of tundra and trumpeter swans and all or most of the continental populations of eight species or subspecies of geese. In recent years, Alaska wetlands have on an average supported 30% of the continental populations of northern pintails, 24% of America widgeons, 19% of scaup, 18% of canvasbacks, and 13% of green-wing teal. This percentage increases in drought years in prairie states and provinces.

Coastal and riparian wetlands are critical to many marine, freshwater and anadromous species including salmon, crab, shrimp, forage species, and mollusks. Wetland habitats support critical early life stages of marine species that later mature and are harvested offshore. Coastal wetland-dependent species are vital to Alaska's sport and commercial fisheries. Alaska seafood harvest is the largest and most valuable of any state. In 1991, over 5 billion pounds of seafood was harvested at a wholesale value of over 3 billion dollars. Total participation, in terms of the number of permit holders and crew, was 50,638 persons in 1989. Wetland types adjacent to rivers maintain and regulate stream flow in channels used by fish. Salmon that move between freshwater and saltwater are dependent upon both coastal and riparian wetlands. The annual

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salmon commercial fisheries in Alaska are valued at \$600 million and employ approximately 22,000 people. Coastal management districts in Alaska contain over 80% of the State's population.

According to the USFWS's 1990 report to Congress, an estimated 200,000 acres of Alaskan wetlands have been lost since the 1780's, with most losses occurring in and around populated areas, transportation corridors, and development areas for oil, gas, mineral, agricultural and timber resource development. Significant localized wetland losses have been noted by the USFWS in some areas (e.g., between 1950 and 1990 Anchorage lost 52.7% of its wetlands).

Currently the USFWS is inventorying Alaska's wetlands through the National Wetlands Inventory (NWI) program. Approximately 26% of the State has been mapped. The USFWS is mandated to complete the NWI effort for the entire State by the year 2000. These maps provide resource managers and the public with information on the size, location, and general characteristics of Alaska wetlands and are used to produce statistical data on the status and trends of Alaska wetlands.

#### **Stakeholder and Public Comments**

A number of concerns, observations, and recommendations were expressed on how the Section 404 program and the Administration's August 24, 1993, Wetlands Plan could best be implemented to reflect Alaska's unique physical environment and wetland characteristics. Comment topics addressed included changes to wetland delineations procedures, extent and nature of Alaska wetlands, lack of buildable uplands, wetland functions and values, and wetland categorization and ranking.

- In general, commentors agreed that protection of high value wetland resources is important, but noted that some wetlands are more important than others. Commentors expressed a need for a single classification and categorization method to be uniformly or regionally applied throughout the state. Commentors noted the lack of a generally accepted, uniform set of criteria defining high-, medium-, and low-value wetlands. Several commentors suggested that attributes or types of high value wetlands should be identified, and that there was a need to include local knowledge in assessments of wetland functions and values, related to permit decisions. A few commentors opposed a ranking categorization and recommended that the Corps should not adopt a high-value/low-value wetlands classification system for Alaska, but continue its present policy, since too little is known about the functions and values of Alaska wetlands.
- Some commentors expressed concern over how the Corps determines or delineates wetlands, the need to regionalize wetland delineation procedures not

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only from a national perspective but within the State, and the need to develop delineation procedures to exclude certain types of wetlands (e.g., forested western hemlock and permafrost wetlands) based on specific regional criteria and regional data within Alaska. One commentator recommended changes to the delineation manual for Alaska's coastal forest regions to limit wetland delineation determinations to only those areas greater than two acres and where obligate and facultative-wet plant species comprise more than 50% of the vegetation. Another commentator recommended that the facultative vegetation category is too broad and the national list of plant species that occur in Region A (Alaska) wetlands needs to be studied with the possibility that some species may be removed. One commentator believed there should be a scientifically based jurisdictional definition of Alaska wetlands which distinguishes them from those in more temperate climates. Another commentator recommended that the definition of jurisdictional wetlands be amended to remove or reduce regulation of isolated wetlands. Some commentators stated that permafrost wetlands should not be automatically classified as wetlands solely because they include "tundra like" vegetation or the tundra mat has a high moisture content of frozen water.

- Some commentators noted that many bush communities (western, northwestern, North Slope, etc.) are predominantly located on or surrounded by wetlands and that any development whether for basic public services (sewer, water, schools, etc.) or business often necessitates wetland use. The abundance of Alaska wetlands in combination with Alaska's short building season, leads some to claim that the Section 404 program places a heavier burden on Alaska than the rest of the country. These comments were often couched in future terms, that is, the current system with some added efficiencies is working well. Fears for restriction of needed development were based on the potential application of a no net loss policy without flexibility for Alaska's conditions and unique physical environment.
- Some commentators stated that there is no valid reason to exempt Alaska's wetlands from the nationwide regulatory scheme. The existing Section 404 regulatory program is sufficiently flexible to accommodate Alaska conditions and that an exemption is not needed. Other commentators stated that due to the nature and extent of Alaska wetlands, lack of buildable uplands, and the high percentage of wetlands in conservation units, special consideration should be given under Section 404 for Alaska in terms of mitigation sequencing, permitting, and no net loss goals.
- Many commentators recommended acceleration of the USFWS's National Wetlands Inventory in Alaska.

## ANALYSIS AND PROPOSED RECOMMENDATIONS FOR DISCUSSION

Developing a comprehensive wetland ranking system requires extensive and detailed information on wetland functions, consideration of regional influences and uses, and scarcity or abundance of wetland types, both locally and regionally. While "a priori" (high-, medium-, or low-value) categorization and ranking systems appear attractive, a national a priori categorization and ranking system is unworkable due to technical, fiscal and environmental implications. There is currently no scientific basis for a nationwide ranking of functionally distinct and diverse wetland types; any such scheme would be extremely difficult to develop and would likely require many years to complete.

In contrast to a national a priori categorization system, opportunities exist for regional categorization in local or regionally developed advanced planning studies on a watershed basis. Local advanced planning studies can provide a scientifically sound and workable framework for early consideration of variations in wetland functions within the Section 404 program (see Advance Planning and Watershed Management Issue Paper). Appropriate functional assessment techniques can be applied within a planning or watershed area. Reasonably foreseeable development needs can then be superimposed upon wetland inventories and functional assessments to identify appropriate regulatory responses. Highly functional or ecologically significant ("high value") wetlands can be identified as deserving a very high standard of protection; conversely, wetlands with limited function and ecological significance ("low value") can be identified as appropriate for general permits or other regulatory streamlining methods.

Examples of areas where the Corps has examined local wetland information and has issued GPs to fill low value wetlands include Anchorage, Bethel, Fairbanks, Sitka, Homer, and several residential development GPs for rural regions of Alaska (see Alternative Permit Process Issue Paper). In addition, mapping efforts have been conducted that rank wetlands by functions and values at various Alaska locations (e.g., Homer, Kenai River corridor, Fairbanks, Anchorage, and Juneau).

The argument for exclusion of forested wetlands dominated by western hemlock or permafrost wetlands presume that only one of the three parameters for soils, vegetation, or hydrology is used to provide a jurisdictional wetland determination. To the contrary, the 1987 Wetland Delineation Manual requires that all three parameters must have positive field indicators for an area to be considered a jurisdictional wetland. Regionalization of the wetland delineation manual is considered an important issue in providing regional criteria and indicators consistent with National criteria for wetland determination. The National Academy of Science's (NAS) committee is currently reviewing and evaluating the scientific aspects of wetland identification and characterizations. It would be premature to propose changes prior to completion of the NAS study. As stated in the Administration's August 24, 1993, Wetlands Plan, if the

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Federal agencies jointly conclude that the 1987 manual should be revised to respond to recommendations of the NAS study, any proposed changes will be available for public review and comment, and would be field tested prior to final adoption to determine their impact under regional conditions.

The Administration's August 24, 1993, Wetlands Plan, includes several initiatives that will result in improvements to the wetlands program in Alaska. In addition, there are specific actions that the Federal agencies in Alaska recommend to address issues relative to Alaska's physical environment and wetland characteristics.

**Administration's Wetland Plan**

- Develop improved analytical tools for wetlands functional assessments. The Federal agencies will expedite development of a new approach for wetland functional assessments known as the Hydrogeomorphic Classification System (HGM). The HGM methodology being developed by the agencies and academic community is an improved analytical tool to make timely and accurate assessments of wetland functions.
- Issue Section 404(b)(1) Flexibility Guidance. On August 24, 1993, EPA and the Corps issued guidance to their field staff to clarify and standardize implementation of the flexibility afforded by the 404(b)(1) Guidelines to make regulatory decisions regarding the analysis of project alternatives based on the relative severity of the environmental impact of proposed discharges. The guidance clarifies that small projects with minor impacts are subject to less rigorous permit review than larger projects with more substantial environmental impacts.
- Encourage Advance Planning Efforts. The Federal agencies will provide technical assistance for advance planning efforts addressing wetlands conservation, and will counsel planning participants on methods to link local or regional planning with Section 404 regulatory decision making. Wetland categorization will be supported within the context of an approved advance plan to provide landowners with early identification and characterization of wetlands on their property, streamlined permit review, and more flexible mitigation sequencing where appropriate. The Administration recommends changes in the Clean Water Act to provide incentives (financial and regulatory) for wetland planning efforts. Congress should provide the Federal agencies the authority to use grant monies to fund both the development and implementation of these plans.
- Regionalize General Permits for Activities in Defined Categories of Waters. Nationwide Permit 26 (NWP 26) authorizes certain discharges into isolated waters

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and waters above the headwaters point on streams. The Corps will undertake, in close coordination with relevant State and Federal agencies, a field review and evaluation of NWP 26 for the purpose of regionalizing and improving its use. Revisions to NWP 26 will focus on ensuring that appropriate levels of wetlands protection are provided through national and regional terms and conditions.

- Support the use of the 1987 Wetland Delineation Manual by the Corps, EPA, Soil Conservation Service, and USFWS pending evaluation of the NAS study. If the Federal agencies jointly conclude that the 1987 manual should be revised to respond to recommendations of NAS, any proposed changes will be the subject of a process that will provide full opportunity for public comment and field testing.
- Recommend that Congress add examples of "isolated water" to the statutory definition of wetlands. From a scientific standpoint, isolated wetlands perform many of the same vital functions performed by other aquatic areas widely accepted as wetlands.
- Increase state, local, and tribal roles in wetlands protection and regulation. A number of the Administration's wetland plan tasks specifically address increased State, Tribal, and local government's role and involvement into the wetland decisionmaking, endorses development of State, regional and local wetland conservation plans, encourages development of Programmatic General Permits (PGP) with adequate safeguards that protect aquatic resources, and encourage State assumption of the Section 404 program including recommendations to Congress to authorize partial assumption of the Section 404 program as an interim step towards full assumption.

#### Alaska Specific Actions

- Evaluate the need for further Alaska specific regionalization of the 1987 wetlands delineation manual. After completion of the National Academy of Sciences study on wetlands delineation, the Federal agencies would fully evaluate the need for further Alaska specific regionalization of the 1987 wetlands delineation manual. Substantive changes to the 1987 manual would be made only after the citizens of Alaska have had an opportunity to comment on proposed changes and after appropriate field testing.
- Continue to develop regionalized general permits (GP). The Corps and EPA would continue to develop regionalized general permits (GP) based on wetland management plans for areas with abundant low value wetlands where individual and cumulative impacts are considered minor. (see Alternative Permit Process Issue Paper)

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- Develop the Hydrogeomorphic Classification System within Alaska for wetland functional assessments. The Corps and EPA would work to develop the Hydrogeomorphic Classification System within Alaska for wetland functional assessments. The Hydrogeomorphic classification system would not supersede the NWI mapping classification, but would provide a standardized analytical tool to make timely and accurate assessments of wetland function which would assist agencies in assessing the relative severity of environmental impacts. Development of regionalized classifications would assist in identifying wetlands that are highly functional and ecologically significant that deserve a high standard of protection, and conversely, identify wetlands with limited function and ecological significance where minimal environmental harm can be expected and where regulatory streamlining methods such as general permits may be appropriate.
- Provide Alaska priority status in terms of funding for development of Wetland Conservation Plans. EPA would provide Alaska priority status in terms of funding under the Wetlands Grant program and Water Quality 104(b)(3) programs for development of Wetland Conservation Plans. (see State, Local, and Native Roles and Wetlands Inventory, Classification, and Categorization Issue Papers)
- Provide technical assistance on wetland categorization for advanced planning efforts. The Corps and EPA together with the USFWS would, within funding and manpower constraints, provide technical assistance on wetland categorization for advanced planning efforts addressing wetland conservation, and would counsel planning participants on methods to link local and regional planning with the Section 404 regulatory program. Where appropriate partnership agreements with local, regional and State offices would be established.
- Supplementally fund acceleration of the NWI mapping efforts in certain areas. The Corps and EPA together with the USFWS, within funding and manpower constraints, would continue to supplementally fund acceleration of the NWI mapping efforts in areas with high potential for development and/or areas that possess high wetland values, or ecologically significant. This would facilitate needed mapping, characterization, and tracking of wetland loss trends. Prioritize NWI mapping efforts toward the above areas, coupled with expedited development of a classification system for Alaska would greatly facilitate characterization of wetlands functions and the permit evaluation process.

ALASKA WETLANDS INITIATIVE  
ISSUE PAPER - 4

**SUBJECT:** State, Local, and Native Roles

**ISSUE:** How can the role of State and local governments, and Native interests be improved in the protection and regulation of Alaska's wetlands?

**BACKGROUND:**

**General**

The Clean Water Act Section 404 program currently provides several mechanisms that allow participation by State and local governments, and Native interests to protect and manage Alaska's wetlands. These mechanisms include the development of local wetland management plans, special area management plans (SAMP), proposals for regional and programmatic general permits (PGP), advanced identification of areas either generally unsuitable for disposal sites or possible future disposal sites (ADID), and provisions for State/Tribal assumption of the Section 404 program (see Advance Planning and Watershed Management Issue Paper).

Other opportunities for local community involvement in the regulatory program exist in Alaska as well. For example, providing comments on Corps' Public Notices for individual permit applications is one mechanism for public involvement (see Individual Permit Process Issue Paper). Public notices also provide any commentator the opportunity to request a public hearing on a proposed project. State permitting reviews provide the Corps with information as to the local community position on a given action. Each of these activities serves to identify legitimate Federal interests and provides a basis for satisfying those Federal interests in the most appropriate and efficient way. Where Federal involvement or oversight is not mandated by law, local interests govern.

**Stakeholder and Public Comments**

A number of observations, concerns, and recommendations in regard to how the role of State and local governments, and Native interests can be improved in the protection and regulation of Alaska's wetlands were raised by the stakeholders and public commentators. The divergent comments included those that stated the State and local governments and native groups need a stronger voice in the decision-making process to those that stated there is general distrust of the State and local governments' ability to carefully implement their regulatory authority. The comments are summarized

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as follows:

- Some commentors express concern that statutory or regulatory schemes for effecting wetlands policy on ANCSA private lands should ensure the involvement of Alaska Native land owner representatives in the policy formation, statutory and regulatory development process, planning, funding, inventory, management and representation on advisory entities at the local, State, and Federal levels; or as an alternative, Alaska Native lands should be exempted from the wetland policies, laws and attendant regulations.
- Other commentors suggest changes to the Clean Water Act that will support assumption of the wetlands permitting program by the State, allow exemptions for various activities and land status, and provide more Federal support for State and local participation in management of wetlands.
- Some commentors state that assumption of the Federal permitting authority for wetlands should be allowed only after demonstrating that the program's criteria for assessing the potential impacts of wetland development on fish and wildlife and the program's requirements for mitigating those impacts are the same as, or more stringent than, Federal requirements.
- Of concern to many was that the Section 404 program in Alaska is such that it unduly disadvantages Native communities and rural Alaskans and precludes providing such basic needs as roads, sanitation facilities, and clean drinking water supplies.
- A Native stakeholder requested an Alaska-wide exemption from Section 404 regulation, exemption for Native-owned property, exemption from compensatory mitigation, and other forms of regulatory "relief".
- Some commentors suggested that more resources should be spent assisting local governments by providing input for the process of identifying functions and values of wetlands.
- Some commentors maintained that improvement is needed to the process by which the Corps incorporates local input into the review process. Too often review and comments of a project made by a local body are discounted or ignored by the Corps in its final review and decision making process.

**ANALYSIS AND PROPOSED RECOMMENDATIONS FOR DISCUSSION**

Existing mechanisms provide opportunities for State and local governments and

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Native groups to participate in the Section 404 regulatory program. Experience has indicated that certain of these mechanisms are more likely than others to be practicable in Alaska at this time. It is appropriate to encourage State and local governments and Native groups (through technical assistance and potential grant funding) to pursue development of comprehensive aquatic resource management/conservation plans and associated regulatory mechanisms so that in the future, the opportunity for programmatic general permits would exist.

Several provisions of the Administration's August 24, 1993, Wetlands Plan address concerns relative to the role of State and local governments and Native interests in the protection and regulation of Alaska's wetlands. In addition, there are specific actions that the Federal agencies in Alaska recommend to address issues relative to State, local and Native roles.

#### Administration Plan

- Assist States, Tribes, and Local Governments in Taking a Stronger Role in Wetlands Protection. The Administration will provide technical and financial assistance and guidance to States, Tribes, and local governments to assist them in taking more of a leadership roles in wetlands protection, e.g., through State/Tribal assumption of Section 404, development of comprehensive State/Tribal Wetland Conservation Plans, application of State/Tribal Section 401 Certification authority to wetlands, development of Programmatic General Permits under Section 404, and better coordination between State, Tribal, and Local permit programs and the Section 404 program.
- Provide Incentives for States, Tribes, and Regional and Local Governments to Integrate Watershed and Wetlands Planning. The Clean Water Act should authorize the development of State/Tribal watershed protection programs, requiring local and regional involvement and Federal approval of the State/Tribal programs. Wetlands should be incorporated into the overall watershed approach, with minimum requirements for wetlands protection and restoration planning. Approved watershed plans would receive a high priority for technical and financial support for activities such as mitigation banking, advance identification, and categorization under the Section 404 regulatory program. There would also be a high priority given to developing Programmatic General Permits that defer to local regulatory programs implementing approved watershed plans.
- Increase Deference to State, Tribal, Regional, and Local Wetlands Decision Making. The Corps will issue guidance which specifies the circumstances under which State, Tribal, regional, and local programs can effectively regulate Section 404 activities, through issuance of Programmatic General Permits (PGPs). The

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guidance will also clarify the safeguards required to ensure that these programs properly protect wetlands and other waters.

- Endorse State/Tribal Wetland Conservation Plans. Congress should endorse the development of State/Tribal comprehensive wetland plans, with the goal of supporting State and Tribal efforts to protect and manage their wetlands resources. EPA is currently funding the development of 22 State Wetland Conservation Plans; Congress should provide EPA the authority to use its Wetlands Grants Program to fund both their development and implementation (see issue paper 9).
- Encourage State/Tribal Assumption of Section 404. Congress should provide EPA the authority to use its Wetlands Grants Program to fund both the development and implementation of State assumption of the Section 404 program. In addition, Congress should authorize partial assumption of the Section 404 program by States and Tribes as an interim step toward full assumption. By authorizing partial assumption of discrete areas within State or Tribal jurisdictions, the State/Tribe can gain experience with the program on a smaller scale.
- Provide State/Tribes with Access to Wetlands Delineation Training. State and Tribal agencies will be encouraged to participate in the Federal interagency wetlands delineation training and certification programs to strengthen their abilities to conduct wetlands delineations, and to improve consistency in wetlands identification among the State and Federal wetlands programs.

Alaska Specific Actions

- Develop Regional General Permits. The Corps and EPA would focus additional efforts on developing regional general permits based on wetland management plans. The general permits should be developed in conjunction with the State and local governments to ensure their needs are fully recognized throughout the process. By basing the general permits on a previously agreed upon management plan the concern for misusing wetlands would be minimized and Federal interest and concerns would be satisfied by appropriate conditioning of the regional permit (see Alternative Permit Process Issue Paper).
- Develop Circle General Permits for Alaskan communities. General permits (GPs) could be developed for each recognized community in Alaska. All wetlands within study area watersheds of these communities (or "circles") would be evaluated using Advance Identification (ADID) procedures (see Wetlands Inventory, Classification, and Categorization Issue Paper). The ADIDs would

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identify low value wetlands and GPs would be developed to authorize community-endorsed activities solely within these low value wetlands. In developing these GPs, the Corps would ensure that the environmental consequences of anticipated community activities in low value wetlands would be individually and cumulatively minimal and in compliance with the Section 404(b)(1) Guidelines. The communities would administer the Circle GPs based on their individual needs and values. All development within waters of the U.S./wetlands not covered by the Circle GPs would be administered under applicable Corps regulations. (see Alternative Permit Process Issue Paper)

- Conduct Monitoring of Existing and Future Cumulative Wetland Impacts of General Permits. The Corps and EPA would focus additional efforts toward monitoring and determining cumulative impacts of existing GPs. This would provide information for evaluating GPs, aiding watershed planning, and formulating special area management plans (see Advance Planning and Watershed Management Issue Paper).
- Provide Technical Assistance for State Assumption. EPA would provide technical assistance to the State if the State wishes to pursue assumption of the Section 404 program. (see Advance Planning and Watershed Management Issue Paper)
- Recommend written partnerships be established between the Corps and all interested stakeholders on Section 404. These documents would capitalize on the positive communications established during this Initiative, by clearly expressing mutually agreeable expectations and commitments associated with the Section 404 regulatory program. They would also describe communication networks to be established to better inform all constituencies of the purposes and procedures of Section 404.

ALASKA WETLANDS INITIATIVE  
ISSUE PAPER - 5

**SUBJECT:** The Individual Permit Process

**ISSUE:** How can the Section 404 individual permit process be best implemented in a fair, flexible, and efficient manner in Alaska?

**BACKGROUND:**

**General**

Authorization from the Corps of Engineers is required under Section 404 of the Clean Water Act for any project that involves the discharge of dredged or fill material into waters of the United States, including wetlands. This is true regardless of whether the applicant is a private or government entity or whether the purpose of the proposed work is private or commercial. Authorization is also required pursuant to Section 10 of the Rivers and Harbors Act of 1899 for any project that involves the placement of structures in, or work affecting, a navigable waterbody.

Although an individual Section 404 permit is often required, authorization from the Corps for a discharge of dredged or fill material more commonly comes in a number of other forms. Many proposed activities are previously authorized by an existing nationwide or regional general permit. There are also Alternative Permit Processing procedures which may shorten the typical individual permit process (see Alternative Permit Process Issue Paper). The Corps also can verify that certain activities are exempt from Section 404 regulation. The Corps can determine if an activity meets the criteria for these authorizations or exemptions through a pre-application consultation.

If it is determined that an individual permit is necessary, an application form must be submitted with plans for the proposed work. The Corps then conducts a public interest review which considers the proposed work's impact on a minimum of 21 public interest factors. This review also includes requesting comments, by notifying the public and other regulatory or resource agencies of the proposed work through the issuance of a public notice. All comments received are then given full consideration and a determination of the extent of the impacts associated with the project is made. A combined Environmental Assessment/Decision Document, which includes a determination of compliance with the Section 404(b)(1) Guidelines, is then prepared, resulting in a decision to either issue the permit, deny the permit, or modify the proposal.

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through special conditioning, or revisions to the scope of work.

Permit decisions are generally made within 60-90 days from the date an application is complete. However, larger or controversial projects may take 120 days or more to evaluate. In rare cases it may take several years to complete the review. More lengthy permit reviews generally occur in instances when the project site is located in an environmentally sensitive area such as high value wetlands, there is strong opposition from the public or local governments, or it is determined that an Environmental Impact Statement is necessary. During Fiscal Year 1993 the Alaska District completed 71% of its evaluations of individual permit applications (271 issued, 17 denied) in 120 days or less. The average evaluation time was 109 days. However, the average evaluation time for all actions (both individual and general permits) issued or denied was 43 days.

**Stakeholder and Public Comments**

Commentors expressed concerns primarily toward the individual permit process, but some also noted problems with jurisdictional determinations. Although there was some recognition of recent improvements, there was a general consensus that the individual permit process took too long without concomitant environmental benefit. Not all commentors shared this opinion as some felt the process went too quickly with too little time for natives or rural Alaskans to provide comments.

- Many commentors characterized the permit process as being overly complex, slow, unpredictable and unfair. It was claimed that permits take too long to obtain; timing is compounded in Alaska by the short construction season; decisions are inconsistent; there exists no Federal clearing house or single deciding agency to implement the process; and it is unfair that the Corps does not provide an appeals process short of litigation.
- There was a general distrust for permit accounting statistics related not only to timing but also issuance/denial/withdrawal rates, mitigation/special condition requirements, and compliance/enforcement/ monitoring requirements. There was also a general recognition of differing needs/concerns between "big" development interests and the "mom and pop"/native development interests. Although statistics were often used to demonstrate a particular point of view, there was no attempt made to identify statistics or methodology of statistics collection that might have been or could be of mutual acceptance.
- Ways to improve timing of the individual permit process centered on stricter time limits for making a decision (a 60 day limit was suggested by some); the value of early coordination (preapplication coordination) for larger projects; advanced planning such as SAMPs and resource inventories/mapping (see Advance

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Planning and Watershed Management and Wetlands Inventory, Classification, and Categorization Issue Papers); applicant assistance ("mom and pop"/native applicants); applicant exit interviews/polls; closer coordination of permit time frames with the State's review; and general public education.

- One commentator compared Alaska District processing times with the national average and reported that Alaska time frames were shorter than the national averages.
- Suggestions for overall streamlining of the permit process included maximizing use of alternative permit processing procedures (see Alternative Permit Process Issue Paper).
- The fairness or equity of the permitting process was discussed in many contexts and included the timeliness aspects of a decision as noted above. The discussion touched on all aspects of the permit process and problem perceptions that existed even if no application was made. For example, it was stated that real estate values could be drastically affected by simply identifying a property as being subject to the 404 permit process. There was a general consensus that the Corps and EPA needed to do more to educate the public about the entire permit process and erroneous perceptions that are adversely affecting the public.
- Permit application requirements were considered excessive and beyond the capabilities of many, especially in the "bush" communities. Conversely, it was suggested that the Corps' public notices be improved with better project descriptions and plans. Concern was expressed regarding additional information requests either to complete an application (excessive or difficult information needed to complete the application) or for the decision process (for example, questions directed at having an applicant demonstrate that their proposal was the least environmentally damaging practicable alternative). It was suggested that the number of information requests be limited, and in writing.
- There was also concern regarding comments received and coordinated with permit applicants. It was suggested that comments be screened by the Corps and that only legitimate concerns (only substantive concerns that the Corps agreed with) be passed on and/or the Corps provide its position on the concern when passing it on to the applicant. There was also a belief that the Corps was having, or encouraging, applicants work things out with an objecting party. In an example cited in this regard, it was claimed that a reviewing resource agency requested compensatory mitigation for a proposed action and that the Corps left it up to the applicant to negotiate the issue directly with the resource agency.

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- The decision-making process was considered by some to be too vague, open-ended and unpredictable. In the interest of fairness it was suggested that evaluation requirements such as the practicability of alternatives test of the 404(b)(1) Guidelines should be clarified or deleted. For example, it was suggested that the Corps and EPA publish clearly written policy that an applicant would not have to address practicability or worry about compensatory mitigation requirements in abundant low-value wetland areas in Alaska. Others thought that full consideration was not being given to concerns of importance to their particular constituency. For example, native interests did not feel that wetland value determinations fully considered their values, and tourism interests did not believe that impacts (such as tourism access and aesthetics) were measured from their perspective.
- Concern was expressed about the administration's no-net-loss of wetlands goal and how a strict application of this goal could adversely affect future development in the State (see No Overall Net Loss of Wetlands Goal Issue Paper). There was considerable discussion of issues surrounding mitigation requirements of the program. Some thought the requirements were excessive, or that they were not given credit where it was deserved (for example, avoidance and minimization efforts prior to submittal of an application); others were of the opinion that not enough compensatory mitigation was being required in Alaska (see Mitigation Sequence and Compensatory Mitigation Issue Papers).
- Another concern was that there was not enough flexibility in the process for the unique circumstances that exist in Alaska. That a program structured for the Lower 48 was not workable in Alaska. Others asserted that there was too much flexibility in the program as it is currently administered citing the low denial and compensatory mitigation rates, the high number of regional general permits, and the numerous activities authorized by nationwide permits.
- Methods to improve the evaluation process and resultant findings included: information sharing such as use of centralized data bases, using documents or information prepared by others; recognition of human aspects of wetland value including native and recreational uses; the need to balance wetland/environmental protection with rural economic development needs and local native customs; consideration of rural/native time constraints (hunting/subsistence seasons) when requesting input on permit applications or proposed GP actions; more consideration of the local tax base, economic implications and local zoning determinations; use of consensus opinion; and an appeals process. Most thought an appeals process should be limited to applicant concerns (permit denials, objectionable conditions, jurisdictional determinations, etc.), while others thought that issuance and requested restrictions should also be

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subject to appeal.

- Other suggested improvements in the regulatory program included specific changes in laws and regulation, and improving the Corps' monitoring of permitted activities. Specific regulatory issues identified included: log-transfer facilities, mine tailing reservoirs, practicable alternatives, and whether to classify wetlands as "high" and "low" value. Increased planning, monitoring, and reporting to the public were proposed from several different viewpoints. Some commentors want an accounting of wetland impacts, compliance with permits, or cumulative impacts by the Corps; this might include pre-permit site visits, more training in wetland delineation, and increasing post-construction site visits. It was also suggested that third-party agreements be monitored and considered as mitigation in the 404 permit review.
- It was further suggested by some that the government reimburse property owners in cases of permit denial. One party suggested this apply to any loss of property value because of program implementation or public perceptions of the program. It was stated by some that permit denials, time delays, costly conditions (including compensatory mitigation) should be considered a "takings" and that the Federal government should compensate applicants accordingly. Some also felt that private property owners had the right under the U.S. Constitution, to do what they saw fit on their private property and that the government had no right to interfere.

#### ANALYSIS AND PROPOSED RECOMMENDATIONS FOR DISCUSSION

Permit application and public notice requirements are established by law and/or regulation. Minimum application requirements are laid out in the Corps' pamphlet EP 1145-2-1, May 1985, Regulatory Program Applicant Information. The pamphlet explains how to fill out a permit application, addresses what information and drawings are required and provides sample drawings. The Alaska District supplements the pamphlet with a check list and guidance to help applicants complete their drawings. Corps public notices must contain sufficient information to give a clear understanding of the nature and magnitude of the activity in order to generate meaningful comments. The public notice must be issued within 15 days of receipt of a complete application. The Corps cannot withhold the public notice for information needs exceeding minimal requirements. The Alaska District strongly encourages pre-application consultation for all larger projects. The District also prepares a preliminary 404 (b)(1) evaluation for Section 404 permit applications prior to going to public notice and gives the applicant an opportunity for a pre-application consultation prior to considering the application complete when it appears the application may not conform to the guidelines. Also, when informing an applicant that their project would soon go to public notice the District routinely notifies an applicant as to what information needs have been identified to complete a review of

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the project.

The District has worked with the State to coordinate the timing of the State and Federal review of projects. The States coastal zone questionnaire is included with all Corps application packages; the Corps and the State share the lead for setting up pre-application coordination meetings with interested State and Federal resource agencies; the State has agreed to accept the Corps application as application for State 401 Water Quality Certification whenever the Corps determines the activity could result in a discharge to Waters of the U.S.; the District includes State public notices with its public notice and handles State legal notices (but not payment for) for the activity; the District mails an advance copy of complete applications to the State 401 and Coastal Zone Management (CZM) agencies prior to going to public notice; the District notifies the CZM offices of all actions advertised the previous week; and the State has agreed to accept the District's determination for minor permit modifications subject to expedited review (the State may reverse this determination and require a full State review whenever they determine this to be appropriate). The District remains open to further suggestions to improve this coordination.

As noted above, many commentors indicated that the Corps individual permit process took too long. As part of the Alaska Wetlands Initiative the Alaska District mailed a survey to all applicants within the last five years and asked the applicants (over 1500) to rate the program. As of this writing over 400 responses have been received and the most common complaint has been that the process takes too long. We consider this complaint to be valid. The District's time frames were especially poor for the period from Fiscal Year (FY) 1988 through FY 1990. However, beginning in FY 1991 there has been continual improvement through the present. For FY 93 the Alaska District evaluated 71% of its standard actions (individual permits) in 120 days or less, versus a national average of 72%. However, as was noted by one commentor, the Alaska District exceeded the national average for permit evaluations in less than 120 days for the 4th quarter of FY 93. This improvement coincides with a substantial increase in the number of employees in the Alaska District Regulatory Branch and our success in retaining them, as well as an internal reorganization that directed more resources towards permit evaluation in order to reduce backlogs, streamline review and reduce time frames.

Although the Alaska District places a high emphasis on permit time frames, it places an even higher priority on making the "right" decision. The Corps regulatory program is highly complex and often involves many competing interests. Further, many of the determinations required on each permit action require subjective judgment. The District gives full consideration to private property rights and all substantive comments received on each action. The program is subject to national policy changes, interpretation challenges and court decisions; there are numerous legal requirements that are or could become an issue on any given action (e.g. National Environmental Policy

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Act, Endangered Species Act, National Historic Preservation Act, etc.). Although some may take exception with determinations made by the Corps, the Alaska District believes that its record demonstrates fair, well-reasoned decisions.

The Alaska District has long recognized the need for flexibility in the permit evaluation process, including the Section 404(b)(1) Guidelines analysis. This has been accomplished by using expedited reviews where warranted (e.g., permit modifications) and by utilizing the inherent flexibility in the Guidelines, which was recently reemphasized to field staff by the Corps and EPA.

The Alaska District complies with the "Takings Executive Order" (EO 12630) and prepares a "Takings Implication Assessment" when a decision so warrants. The District has not been directly involved in any takings litigation.

Several provisions of the Administration's August 24, 1993, Wetlands Plan address concerns relative to the individual permit process. In addition, there are specific actions that the Federal agencies in Alaska recommend to address issues relative to implementation of the individual permit process in Alaska.

#### Administration Plan

- Establish Deadlines for Permit Action. The Corps is to modify its regulations, through a public rulemaking process, to establish regulatory deadlines for reaching decisions regarding permit applications. The regulations will generally require the Corps to reach permit decisions within 90 days from the date of issuance of the public notice, unless precluded by other laws, such as the National Environmental Policy Act. This effort is scheduled to be completed by August 23, 1994.
- Adopt an Appeals Process for jurisdictional determinations, permit denials, and administrative penalties. The Corps will develop an administrative appeals process under the 404 regulatory program. The process will be implemented after a public rulemaking, and will be designed to allow for administrative appeals of the Corps' determination that it has regulatory jurisdiction over a particular parcel of property, permit denials, and administrative penalties. The process will allow third parties to participate in applicant appeals of permit denials and will require that applicants exercise their right to appeal before initiating judicial action. This effort is scheduled to be completed by August 23, 1994.
- Issue Section 404(b)(1) Flexibility Guidance. On August 24, 1993, EPA and the Corps issued guidance to their field staff to clarify and standardize implementation of the flexibility afforded by the 404(b)(1) Guidelines to make regulatory decisions regarding the analysis of project alternatives based on the

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relative severity of the environmental impact of proposed discharges. The guidance clarifies that small projects with minor impacts are subject to less rigorous permit review than larger projects with more substantial environmental impacts.

**Alaska Specific Actions**

- Develop Interagency Guidance to Clarify how Circumstances in Alaska such as the Abundance of Wetlands can Reduce Opportunities to Avoid Impacts to Wetlands and Affect how Rigorously Alternatives are Evaluated. The August 24, 1993 flexibility guidance should be shared with potential applicants to remove unnecessary fears and apprehension of the regulatory program. The Corps and EPA should clarify the guidance for Alaska by specifying when detailed alternative information is not required for the 404(b)(1) analysis (for example when there is no significant or easily identifiable difference in functional value of the proposed discharge site when compared with other sites within the general vicinity) and that compensatory mitigation would normally not be required for fill in areas with abundant low value aquatic areas.
- Conduct Exit Polls or Interviews with Permit Applicants. A recent Alaska District questionnaire sent to all permit applicants within the last five years should be continued and used as a basis for identifying concerns with the regulatory program in Alaska. The Alaska Wetlands Initiative Stakeholders and other interested parties should be given the opportunity to suggest improvements to the questionnaire. In addition to the questionnaire, all applicants should be given the opportunity for an oral exit interview.
- Ensure Sufficient Regulatory Resources. The Corps should ensure that the District element implementing the program has sufficient resources, the ability to control the resources, and an organizational structure that fosters efficient decisionmaking. Furthermore, the District must have the ability to retain trained staff and recruit quality candidates, when necessary. Serious consideration should be given to elevating the Branch organizational structure, upgrading project managers as envisioned in the Regulatory Resources Management Initiative, and expanding field offices.

ALASKA WETLANDS INITIATIVE  
ISSUE PAPER - 6

**SUBJECT:** Alternative Permit Processing Procedures

**ISSUE:** How can alternative permit processing procedures be best implemented in a fair, flexible, and efficient manner in Alaska?

**BACKGROUND:**

**General**

Corps District Engineers (DE) are authorized, and encouraged, to use alternative permit processing procedures such as letters of permission (LOP), regional general permits (RGP) and joint procedures. It is intended that these alternative procedures be used in instances where there are minimal impacts and/or adequate environmental safeguards in order to: (1) reduce delay and/or (2) avoid duplication of efforts where other agencies have ongoing permit programs for activities also regulated by the Corps. LOPs are currently available to use for the authorization of certain activities under Section 10. LOPs can also be developed and used to authorize certain activities under Section 404. RGPs are developed through a process similar to that required for the authorization of a proposed activity by an individual permit (see The Individual Permit Process Issue Paper). Both Section 404 LOPs and RGPs are to be used for work which would not have more than minor individual or cumulative impacts on the environment and which should encounter no appreciable opposition. Joint procedures can be developed with other agencies when the fundamental objectives and requirements of the Federal permit process can be maintained.

Alternative permit processing procedures are designed to eliminate regulatory duplication and to expedite the permit process for activities covered by the procedures. The Alaska District previously developed an alternative permit procedure for North Slope oil and gas projects in 1983 and utilized the process through 1989. This process was entitled "Abbreviated Processing Procedure 83-1" and was based primarily on the following factors: (1) avoidance of "high value" aquatic areas to the maximum extent practicable; (2) minimization of impacts through project design and standard special conditions; (3) pre-application coordination between the applicant, EPA, the Corps, and interested Federal and State resource agencies; and (4) no substantive disagreement between reviewing agencies that project impacts would be minimal and that project impacts had been avoided and minimized to the maximum extent practicable.

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The process was implemented after issuance of a generic public notice (with opportunity for public hearing), an environmental assessment, and receipt of general consistency determinations from the State of Alaska (Section 401 Water Quality Certification and Coastal Zone Management consistency). A separate evaluation pursuant to EPA's 404(b)(1) Guidelines was prepared for each action authorized under the procedure. The public process that led to implementation of the procedure was effective in reducing the number of all interested parties requiring notification on a case by case basis. The goal of the process was to issue a standard Corps permit within 30 days once it was determined not to be contrary to the public interest.

Currently, there are no alternative joint permit procedures, abbreviated permit processing procedures, or 404 LOP procedures in place in the State of Alaska because the Alaska District has placed a high priority on the development of RGPs. However, the District recently initiated the development of alternative joint permit procedures for projects involving water and waste water projects in rural Alaskan villages that are conducted and/or funded by the U.S. Public Health Service or by the Village Safe Water Program. A public notice for comment on this proposed procedure was issued on December 3, 1993. Implementation of these new procedures is anticipated in early 1994.

The Corps has the authority to issue general permits (GPs) on a nationwide, regional, and State basis for those categories of activities in wetlands and other waters of the U.S. that are similar in nature and that will have only minimal adverse environmental effects, either individually or cumulatively. They are also used to avoid unnecessary duplication of regulatory control exercised by another agency provided the environmental consequences of the action are individually and cumulatively minimal (see State, Local, and Native Roles Issue Paper). If an activity is authorized by a general permit, work can proceed, without first applying for an individual authorization, as long as it complies with the conditions of the GP. However, some GPs may require that a project description and plans be submitted. There may also be some situations in which an abbreviated evaluation process for certain activities or locations is incorporated as a special condition to the GP.

At present, there are 36 nationwide GPs. In addition, the Alaska District currently has 21 regional GPs in effect in the State of Alaska. Four GPs apply statewide, and authorize mooring buoys, float houses, placer mining, and mariculture activities. The remaining GPs include activities such as docks, bank stabilization, residential fills, and commercial fills, and cover specific regional locations such as Sitka, Anchorage, the Kenai River, Fairbanks, and Deadhorse.

#### Stakeholder and Public Comments

Commentors identified many issues and concerns related to alternative permit

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processing procedures. Although most concerns were directed at the individual permit process (see Individual Permit Process Issue Paper), there was also considerable discussion of alternative permit processing procedures.

- Overall, commentors were generally in favor of maximizing use of alternative permit processing procedures to reduce permit process time frames. General Permits (GP) and Abbreviated Processing Procedures (APP) received the most attention as alternative processes. With the exception of programmatic general permits (PGP) there was general agreement that the GPs were working well in Alaska and may be the preferred mechanism to achieve most future streamlining. The primary concern presented against GP usage was the lack of a credible cumulative impact analysis prior to GP issuance and insufficient follow-up or monitoring to determine permit compliance and reliability of cumulative impact predictions. Some commentors expressed the view that the Alaska District should go back to doing more Section 10 Letter of Permission (LOP) reviews.
- APP discussions were generally centered on the APP procedure that the Alaska District implemented for North Slope oil and gas activities between November 1983 and November 1989. The Alaska District's proposed efforts with the Public Health Service, and Village Safe Water were noted in the context of an APP process. Understandably, comments on APP procedures were limited, as the District has only one previous procedure implemented in the State of Alaska and this procedure only applied to oil and gas activities. Comments made were all positive; asking that the old procedure be reinitiated; that new procedures be implemented for other types of activities; and that action on the proposed procedure for septic/clean water in native villages be expedited.
- Comments on GPs were more numerous and varied. The majority of comments made on GPs were positive. The most common comments were that existing GPs appeared to work well, and that more GPs are needed. However, some commentors emphasized that GPs should be limited to small groups or types of activities that are similar in nature and will have no substantial environmental effects, either individually or cumulatively; some felt that before renewing or issuing new GPs, the Corps and EPA should conduct a full cumulative impact analysis of all prior GPs and provide full monitoring and public accounting for any future such permits; some objected to programmatic general permits (PGPs) and felt that State and local governments could not be trusted with a GP's administration; some felt that wetland resources and their functions and values should be identified and classified prior to issuing any GP; it was suggested that wetland functions and values be determined by interdisciplinary teams of experts; it was suggested by at least one party that all GPs have threshold limits established for wetland resources and that the GP should be revoked when the

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limit was reached; another person asked that the process for establishing PGPs be specified including a time frame for completing the PGP process; the same party felt that local municipalities should be given real authority to implement the PGP and that the PGP process should consider "plan-level" issues and these issues should not be reopened on a case-by-case basis; one commentor expressed support for the GP concept but was concerned with GP results in the Anchorage bowl area; another commentor thought that the abbreviated review period associated with the HUD Housing GP (GP 89-3) was still too long for most projects which require off site borrow (fill material); at least one party indicated that Alaska had more GPs than any other State and that perhaps there were already too many GPs.

- Although the "Alaska 1%" Exemption will be withdrawn, many stakeholders were of the opinion that some sort of exemption was still appropriate and must be considered as an alternative (see Special Alaska Circumstances - Legal Issues Issue Paper).

**ANALYSIS AND PROPOSED RECOMMENDATIONS FOR DISCUSSION**

GPs are the most widely used way to expedite the Section 404 permit process in an environmentally acceptable manner. GPs can only be developed for projects that would have minimal environmental impacts both individually and cumulatively. Therefore, there is a limit as to what might be covered by future GP development. Monitoring specific activities authorized by GP is by necessity limited (with regard to individual permits, the Corps goal is to monitor at least 25% of these permits on an annual basis). Monitoring is done on a priority basis; projects with the greatest potential for environmental degradation and those with the most substantive special conditions (such as compensatory mitigation) are given priority. Attention is also given to project location in relationship to other permitted activities. Travel distances and expense in Alaska require "bunching" site visits to the maximum extent practicable. GP activities are considered to have minimal impacts and are generally given lower priority for site inspections. There have been exceptions however; placer mining GP actions have gotten considerable attention. This was prompted by controversy associated with placer mining activities in 1988 when the GP was developed, and was possible because there are often numerous mining activities in relatively close proximity to each other.

Cumulative impact predictions have been made for the GPs implemented in Alaska and summary cumulative impact analysis of GPs have been conducted for GP renewals. A comprehensive cumulative impact analysis for all GP authorizations permitted in the past would be a difficult task. As with nationwide GPs, some past GPs have had no reporting requirements and information available on some is scanty at best. Further, GPs limited to small geographic areas would not necessarily have impacts that

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would be cumulative with another GP located many miles away. The number of GPs available for use in Alaska is not comparable to the number of GPs that may exist in any other state; Alaska is a big State with many GPs tailored to small geographic areas; some existing Alaska GPs cover only a few actions per year; many other states have statewide GPs covering hundreds of actions per year. GP impact predictions have generally been based on the maximum number of activities or maximum wetland acres that were expected to occur or be affected by the GP. Actual number of activities, and when relevant, wetland acres affected by GPs have been well below the predictions. This is also true for the APP process that existed for oil and gas activities on the North Slope. While the APP was in effect it appeared to work well and development and resource agencies alike appeared satisfied with the process.

The Corps recognized the problems associated with the Anchorage GPs early in their implementation and took action to correct these problems. The City of Anchorage had expended considerable effort and money in developing the "Anchorage Wetland Management Plan" (partly or wholly on reliance of the Corps developing the Anchorage GPs). The Alaska District entered into negotiations with the City of Anchorage in 1985 to determine how best to correct deficiencies identified in the GPs. The culmination of these negotiations was a Special Public Notice (SPN 86-1) issued on January 7, 1986, which in effect and purpose established a no-net-loss of wetland value policy for Anchorage wetlands designated preservation or conservation in the Anchorage Wetland Management Plan (over five years prior to the officially expressed Corps/EPA goal of no-net-loss of wetlands).

It was noted in the background discussion above that most concerns for GPs were centered on PGPs. While the Alaska District had a number of GPs in the past that were considered programmatic (such as the Anchorage and Homer GPs), most of these GPs would not be considered programmatic today (only the floathouse and mariculture GPs would be considered programmatic by current standards). The programmatic nature of these older GPs was based on guidance contained in Regulatory Guidance Letter (RGL) 83-7. Under current guidelines a PGP would need to tie into an existing program that offered the same level of environmental protection as the DA administered Section 404 program. The Corps and EPA retain enforcement responsibility for all Section 404 permits be they individual permits or GPs (nationwide, regional, or programmatic) (see State, Local, and Native Roles Issue Paper).

In 1992 the Alaska District published a public notice soliciting interest in additional GPs within the State of Alaska. The District also entered into a "Partnership Agreement" with the Alaska Department of Governmental Coordination to pursue development of GP and APP procedures with a completion goal of December 31, 1994. These commitments will affect other potential recommendations coming from the Alaska Initiative.