

Response to Comments
Small Suction Dredge General Permit
AKG-37-5000

Introduction

EPA received concurrence on its Alaska Coastal Management Program (ACMP) Consistency Determination from the Department of Natural Resources, Office of Project Management and Permitting (OPMP), on April 4, 2007, based on the inclusion of several conditions. The Final Consistency Response is included in this document in Appendix A.

EPA received the final §401 Certification from the Alaska Department of Environmental Conservation on April 16, 2007. The Certification document is included in this document in Appendix A.

Permit Comments

EPA received comments on the general permit from Brian Berkhahn, the Alaska Miners Association, Inc. (AMA), the Center for Science in Public Participation (CSP²) and Jeff Boatwright.

1. Comment: Mr. Berkhahn requests that the use of motorized winches should be allowed under the general permit.

Response: EPA has the responsibility under the Act to protect and maintain the chemical, physical and biological integrity of waters of the US. In addition to being based on controlling turbidity, the prohibition on the use of motorized winches to move instream obstructions is based on habitat considerations that are necessary to protect the physical and biological integrity of the receiving water. While moving of obstructions using hand winches is expected to have minimal impact, the movement of larger boulders within a streambed may change the hydrology of the stream resulting in erosion patterns different from naturally occurring ones. Additionally, the act of moving the boulder or other obstructions can potentially destroy habitat.

2. Comment: The AMA questions the need for EPA to regulate suction dredging in Alaska because the Department of Natural Resources, Office of Habitat Management and Permitting (OHMP) regulates this activity and the Army Corps of Engineers is in the process of issuing a permit for the same activity.

Mr. Boatwright comments that the regulatory authority for permitting suction dredges rests with the Corps under §404 of the Act rather than with EPA under §402.

Response:

Overall Regulatory Authority

The Clean Water Act ("CWA" or the "Act") is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, Section 301 of the Act, 33 U.S.C. § 1311(a), makes "the discharge of any pollutant by any person" unlawful. Notwithstanding the Act's strict pollution prohibition, it allows for the discharge of pollutants under either the National Pollutant Discharge Elimination System ("NPDES") or the 'dredge-and-fill' permit program. 33 U.S.C. §§ 1311(a), 1342, 1344.

Under the NPDES program, EPA "may, after the opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a) of the CWA]," conditioned upon the discharge meeting specified requirements. 33 U.S.C. § 1342(a)(1). Under the 'dredge-and-fill' program, which establishes a separate permitting scheme administered by the U.S. Army Corps of Engineers ("Corps"), "discharge[s] of dredged or fill materials into the navigable waters" is prohibited, unless permitted in accord with established guidelines. 33 U.S.C. § 1344. The Corps has primary authority (with EPA oversight) to issue dredge-and-fill permits in accordance with those guidelines. 33 U.S.C. §§ 1344(b)(1), 1344(c).

CWA jurisdiction under the NPDES and dredge-and-fill programs attaches where there is a "discharge of any pollutant" from a "point source" to "navigable waters." 33 U.S.C. §§ 1311(a), 1362(6), (7), (12), (14). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source, [or] any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). The Act defines a "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). And "navigable waters" is defined under the Act as "waters of the United States." 33 U.S.C. § 1362(7).

Small Suction Dredge Activities Are Subject To The NPDES Program

Suction dredges, whether floating or moored, convey water in a discernible, confined, and discrete manner. A suction dredge is a point source. Suction dredges discharge waste water effluent containing rock and sand, which are pollutants under the Act. Discharges of such effluent into waters of the United States require an NPDES permit.

Point Source

Suction dredges, whether floating or moored, convey water in a discernible, confined, and discrete manner. As a result, suction dredges are point sources as defined under the CWA. 33 U.S.C. § 1362(14); see *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 372-73 (10th Cir. 1978); *Trustees for Alaska v. U.S. EPA*, 749 F.2d 549, 557-58 (9th Cir. 1984); *WA Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E. D. Wa 1994).

The commenter argues that small suction dredges are not facilities (as referred to in the general permit); and therefore, are not subject to CWA regulation. However, EPA defines "facility or activity" as "any NPDES 'point source' or any other facility or activity (including land or appurtenances thereto) that is subject to the NPDES program." 40 C.F.R. § 122.2. Small suction dredges are point sources subject to the NPDES program, and therefore, are deemed facilities.

Discharge of a pollutant

The term pollutant includes dredged spoils, rock, sand, and almost all other forms of waste. 33 U.S.C. § 1362(6). Suction dredge operation releases stream water and bed material as waste products. The re-introduction of stream water (as turbid water) or total suspended solids into the water column, through the process of suction dredging and sluicing, constitutes a discharge of a pollutant under the CWA. The Ninth Circuit has held that material separated from gold and released into a stream, during placer mine activity, constitutes a pollutant; and even though "the material discharged originally [came] from the streambed itself, [its] resuspension [in the stream] may be interpreted to be an addition of a pollutant under the Act." *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1282, 1285-86 (9th Cir. 1990).

The commenter suggests that discharges from small suction dredging is insignificant, and therefore, not subject to CWA regulation. However, Section 402 of the CWA, 33 U.S.C. § 1342, does not exempt a discharge from regulation based on its relative significance. *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1490-1491 (9th Cir. 1986), *rev'd on other grounds*, *Union Oil Co. v. Sierra Club*, 108 S.Ct. 1102 (1988); *Save our Bays & Beaches v. City and County of Honolulu*, 904 F.Supp. 1098, 1105 (D. Hawaii, 1994). Discharges from suction dredges are subject to CWA regulation under the NPDES program.

Waters of the United States

Under the Act, "waters of the United States" include more than title-navigable and navigable-in-fact water bodies. 40 C.F.R. § 230.3; *Riverside Bayview Homes*, 474 U.S. at 134; *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed. 2d 576 (2001), *U.S. v. Rapanos*, 126 S.Ct. 2208, 2216, 165 L.Ed. 2d 159 (2006). EPA regulations define "waters of the United States" as including several categories of waters. 40 C.F.R. § 230.3(5); see footnote 1 *supra*. Only those small suction dredges discharging into jurisdictional waters are subject to regulation under this general NPDES permit.

The commenter suggests that the NPDES program only applies when a pollutant is added to waters of the United States from the "outside world." Several courts have addressed whether an addition of a pollutant must come from the outside world. See e.g., *Natl. Wildlife Federation v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *Natl. Wildlife Fedn. v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988); *Dague v. City of Burlington*, 935 F.2d 1343, 1346, 1354-55 (2d Cir. 1991); *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1298 (1st Cir. 1996); *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 484, 491-2 (2d Cir. 2001); *Catskill Mts. Chapter*

of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77, 83 (2d Cir. 2006). Those cases, however, addressed whether the mere transfer of water, without an intervening use, may result in the addition of a pollutant.

Unlike mere transfers of water, suction dredges draw stream water and bed material from a water body, retain gold or other precious metals, and then discharge waste materials in the form of turbid water and/or sediment back to the water body. As discussed above, such activities have been subject to NPDES regulation. See Rybachek, 904 F.2d at 1282; Trustees for Alaska, 749 F.2d at 552, 561. Were EPA to adopt the commenter's argument, there could be no NPDES regulation over any and all activities that take water for some purpose, such as cooling, washing, or treating, and then discharge the used effluent to the same water body. EPA, however, has consistently determined that NPDES regulations apply to waters subject to an intervening use, which add pollutants to that water prior to discharge. See e.g., Brief for the United States, at 22-3, in South Florida Water Management District v. Miccosukee Tribe of Indians, 124 US 1537 (2004).

In sum, the commenter's suggestion that small suction dredges do not add a pollutant from the outside world misinterprets the case law on that issue. The intervening use of intake waters in suction dredging adds pollutants to those waters prior to discharge. In this respect, small suction dredging is similar most other industrial and municipal discharges subject to NPDES regulation.

The commenter also relies on EPA's regulation, 40 C.F.R. § 122.45(g), for the proposition that NPDES regulation is not required where intake waters are drawn from the same body of water into which the discharge is made. The commenter misinterprets and misapplies this regulation. Under 40 C.F.R. § 122.45(g)(1), an NPDES permit holder may seek to adjust its permit conditions to reflect a credit for pollutants in the permit holder's intake water. However, the regulation does not, as the commenter suggests, create carte blanc an exception to EPA's NPDES permitting authority merely on the basis that intake water is drawn from the same water body into which a discharge is made. See *Id.* § 122.45(g)(3). Rather, to be applicable at all, 40 C.F.R. § 122.45(g) requires an NPDES permit holder to meet several requirements, none of which, have been established here. Moreover, the existing record for this general permit does not, and probably could not, include substantial evidence upon which to base a determination that all the covered discharges from small suction dredges meet 40 C.F.R. § 122.45(g) regulatory requirements. See e.g., *Natural Resources Defense Council v. U.S. EPA*, 966 F.2d 1292, 1306 (9th Cir 1992).

NPDES Permits Conditions

NPDES permits must contain technology-based effluent limits plus any more stringent limits necessary to ensure compliance with water quality standards. 33 U.S.C. §§ 1311, 1313, 1314, 1316, and 1342. Where EPA has not issued national effluent limitation guidelines ("ELGs") for a point source category, EPA is authorized to develop limitations for an NPDES permit on a case-by-case basis using best professional judgment. 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 125.3(c)(2). In addition, EPA is authorized, under 40 C.F.R. § 122.44(k)(3), to use Best Management Practices (BMPs)

to control or abate discharges of pollutants when numeric effluent limitations are infeasible.

There are no ELGs established for small suction dredges. It is EPA's best professional judgment that numeric effluent limitations are infeasible, and that BMPs are sufficient to control or abate the discharge of pollutants from small suction dredges. The fact sheet states that the BMPs included in the general permit were developed as the technology-based limits. These same controls were deemed protective of water quality.

Regulation Of Small Suction Dredges Under Section 404 Of The Clean Water Act.

Since 1997, EPA has regulated small suction dredges under the NPDES program (and medium suction dredging since 1994). Courts have determined that wastes from sluicing or other beneficiation processes related to placer gold mining may be distinct from dredged materials as that term is used in Section 404 of the Act. See *Rybachek*, 904 F.2d at 1282, 1285-86; see also *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1406 (D.C. Cir. 1998); *U.S. v. Deaton*, 209 F.3d 331, 337 (4th Cir. 2000); *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1351 (D. Cal. 2000); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814 (9th Cir. 2001).

NPDES permits are not required for discharges of dredged or fill material that are regulated under Section 404 of the Act, 33 U.S.C. § 1344. 33 U.S.C. § 1342; 40 C.F.R. § 122.3(b). The Corps Alaska District is not regulating small suction dredges for discharge of dredged or fill materials under the Section 404 of the Act. This general permit does not regulate incidental fall back, dredged, or fill material. See e.g., *Nat'l Mining Ass'n*, 145 F.3d at 1406-07 (in vacating EPA's rule that incidental fallback from dredged activities requires 404 permit, the court distinguished *Rybachek* on grounds that the return of dredged material to water from a sluice box is not incidental fall back). Rather, EPA is proposing to regulate wastewater effluent – e.g., turbid water, total suspended solids – from suction dredges to ensure that such discharges meet water quality standards.

Concurrent Permitting By EPA and the Alaska Department Of Natural Resources, Office Of Habitat Management & Permitting

The Alaska Department of Natural Resources, Office of Habitat Management & Permitting (OHMP) requires permits for small suction dredges. While the conditions of the OHMP permits and EPA's proposed general NPDES permits are similar, the goals of the two agencies and their respective permits are different. OHMP issues permits to protect anadromous fish habitat and EPA issues permits to protect water quality for many different uses, including aquatic life. Although OHMP's and EPA's regulatory authority overlap, neither agency can issue a single permit that would satisfy the goals of both agencies. As a result, a small suction dredger is required to obtain both permits to comply with applicable state and federal regulations.

3. Comment: The AMA supports the concept of general permits and the proposals to include area permits.

Response: Comments noted.

4. Comment: AMA expresses appreciation at EPA's willingness to contact the 2002 GP holders but exhibits concern that if this hasn't been done, that it be done immediately since new NOIs should have been submitted 90 days prior to the expiration date (by March 6, 2007) according to the terms of the 2002 GP.

Response: EPA sent letters to over 600 individuals when the general permit went to public notice. The letter covered the re-notice requirements as well as the notice that the draft permit was being public noticed. To date, over 100 of these have been returned as undeliverable.

5. Comment: AMA states that reporting all spills is unrealistic because any refueling operation may result in small quantities of fuel escaping so they request that some measurable quality should be identified.

Response: The requirement was included in the previous permit as a result of the ADEC § 401 Certification and the ACMP process of the general permit. ADEC's regulation for reporting these spills, 18 AAC 75.300, does not contain a "measurable quantity" limitation for discharges to water so the requested permit requirement will not either.

6. Comment: CSP² encourages EPA to develop a map of all placer operations including small suction dredges.

Response: EPA believes that a map containing all placer operations including small suction dredges would be helpful but could be misleading if used to indicate the amount of activity in the State. Since many small suction dredgers apply for several creeks, and some have applied for upwards of 70 creeks/areas, plotting every single location on a map would indicate more activity than could possibly be occurring since most dredgers have only one dredge and can only be in one place at a time.

7. Comment: CSP² requests clarification on the relationship between area permits and timing restrictions imposed by the Department of Natural Resources, Office of Habitat Management and Permitting (OHMP).

Response: The granting of an area permit by EPA does not release a permittee from the requirement to apply for and receive other permits required by law including any OHMP permits. OHMP permits, either on a creek-by-creek or area basis, contain the timing restrictions for spawning periods. For example, the Sixmile/Resurrection area permits issued by OHMP are only valid during the time period between mid-May and mid-July.

Fact Sheet

Several comments were received on the Fact Sheet. The Fact Sheet provides the technical basis for the conditions contained in the draft permit and is a final document when

it is issued. This Response to Comments provides additional basis for the final permit after comments are received.

8. Comment: AMA is concerned that any third party may petition the Director of EPA to require an individual permit and request that the third party be required to offer substantial evidence.

Response: The cited portion of the Fact Sheet is a regulatory requirement found at 40 CFR 122.28(b)(3)(i). This regulation does not require the petitioning party to provide substantial evidence. However, 40 CFR 122.28(b)(ii) requires that if EPA decides to permit a facility through an individual permit rather than a general permit, then EPA must notify the owner/operator of the reason for this decision.

9. Comment: Several commentors do not agree with discussion in the Fact Sheet that says that turbidity is a pollutant.

Response: EPA regrets this error. Generally, the State of Alaska's Water Quality Standards (WQS) apply to parameters that are considered to be pollutants. In the case of turbidity, the WQS is applied to the condition caused by the discharge of pollutants. See comment 2.

10. Comment: AMA does not agree with the addition of NMFS language in the permit that requires a distance between dredging and known areas where eggs or alevins are present because: (a) OHMP already regulates the timing of dredge operations so the GP should require compliance with OHMP requirements and (b) the draft GP does not specify which kinds of fish the distance requirement applies.

Response: a) Since OHMP regulates the timing in anadromous fish streams, this requirement would not be an additional burden on operators instream. NMFS requested this requirement to protect spawning that occurs in areas outside of streams but may be subject to suction dredging such as river mouths or near coastal areas. There are areas at the mouths of some rivers where passage upstream is blocked and spawning occurs in the marine environment where it is influenced by the freshwater from the stream. For this reason, the distance requirement will remain in the permit.

b) AMA is correct because the condition requested by NMFS speaks to anadromous fish and salmon are the only anadromous fish subject to EFH requirements. The requested addition has been made to the permit.

11. Comment: AMA requests clarification of who is required to obtain a "certification of waiver" from ADEC, the applicant or the Corps.

Response: For a general permit, EPA is required to obtain a § 401 Certification or a waiver from ADEC prior to issuing the final permit. There is no certification requirement for coverage of individual operations under the general permit. The Alaska Department of Environmental Conservation certified the general permit on April 16, 2007.

Appendix A
Final Consistency Response
&
CWA 401 Certification

STATE OF ALASKA

SARAH PALIN, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
OFFICE OF PROJECT MANAGEMENT/PERMITTING
ALASKA COASTAL MANAGEMENT PROGRAM

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April 4, 2007

Ms. Cindi Godsey
U.S. Environmental Protection Agency
Regulatory Branch - CEP-CO-R
PO Box 6898
Anchorage, Alaska 99506-0898

Dear Ms. Godsey:


**Subject: EPA NPDES (Small Suction Dredge General Permit No. AKG-37-5000 Re-Issue)
State I.D. No. AK 0612-06J
Final Consistency Response – Concurrence**

The Office of Project Management & Permitting (OPMP) has completed coordinating the State's review of the re-issuance of the U.S. Environmental Protection Agency General Permit (GP) AKG-37-5000 to authorize small suction dredging, for consistency with the Alaska Coastal Management Program (ACMP).

Based on an evaluation of your project by the Alaska Departments of Natural Resources and the affected coastal resource districts, OPMP concurs with the USEPA's certification that the project is consistent with the ACMP and affected coastal district's enforceable policies to the maximum extent practicable. This will be the final ACMP decision for this activity as proposed and amended.

By copy of this letter, OPMP is informing the U.S. Environmental Protection Agency and State review participants of OPMP's finding. If you have any questions, please contact me at 907-465-4664 or email joe_donohue@dnr.state.ak.us.

Sincerely,



Joe Donohue
ACMP Project Specialist

Enclosure

"Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans."

cc: Sharmon Stambaugh – ADEC, Anchorage *
Mel Langdon - ADEC, Anchorage *
Mark Fink - ADFG, Anchorage *
Dick Mylius – ADNR/DMLW, Anchorage *
Gary Prokosch - ADNR/DMLW, Anchorage *
Clark Cox - ADNR/DMLW, Anchorage *
Jack Kerin – ADNR/DMLW, Anchorage *
Linda Books - ADNR/DMLW, Anchorage *
Jeanne Proulx - ADNR/DMLW, Fairbanks *
Roselynn Smith – ADNR/DMLW, Fairbanks *
Brady Scott - ADNR/DMLW, Juneau *
Alex Dugaqua - ADNR/DMLW, Juneau *
Mac McLean - ADNR/OHMP, Anchorage *
Christine Ballard – ADNR/OPMP, Anchorage *
Tom Atkinson – ADNR/OPMP, Anchorage *
Claire Batac – ADNR/OPMP, Juneau *
Janet Burleson-Baxter – ADNR/OPMP, Juneau *
Judy Bittner - ADNR/SHPO, Anchorage *
Michael Eberhardt – ADNR/SPOR, Juneau *
Pam Russell – ADNR/SPOR, Soldotna *
Doug Campbell – AMHTL, Anchorage *
Stephen Connelly – University of Alaska – Lands, Anchorage *
Andy Hughes – ADOT/PF, Juneau *
Victor Ross - USACE, Regulatory, Elmendorf AFB/Anchorage *
Susan Walker - NMFS, Juneau *
Linda Shaw - NMFS, Juneau *
Joan Darnell – NPS, Anchorage *
Steven Borell – Alaska Miners Association, Anchorage *
Approved Coastal Districts (Including Petersburg and Wrangell) *

* = emailed

**ALASKA COASTAL MANAGEMENT PROGRAM
FINAL CONSISTENCY RESPONSE
CONCURRENCE**

DATE ISSUED: April 4, 2007

PROJECT TITLE: EPA NPDES (Small Suction Dredge General Permit
No. AKG-37-5000 Re-Issue)

STATE ID. NO.: AK 0612-06J

AFFECTED COASTAL RESOURCE DISTRICT: Statewide

APPLICANT: U.S. Environmental Protection Agency / Ms. Cindi Godsey

DESCRIPTION OF PROJECT SUBJECT TO REVIEW:

The U.S. Environmental Protection Agency (EPA) proposes to reissue the National Pollution Discharge Elimination System (NPDES) General Permit (GP) for small suction dredge water discharges associated with placer mining activity in State and Federal waters in Alaska.

The proposed reissuance of this GP qualifies as a "Federal agency activity" under § 930.31 in the exercise of EPA's statutory responsibilities. A cover letter and Consistency Determination received from the EPA's Manager of the Region 10 NPDES Permits Unit in Seattle, Washington and dated January 5, 2007 initiated the State of Alaska's ACMP Coastal Consistency review process for this activity as described in State (11 AAC 110 and 11 AAC 112) and Federal regulations (C.F.R. §930.31).

The following description is taken from the January 5, 2007 EPA cover letter received by OPMP:

"The Environmental Protection Agency (EPA) has drafted a draft general permit for public notice for Small Suction Dredges within the State of Alaska. The general permit is a reissuance of the general permit that expires on June 4, 2007. The draft permit package contains a draft certification by Alaska Department of Environmental Conservation (ADEC) under § 401 of the Clean Water Act.

The public comment period will begin on the date that the notice appears in the Federal Register. The comment period will run for 45 days. During this timeframe, EPA has provided the draft permit package to OPMP for ACMP purposes, as well as to the US Fish and Wildlife Service and the National Marine Fisheries Service for Endangered Species Act (ESA) purposes.

EPA has evaluated the General Permit for consistency with the relevant enforceable policies of the ACMP. As a result of this evaluation, EPA finds that the reissuance of this permit is consistent to the maximum extent practicable with the ACMP. Enclosed for your review and concurrence is EPA's consistency determination based on the "Guide to Preparing an ACMP Consistency Determination for

Federal Activities, as Revised 01/06". EPA cannot take final action on the permit until your agency either agrees or disagrees with this determination."

Background Information –

Due to settlement agreements entered into by EPA and environmental groups on November 18, 1996 to resolve a challenge of the existing GP for resolution of a legal challenge related to the impacts of placer mining on the natural environment in Alaska – the EPA agreed to issue three separate GPs to modify and supersede the original GP challenged by the environmental groups in 1994. Three modified GPs were issued on December 6, 1996 – one for mechanical operations, one for medium-sized suction dredge operations, and one for small suction dredges. In April of 1997 these three permits were also challenged by environmental groups and the Alaska Miners Association (AMA) in the 9th Circuit Court.

This particular GP was previously reviewed by the State for consistency with the ACMP in 2002 [AK 0201-02A] and met with no objection. EPA issued the GP on June 3, 2002 for a five-year term that is scheduled to expire on June 4, 2007. EPA is proposing to reissue this general permit to continue regulating small suction dredges in Alaska.

Additional Review Information –

Following the ACMP consistency comment deadline of February 13, 2007, OPMP emailed copies of the consistency comments and recommendations received from participating State agencies and approved Coastal Districts to the representatives of the EPA in Anchorage. The following State-recommended alternative measures were submitted by the Department of Natural Resources' Office of Habitat Management and Permitting (OHMP) that if accepted and incorporated into the final General Permit would allow the re-issue of the General Permit to achieve consistency to the maximum extent practicable with the ACMP Habitat Standard:

"I. COVERAGE UNDER THIS PERMIT

C. Authorized Placer Mining Operations:

For consistency with the Generally Consistent Determination 1 (GCD-1) of the ACMP B list, the GP should limit the hose size to 6 inches or less **and the size of the dredge engine to 18 horsepower or less.**

D. Additional Requirements:

The GP does not describe possible restrictions or State requirements for suction dredge operations in areas designated by the State of Alaska as Critical Habitat Areas, State wildlife refuges, and Game Sanctuaries. A reference should be included that an applicant must contact and obtain permit authorization from ADF&G pursuant to AS 16.20 in all State-designated Critical Habitats, Wildlife Refuges, and Game Sanctuaries.

E. Prohibitions. Subsection 3(a) and (b). ADF&G has identified several areas in addition to those identified by the U.S. Fish and Wildlife Service as important molting and wintering locations for Steller's Eiders. The following additional areas should be included in the timing restrictions for molting areas outlined under (a) (molting areas) and (b) (wintering areas).

3.a. (molting areas)

Kamishak Bay McNeil Head to Cape Douglas)
Hagemeister Island
Sekinak Lagoon (St. Lawrence Is.)

3.b. (Wintering areas)

Kamishak Bay
South end of Kodiak Is: Geese Islands; Aiaklatik Is.; Sitkinak Is.; Kempff Bay;
Akhiok Bay and Is.

On March 1, 2007 OPMP was informed by the EPA Project Manager that these particular measures and six additional administrative wording advisories would be included in the final AKG-37-5000 General Permit. The latter advisories may be found in the “11 AAC 112.300 Habitats” subheading of the “*ACMP Consistency Evaluation*” attached to this ACMP consistency response.

SCOPE OF PROJECT TO BE REVIEWED:

The present review evaluated whether discharges covered by “*National Pollutant Discharge Elimination System (NPDES) Small Suction Dredge General Permit – Permit No. AKG-37-5000*” within the State of Alaska would be consistent with the statewide standards of the Alaska Coastal Management Program at 11 AAC 112.200 - 11 AAC 112.990 and the enforceable policies of Alaska’s statewide coastal resource districts.

CONSISTENCY STATEMENT:

Based on an evaluation of your project by the Alaska Department of Natural Resources’ – Division of Mining, Land and Water (DMLW), and Office of Habitat Management and Permitting (OHMP) and statewide coastal resource districts, and the acceptance of the State recommended alternative measures, the State of Alaska concurs with the ACMP consistency determination submitted by the U.S. Environmental Protection Agency and signed by Mr. Michael J. Lidgard, Manager NPDES Permits Unit of Region X, in Seattle, Washington.

ADVISORIES:

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

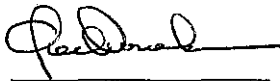
This consistency response is only for the project as described. If, after issuance of a final consistency response, the applicant proposes any changes to the approved project, including its intended use, prior to or during its siting, construction, or operation, the applicant must contact this office immediately to determine if further review and approval of the modifications to the project is necessary. Changes may require amendments to the State authorizations listed in this response, or may require additional authorizations.

This final consistency response is a final order and decision under the ACMP for purposes of Alaska Appellate Rules 601-612. Any appeal from this decision to the superior court of Alaska must be made within 30 days of the date this response is issued.

If the proposed activities reveal cultural or paleontological resources, the applicant is to stop any work that would disturb such resources and immediately contact the State Historic Preservation Office (907-269-8720) and the U.S. Army Corps of Engineers (907-753-2712) so that consultation per section 106 of the National Historic Preservation Act may proceed.

FINAL CONSISTENCY RESPONSE PREPARED BY:

Joe Donohue – ACMP Project Specialist
Department of Natural Resources
Alaska Coastal Management Program
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Joe Donohue

ACMP CONSISTENCY EVALUATION
EPA NPDES (Small Suction Dredge General Permit
No. AKG-37-5000 Re-Issue) – AK 0612-04J

Pursuant to the following evaluation, the project as proposed is consistent with applicable ACMP statewide and affected coastal resource district enforceable policies (copies of the policies are available on the ACMP web site at <http://www.alaskacoast.state.ak.us>).

STATEWIDE STANDARDS

11 AAC 112.200 Coastal Development

(a) In planning for and approving development in or adjacent to coastal waters, districts and state agencies shall manage coastal land and water uses in such a manner that those uses that are economically or physically dependent on a coastal location are given higher priority when compared to uses that do not economically or physically require a coastal location

(b) Districts and state agencies shall give, in the following order, priority to (1) water-dependent uses and activities; (2) water-related uses and activities; and (3) uses and activities that are neither water-dependent nor water-related for which there is no practicable inland alternative to meet the public need for the use or activity.

Evaluation:

OPMP has reviewed this Small Suction Dredge GP under 11 AAC 112.200 and finds that while the GP is not, in itself, water dependent, dredge facilities eligible for discharge authorization under this particular GP may themselves be water-dependent or water-related. The Small Suction Dredge GP proposed for re-issue contains conditions, limits, and requirements that are specifically designed to reduce or eliminate pollution in water discharges of dredge facilities that are water-dependent or water-related.

It is not expected that re-issuance of this GP will have an effect on coastal development.

OPMP has reviewed the proposed re-issuance of the Small Suction Dredge GP under 11 AAC112.200 and has determined this action to be consistent with this standard to the maximum extent practicable.

11 AAC 112.210 Natural Hazard Areas

(a) In addition to those identified in 11 AAC 112.990, the department, or a district in a district plan, may designate other natural processes or adverse conditions that present a threat to life or property in the coastal area as natural hazards.

Evaluation:

OPMP has reviewed the proposed re-issuance of the Small Suction Dredge GP under 11 AAC 112.210 and has determined this action to be consistent with this standard to the maximum extent practicable.

11 AAC 112.220 Coastal Access

Districts and state agencies shall ensure that projects maintain, and, where appropriate, increase public access to, from, and along coastal water.

Evaluation:

OPMP has reviewed the proposed re-issuance of the Small Suction Dredge GP under 11 AAC 112.220 and has determined this action to be consistent with this standard to the maximum extent practicable.

<p>11 AAC 112.230 Energy Facilities</p>
<p>Evaluation: This statewide standard does <u>not</u> apply to this Small Suction Dredge GP as proposed.</p>
<p>11 AAC 112.240 Utility Routes and Facilities</p>
<p>Evaluation: OPMP has reviewed this Small Suction Dredge GP under 11 AAC 112.240 and finds that dredge facilities eligible for discharge authorization under this particular GP may be associated with Utility Routes and Facilities. The Small Suction Dredge GP proposed for re-issue contains conditions, limits, and requirements that are specifically designed to reduce or eliminate pollution in storm water discharges of dredge facilities that are associated with utility routes and facilities and therefore would contribute to the avoidance and/or minimizing of - 1) alteration of surface and ground water drainage patterns; 2) disruption in known or reasonably foreseeable wildlife transit; and, 3) blockage of existing or traditional access.</p> <p>OPMP has determined that the proposed re-issuance of the Small Suction Dredge GP would be consistent with this standard to the maximum extent practicable.</p>
<p>11 AAC 112.250 Timber Harvest and Processing</p>
<p>Evaluation: This statewide standard does <u>not</u> apply to this Small Suction Dredge GP as proposed.</p>
<p>11 AAC 112.260 Sand and Gravel Extraction</p>
<p>Evaluation: This statewide standard does <u>not</u> apply to this Small Suction Dredge GP as proposed.</p>
<p>11 AAC 112.270 Subsistence</p>
<p>Evaluation: This Small Suction Dredge GP does not preclude individuals from subsistence gathering or fishing within either a designated subsistence area, or an area adjacent to a facility that qualifies for this authorization. OPMP has reviewed this GP under 11 AAC 112.270 and finds the action of re-issuing the proposed Small Suction Dredge GP to be consistent with this standard to the maximum extent practicable.</p>
<p>11 AAC 112.280 Transportation Routes and Facilities</p>
<p>Evaluation: OPMP has reviewed this Small Suction Dredge GP under 11 AAC 112.280 and finds that dredge facilities eligible for discharge authorization under this particular GP may be associated with Transportation Routes and Facilities sited within the coastal zone. The Small Suction Dredge GP proposed for re-issue contains conditions, limits, and requirements that are specifically designed to reduce or eliminate pollution in dredge water discharges of facilities that are associated with coastal waters and therefore would contribute to the avoidance and/or minimizing of - 1) alteration of surface and ground water drainage patterns; 2) disruption in known or reasonably foreseeable wildlife transit; and, 3) blockage of existing or traditional access.</p> <p>OPMP has determined that the proposed re-issuance of the Small Suction Dredge GP would be consistent with this standard to the maximum extent practicable.</p>
<p>11 AAC 112.300 Habitats</p>
<p>Habitats in the coastal area encompassed by this Small Suction Dredge GP that are subject to the Program are the following listed under subsection (a):</p> <ol style="list-style-type: none"> 1. offshore areas, 2. estuaries, 3. wetlands,

4. tideflats,
5. rocky islands and sea cliffs,
6. barrier islands and lagoons,
6. exposed high-energy coasts,
7. rivers, streams, and lakes and the active floodplains and riparian management areas of those rivers, streams, and lakes, and,
8. important habitat.

Evaluation: The Office of Habitat Management and Permitting (OHMP) commented on the Small Suction Dredge GP as follows:

“OPMP concurs with EPA’s determination that the proposed General Permit is consistent to the maximum extent practicable with the ACMP Habitat Standard provided the following Alternative measures are incorporated in the final General Permit.” (The Alternative measures are listed under **Additional Review Information** in the “Description of Project Subject to Review” in the body of the ACMP consistency response above.)

“ADVISORIES

- II. Best Management Practices (BMPs) A. Disconnected ponds and meander cutoffs are frequently inundated during some flow events and are utilized by fish as off-channel habitat. For some species and watersheds, access to these off-channel habitats is crucial to the annual food budget and to reduce predation. This BMP should be rewritten to state:
 - A. Streambanks shall not be mined or otherwise disturbed. Dredging is only permitted within the existing wetted perimeter (waterline) in the active stream channel. This provision does not apply to suction dredges operating within mine cuts located above the ordinary high water line or in disconnected ponds and meander cutoffs if fish are not present. Each permittee shall consult with the regional office of OHMP for the region in which the permittee proposes to operate a dredge in order to obtain the information necessary to comply with this BMP.
- II. Best Management Practices (BMPs) D. This BMP currently prohibits operating a wheeled or tracked vehicle instream while dredging is in progress. A reasonable person would thus assume that is allowable to operate a vehicle instream as long as the dredge was not operating. While we recognize that this provision was intended to minimize turbidity, in anadromous fish waterbodies cataloged under AS 41.14.870(a), operating a vehicle below ordinary high water in a cataloged anadromous fish stream requires prior authorization from OHMP under AS 41.14.870(d). This BMP should be revised to read:
 - D. No wheeled or tracked equipment may be used instream while dredging is in progress. In addition, no wheeled or tracked equipment may be used instream in an anadromous fish stream cataloged under Alaska Statute 41.14.870(a) without permit authorization from OHMP.
 - Appendix A. Dalton Highway List. OHMP’s area wide permit for the Dalton Highway also includes Marion Creek which is a cataloged anadromous fish stream. OHMP imposes timing restrictions for this stream.
 - Appendix A. Steese Highway List. OHMP’s area wide permit for the Steese Highway also includes Pilot Creek, portions of which are a cataloged anadromous fish stream. There are no timing restrictions for either the cataloged or non-cataloged portions of this stream.
 - Appendix C. Stipulation 1. Reference to ADF&G should be revised to be OHMP.
 - Appendix C. Stipulation 2. Reference to AS 16.05.870(a) should be revised to be AS 41.14.870(a).”

OPMP has reviewed the proposed re-issuance of the Small Suction Dredge GP under 11 AAC 112.300 and has determined that with the incorporation of these recommendations into the GP by the EPA, this GP re-issue action to be consistent with this standard to the maximum extent practicable.

11 AAC 112.310 Air, Land & Water Quality
Evaluation: The ADEC statutes and regulations with respect to air, land and water quality are no longer incorporated into the coordinated ACMP consistency reviews. The issuance of an ADEC authorization constitutes consistency with the ACMP for the authorized activity and this standard. Consistency with this standard will be established when the ADEC issues or waives the required authorizations.

11 AAC 112.320 Historic, Prehistoric, and Archaeological Resources
(a) The department will designate areas of the coastal zone that are important to the study, understanding, or illustration of national, state or local history or prehistory, including natural processes.
(b) A project within an area designated under (a) of this section shall comply with the applicable standards of AS 41.35.240 and 11 AAC 16.010 – 11 AAC 16.900.
Evaluation: OPMP has reviewed the proposed re-issuance of the Small Suction Dredge GP under 11 AAC 112.320 and has determined this action to be consistent with this standard to the maximum extent practicable.

AFFECTED COASTAL RESOURCE DISTRICT ENFORCEABLE POLICIES

The following Coastal Districts submitted comments:

Aleutians East Borough:
Evaluation: “I have reviewed the General Permit and find the project consistent with the Aleutians East Borough Coastal District Management Plan.”

Aleutians West CRSA:
Evaluation: “The AWCRSA does not have any comments on the subject permit reissue.”

Bristol Bay Borough:
Evaluation: “In reference to the Small Suction Dredge General Permit Reissue, I have found the project to be in conflict with Bristol Bay Borough’s Enforceable Policies and Specific Management Guidelines.

1. Offshore and Estuarine Areas
As an offshore area Kvichak Bay must be managed as a fisheries conservation zone so as to maintain or enhance the state’s sport, commercial, and subsistence fishery. As an estuary, Kvichak Bay and the lower 10 miles of the Naknek River must be managed to assure adequate water flow, natural circulation patterns, nutrients, and oxygen levels, and avoid the discharge of toxic wastes, silt, and destruction of productive habitat.
 - 1.1 In conformance with AS 38.05.140, “the submerged and shore lands lying north of 57 degrees, 30 minutes north latitude and east of 159 degrees, 49 minutes west longitude with the Bristol Bay drainage are designated as the Bristol Bay Fisheries Reserve. Within the Bristol Bay Fisheries Reserve, no surface entry permit to develop an oil or gas lease may be issued on state owned land until the legislature specifically finds that the entry will not constitute a danger to the fishery. All of Kvichak Bay located within Bristol Bay is in the Bristol Bay Fisheries Reserve.
2. Rivers, Streams and Lakes
Rivers, streams and lakes must be managed s to protect natural vegetation, water quality, important fish or wildlife habitat, and natural water flow.
 - 5.12 Water intake pipes shall be designed with screen of sufficient size that fry and juvenile fish are not entrained or impinged upon the screen. Maximum water velocity at the surface of the screen should be less than 0.1 foot per second. Screen openings shall not be larger than 0.04 inch. Where other techniques achieve similar results or in water where there are no young fish present, exceptions can be granted.

Discussion: OPMP consulted with both OHMP and the EPA and reached the following conclusions with regard to the Bristol Bay Borough consistency comments.

1. A State ACMP consistency review will be required before any new entry into any area in the vicinity of Bristol Bay and the Bristol Bay Borough would be an active review participant with deference to comment on proposed projects. This GP would only be used if the State review found the proposal to be consistent with all Federal, State and local statutes and regulations.

Both the statewide 11 AAC 112.300 Habitats standard and the Title 41 anadromous fish authority of OHMP would be brought to bear on proposed projects. The State review process may find such a proposal in the area of interest to be inconsistent with 11 AAC 112.300 and State permits would not be issued.

- 1.1 This particular GP is not for development of oil or gas leases. In the event this designation is carried over to the new Bristol Bay Borough Coastal Management plan, the activity covered by the GP would likely not qualify to be sited in this Bristol Bay Fisheries Reserve.

Both 11 AAC 112.300(b)(8) Habitats and OHMP's Title 41 regulations for anadromous fish, as well as ADEC Water Quality regulations are in place to protect natural vegetation, water quality, important fish or wildlife habitat and natural water flow.

OHMP responded to this Bristol Bay Borough enforceable policy as follows:

"The water intake screening stipulation is not relevant to suction dredging. A suction dredge uses a venturi effect to create a suction (vacuum) at the nozzle. Material suctioned up does not pass through the pump but rather is discharged directly into a sluice box and then over the end to the receiving water. If an organism was to be vacuumed up (which is unlikely) it would pass directly through the pipe and over the sluice back into the waterbody. Screening the intake would prevent the dredge from processing material...

...For water pumps, the screening requirement is relevant and is carried by OHMP under AS 41. Timing restrictions for suction dredging are commonly used for the period of time eggs and alevins are in the gravels."

Haines Borough Coastal District:

Evaluation: "This general permit is consistent with the Haines Coastal Management Plan enforceable policies. The Planning Commission passed it without negative comment."

Hoonah Coastal District:

Evaluation: "In reference to EPA NPDES Small Suction Dredge General Permit No. AKG-37-5000 Reissue, Project AK 0612-06J located statewide, complies with the Hoonah Coastal District Enforceable Policies, therefore we have no objection to reissuing the permit."

Lake and Peninsula Borough:

Evaluation: "The Lake and Peninsula Borough Planning Commission reviewed this consistency review at the regular Planning Commission meeting on February 12, 2007.

In review of the Appendix A of this document that lists the wild and scenic Rivers it appears there are a lot of rivers missing that have been determined to be wild and scenic as determined by the following website <http://www.nps.gov/rivers/wildriverslist.htm#ak>.

Specifically missing are the Alagnak, Chilikadrotna and Mulchatna Rivers within the Lake and Peninsula Borough. It also appears there could be other Rivers in the state are also missing from the list. According the Appendix A this list is prepared by the state of Alaska DNR/OPMP. We recommend the appendix A be updated to reflect all the Wild and Scenic Rivers.

With the exception of the above mentioned river list needs to be updated, the Planning Commission determined this review is consistent to the extent practicable under what can be reviewed using the new state standard and existing coastal management plan minus the fact that Air, Land and Water section being removed from the regulations and plan from when this General Permit was last reviewed for consistency.”

Discussion: Appendix A is an EPA-generated list. To clarify the intent of Appendix A, OPMP consulted with the EPA about the Lake and Peninsula Borough’s concerns associated with the Appendix A and the fact that some rivers were missing from the Wild and Scenic Rivers list. EPA stated: “Appendix A is not nor was it ever intended to be a list of Wild and Scenic Rivers.”

Valdez Coastal District:

Evaluation: “The Valdez Coastal District has reviewed the above referenced proposal for consistency with its Coastal Management Program. The project is consistent with the Valdez Coastal Management Plan to the extent practicable under the new state standard. Mining and Water Quality are regulated under the appropriate State agencies.”

STATE OF ALASKA

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
WASTEWATER DISCHARGE PROGRAM

SARAH PALIN, GOVERNOR

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April 16, 2007

ADEC File # 900.68.001

Mike Lidgard
NPDES Unit Manager
USEPA
1200 Sixth Avenue
Seattle WA, 98101

RE: 401 Certification of NPDES General Permit AKG-37-5000

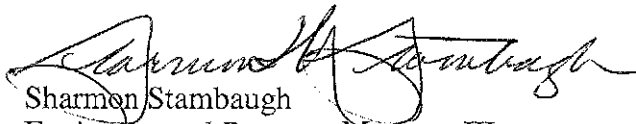
Dear Mr. Lidgard;

On March 12, 2007 EPA Region 10 requested a final 401 certification for the reissue of NPDES General Permit AKG-37-5000, regulating discharges from small suction dredge placer mines in Alaska. The enclosed 401 certification is issued in accordance with Section 401 of the Clean Water Act, which includes the Alaska Water Quality Standards (18 AAC 70).

ADEC regulations provide an opportunity for any person who disagrees with any portion of this decision to request an adjudicatory hearing in accordance with 18 AAC 15.200-310. This request should be hand delivered or mailed to the Commissioner of the Alaska Department of Environmental Conservation, 410 Willoughby Avenue, Suite 303, Juneau, Alaska 99801-1795. Failure to file a statement of issues within 30 days of receipt of this letter constitutes a waiver of your right to judicial review of this decision.

If you have any questions regarding this 401 certification please contact Alan Kukla at 907.269.7523 (alan_kukla@dec.state.ak.us) or Kathie Mulkey (kathleen_mulkey@dec.state.ak.us) at 907.451.2106.

Sincerely,


Sharron Stambaugh
Environmental Program Manager III
Wastewater Discharge Programs

Enclosures: Certificate of Reasonable Assurance for NPDES Permit AKG-37-5000

STATE OF ALASKA
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
CERTIFICATE OF REASONABLE ASSURANCE

A Certificate of Reasonable Assurance, as required by Section 401 of the Clean Water Act, has been requested by EPA for NPDES Permit No. AKG-37-5000, SMALL SUCTION DREDGE PLACER GP.

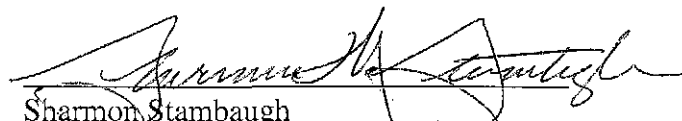
Public Notice of the application for this certification was made in accordance with 18 AAC 15.140.

Water Quality Certification is required for the proposed activity because the activity will be authorized by an EPA permit identified as No. AKG-37-5000 and discharge may result from the proposed activity.

Having reviewed the preliminary final permit, and any comments received in response to the public notice, the Alaska Department of Environmental Conservation certifies that there is reasonable assurance the proposed activity, and any possible resultant discharge, provides sufficient water quality protection, and is in compliance with the requirements of Section 401 of the Clean Water Act, which includes the Alaska Water Quality Standards (18 AAC 70).

April 16, 2007

Date


Sharmon Stambaugh
Environmental Program Manager III
Wastewater Discharge Programs