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INTRODUCTION

A. Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed the Complaint in this matter against the State of Alaska, Department of Transportation & Public Facilities (“DOT&PF”), alleging that DOT&PF violated Section 301(a) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1311(a).

B. The Complaint alleges that DOT&PF violated CWA Section 301 by: (1) failing to comply with a Federal Storm Water Construction General Permit, which was applicable during the pendency of the construction activities identified in the Complaint; and (2) discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at 10 sites located on the Kenai Peninsula, Alaska (the “Section 404 Sites”) as more fully described in the Complaint, without authorization through the United States Army Corps of Engineers (the “Corps”).

C. DOT&PF neither admits nor denies the allegations in the Complaint and nothing in this Decree shall constitute or be construed as an admission of liability, fact or law, or of any wrongdoing on the part of DOT&PF.

D. The United States and DOT&PF have consented to the entry of this Decree without trial of any issues.

E. The parties to this Consent Decree agree that this Decree is not intended to be used in subsequent litigation to establish either a point of law or fact; provided, however, that the foregoing shall in no way affect the binding nature of this Decree or the parties’ respective obligations pursuant to this Decree, nor shall the parties be precluded from establishing the

existence or content of this Decree in either subsequent litigation or subsequent proceedings in this lawsuit where the terms or existence of the Decree may be at issue, including, without limitation, any action to enforce the terms of this Decree. This Decree does not create any rights, implied or otherwise, in any third parties not specifically identified.

F. These parties recognize, and this Court finds by entering this Decree, that the parties have negotiated this Decree in good faith, that implementation of this Decree will avoid prolonged and complicated litigation between these parties, and that it is fair, reasonable, and in the public interest.

G. Kachemak Heritage Land Trust (“KHLT”) is a non-profit organization established to preserve, for public benefit, land with significant natural, recreational, or cultural values on the Kenai Peninsula.

H. KHLT was not involved with the activities of DOT&PF that gave rise to the allegations in the Complaint, but has consented to be added as a party to this case and be bound by this Consent Decree solely for purposes of performing its obligations under Section VI below, Mitigation Contribution for Environmental Protection.

I. The alleged Section 404 violations arose in connection with work initiated by DOT&PF to address damage caused by two 100-year floods that occurred in October and November, 2002.

J. The parties desire to resolve the alleged Section 404 violations without affecting the processing of DOT&PF’s CWA Section 404 permit application for the replacement of the Ninilchik Bridge, to which the normal permitting procedures will be applied without special consideration given to the alleged violations being resolved in this Consent Decree.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication or admission of any issue of fact or law, and upon consent and agreement of the parties, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the District of Alaska pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because Defendant is the state government located in this District, the subject properties are located in this District, and the causes of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309, 402 and 404, of the CWA, 33 U.S.C. §§ 1311, 1319, 1342, and 1344.

II. DEFINITIONS

4. Except as specifically provided in this Decree, definitions for the terms used in this Decree shall be incorporated from the Clean Water Act and the regulations promulgated pursuant to that Act. Whenever terms listed below are used in this Decree the following definitions apply:

a. "404 Permit" means a Clean Water Act section 404, 33 U.S.C. § 1344, permit issued by the Corps.

b. “Action Item” means a condition that requires action to be taken to achieve or maintain compliance with the requirements of the CGP, as defined herein, and this Consent Decree.

c. “Active Project” means any Project for which DOT&PF has filed a Notice of Intent for coverage under a CGP, as defined herein, but has not yet filed a Notice of Termination with the relevant permitting authority.

d. “AK-CESCL Training Program” means Alaska Certified Erosion and Sediment Control Lead Storm Water Training Program developed under a Memorandum of Understanding among the Associated General Contractors of Alaska, Associated Builders and Contractors of Alaska, DOT&PF, the Corps, Alaska Department of Environmental Conservation (“ADEC”), Alaska Department of Natural Resources, Alaska Railroad Corporation, and the Municipality of Anchorage. An outline of the AK-CESCL training course is attached as Appendix A.

e. “Best Management Practices” or “BMPs” shall have the meaning ascribed to it in the CGP.

f. “CGP” means either the Federal Storm Water Construction General Permits issued by EPA and published on July 1, 2003 (68 Fed. Reg. 39087 - 39091) and any reissuance or modification thereof, or a stormwater construction general permit issued by ADEC after the state is delegated NPDES permitting authority for stormwater discharges, whichever is applicable.

g. “CGP Inspection Report” means the self-inspection report required by Paragraph 7.c. of this Consent Decree.

h. “CWA” means the Clean Water Act as amended under 33 U.S.C. §§ 1251-1387 (2009).

i. “Construction Activities” refers to construction activities regulated under the CGP, and includes the disturbance of soils associated with clearing, grading, or excavating activities, or other construction-related activities.

j. “Contractor” means the general contractor retained by DOT&PF for performance of the construction contract at a Project who is in operational control of day-to-day Construction Activities at the project.

k. “Contractor’s Superintendent” means the Contractor’s employee or representative charged with the supervision or completion of construction at a Project.

l. “Contractor’s SWPPP Manager” means the Contractor’s employee or representative who conducts CGP inspections at an Active Project, pursuant to the CGP and this Consent Decree.

m. “DOT&PF Project Engineer” means an employee or representative who is the authorized representative of the DOT&PF contracting officer and is responsible for the administration of the construction contract at a Project.

n. “DOT&PF Regional Stormwater Specialist” means a DOT&PF employee or representative who provides compliance assistance related to the CGP within a specified DOT&PF region.

o. “DOT&PF Stormwater Inspector” means a DOT&PF employee or representative who conducts inspections as required by a CGP and this Consent Decree.

p. “Interim Stormwater Training” means the erosion and sediment control training available from DOT&PF that is provided to newly employed, transferred, assigned, or contracted DOT&PF Regional Stormwater Specialists, Project Engineers, and Stormwater Inspectors, as required by Paragraph 5.a. of this Consent Decree. An outline of the Interim Stormwater Training course is attached as Appendix B.

q. “Project” means any location in the State of Alaska that is subject to Construction Activities by DOT&PF, where

(1) DOT&PF has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications; or

(2) DOT&PF has operational control as defined in the CGP of day-to-day activities which are necessary to ensure compliance with a SWPPP or other CGP conditions.

r. “Sites” means the thirteen (13) locations specified in the Complaint at which DOT&PF allegedly committed violations of the CWA.

s. “Section 402 Sites” means the three (3) locations specified in the Complaint at which DOT&PF allegedly violated CWA sections 301 and 402, 33 U.S.C. §§ 1311, 1342.

t. “Section 404 Sites” means the ten (10) locations specified in the Complaint at which DOT&PF allegedly violated CWA sections 301 and 404, 33 U.S.C. §§ 1311, 1344.

u. “Seasonal Thaw” means the annual recurrence of snow and ice melting at a Project after a prolonged period of freezing conditions.

v. “SWPPP” means a Storm Water Pollution Prevention Plan as described in the CGP.

III. COMPLIANCE PROGRAM

5. Training:

a. *Training for DOT&PF.* All DOT&PF Regional Stormwater Specialists, Project Engineers, and Stormwater Inspectors will attend and be certified in the AK-CESCL training described in Appendix A or demonstrate completion of a course that meets or exceeds the requirements of the AK-CESCL Training Program, within six (6) months of date of entry of this Decree, and before performing their duties related to this Consent Decree at any Project. However, if they have not received AK-CESCL training, newly employed, transferred, assigned, or contracted DOT&PF Regional Stormwater Specialists and Project Engineers assigned to any Project must, at a minimum, receive Interim Stormwater Training (which may be web-based modules) before performing their duties related to this Consent Decree at any Project, and within ninety (90) days of their employment or contract with DOT&PF. An outline of the Interim Stormwater Training course is attached as Appendix B. Newly employed, transferred, assigned, or contracted DOT&PF Regional Stormwater Specialists and Project Engineers must attend and be certified in the AK-CESCL Training Program within six (6) months of their new employment, transfer, contract or assignment. All DOT&PF Stormwater Inspectors shall receive AK-CESCL or equivalent training, as provided by Paragraph 5.d., prior to performing their duties related to this Consent Decree at any Project and no later than six (6) months of their new employment, transfer, contract or assignment. All DOT&PF Regional Stormwater Specialists, Project Engineers, and Stormwater Inspectors assigned to any Project must be re-certified in the AK-

CESCL Training Program or equivalent every three (3) years, prior to performing their duties under this Consent Decree.

b. *Training for Contractors.* DOT&PF standard contract specifications shall provide that Contractor's Superintendents and Contractor's SWPPP Managers shall have current AK-CESCL or equivalent certification before performing their duties at any Project. DOT&PF standard contract specifications shall provide that current certification requires either recertification every three (3) years under the AK-CESCL Training Program or comparable recertification under an equivalent course as set forth in Paragraph 5.d.

c. *Modification to AK-CESCL Training Program.* Any major modification to the AK-CESCL Training Program described in this Decree must receive the approval of the EPA's NPDES Compliance Officer specified in Paragraph 35 (Notification). An outline of the AK-CESCL Training Program, entitled Course Elements, is attached at Appendix A. Major modifications are the (a) elimination of any training module, (b) decrease in the number of training hours required for certification, (c) lowering of testing requirements, (d) extending the time for re-certification, or (e) inclusion of a new module such that any other module is substantially (fifty per cent (50%) or more) reduced. DOT&PF must notify EPA within thirty (30) days of any major modification to the AK-CESCL Training Program. If EPA objects to any modification, that objection will be in writing and will provide the reasons that the modification has not been approved. If EPA does not object in writing to the modification within thirty (30) days of notification, the modification will be deemed approved. All other changes are deemed minor and are not subject to EPA approval. Any major modification to the AK-CESCL Training

Program must be documented in DOT&PF's annual report to EPA along with an updated outline of the AK-CESCL Training Program.

d. *Equivalent AK-CESCL Certification.* For purposes of this Decree, a current certification from one of the following erosion and sediment control training programs is equivalent to the AK-CESCL Training Program certification: Washington Department of Ecology Certified Erosion and Sediment Control Lead; CPESC, Inc's Certified Professional in Erosion and Sediment Control; and CISEC Inc.'s Certified Inspector in Sediment and Erosion Control.

6. Construction and SWPPP Requirements:

a. *SWPPP:*

(1) The name of the person(s) who prepares a SWPPP must appear on the SWPPP, together with the date of the pre-construction inspection, if applicable.

(2) The DOT&PF Project Engineer must sign and certify the SWPPP as approved for every Project prior to commencement of Construction Activities at a Project.

(3) Any SWPPP amendment for a Project must be dated and approved in writing by an AK-CESCL - or equivalently - certified individual, as provided by Paragraph 5. The SWPPP must also include the approving individual's name and AK-CESCL (or equivalent) certification expiration date.

(4) For each Project, the approved and most recently amended SWPPP, including project reports and certifications that are required under the CGP, documentation of training for personnel who conduct CGP inspections, and Delayed Action Item Reports (if any) that are required under this Consent Decree must be maintained at the Project or

be locally available as required by the CGP and made available for review by inspectors with authority under the CGP.

b. *BMP Manual*: Each SWPPP and each SWPPP amendment must contain a reference to the BMP manual or publication used as a source for each BMP described in the SWPPP, along with schematics or descriptions of the BMP. If no BMP manual or publication was used to select or design a given BMP, then the SWPPP must say so and include a description of the design and placement of the BMP.

c. *Seasonal Stabilization*: After commencement of Construction Activities, each Active Project shall be stabilized with appropriate sediment and erosion control BMPs prior to Seasonal Thaw.

7. Inspection Program:

a. *Pre-construction Inspections*: For all Projects awarded to a contractor ninety (90) days or more after the entry of this Decree by the district court, the following pre-construction inspection requirements shall apply prior to commencing Construction Activities. In the DOT&PF Central Region, at Projects that are accessible by a contiguous road system from DOT&PF's Anchorage office, a pre-construction inspection must be completed at each Project equal to or greater than one (1) acre. For all other Projects in the DOT&PF Central Region, a pre-construction inspection must be completed at each Project that is equal to or greater than five (5) acres. A pre-construction inspection must also be completed at each Project equal to or greater than five (5) acres in the DOT&PF Northern Region and Southeast Region. Each pre-construction inspection must identify or verify: opportunities to phase construction activities at

the Project; appropriate BMPs and their sequencing for the Project; and, which sediment controls to install at the Project prior to commencing Construction Activities.

b. *Inspections:* All self-inspections required by the CGP shall be conducted by the DOT&PF Stormwater Inspector and Contractor's SWPPP Manager at a frequency allowed by the CGP, as set forth in the SWPPP. Inspections shall only be conducted by AK-CESCL – or equivalently – certified personnel as outlined in Paragraph 5 of this Consent Decree. The DOT&PF Stormwater Inspector and Contractor's SWPPP Manager shall conduct all inspections jointly, unless impracticable. For the purposes of this subparagraph, the term “impracticable” includes but is not limited to the conduct of joint inspections during winter shutdown at Projects at locations that require access by aircraft. If a joint inspection is not practicable, and the CGP Inspection Report contains one or more Action Items, then the report must be submitted to the party not conducting the inspection within three (3) days of the inspection date. If a joint inspection is not practicable, and CGP Inspection Report contains no Action Items, then the report must be submitted to the party not conducting the inspection as soon as practicable. Inspections must include all of the areas of the Project that are required by the CGP to be included in the self-inspection.

c. *Inspection Reports:* At all Active Projects, DOT&PF and its contractors shall conduct and document self-inspections required by the CGP using the inspection report form (“CGP Inspection Report Form”) in Appendix C. For CGP inspections and reports to comply with the Consent Decree, each CGP Inspection Report Form in Appendix C must be filled out with the following information:

- (1) the inspection date;

(2) the names, AK-CESCL (or equivalent) certification number (where applicable), and AK-CESCL (or equivalent) expiration date for the DOT&PF Stormwater Inspector and Contractor's SWPPP Manager conducting the inspection;

(3) a statement that all Project areas disturbed by Construction Activities, areas used for storage of materials that are exposed to precipitation, and areas where pollutants may enter a storm water conveyance system have been inspected (if any Project area(s) was not inspected, then the inspection report must list those areas using either station numbers or other locational identifiers);

(4) weather information for the period since the last inspection (or since commencement of Construction Activities if the first inspection) including a best estimate of the beginning of each storm event, duration of each storm event, approximate amount of rainfall for each storm event (in inches), and whether any discharges occurred;

(5) weather information and a description of any discharges occurring at the time of the inspection;

(6) location(s) of discharges of sediment or other pollutants from the site, along with either the station number or other locational identifiers;

(7) location(s) of BMPs that need to be maintained, along with either the station number or other locational identifiers associated with each observation;

(8) location(s) of BMPs that failed to operate as designed or proved inadequate for a particular location, along with either the station number or other locational identifiers associated with each observation;

(9) location(s) where additional BMPs are needed that did not exist at the time of inspection, along with either the station number or other locational identifiers associated with each observation;

(10) any and all necessary BMP Action Items (*e.g.*, maintenance needs, replacement needs, or SWPPP amendments), along with a specified date (prior to the next storm event unless impracticable) when Action Items will be completed; and

(11) a certification of the inspection report by the DOT&PF Project Engineer and Contractor's Superintendent.

d. *Modifications to the Inspection Report:* DOT&PF may modify the CGP Inspection Report Form, provided the proposed modifications to the CGP Inspection Report Form ensure that the form includes at least the eleven (11) elements listed in Paragraph 7.c. Except as provided below, DOT&PF must notify the NPDES Compliance Officer in Paragraph 35 (Notification) prior to any proposed modifications to the CGP Inspection Report Form. If EPA objects to any modification, that objection will be in writing and will provide the reasons for which the modification has not been approved. If EPA does not object to the modification within thirty (30) days from the date of notification, the modification is deemed approved. All modifications to the CGP Inspection Report Form must be documented in DOT&PF's annual report to EPA along with a copy of the modified CGP Inspection Report Form. A modification under this subparagraph means any change to the eleven (11) elements listed in Paragraph 7.c. However, under this subparagraph, an addition to the CGP Inspection Report Form that does not limit or otherwise reduce the information listed in Paragraph 7.c., is not a modification requiring prior notice to EPA or EPA approval.

8. Project Maintenance:

a. *Deadline for Completing Action Items:* Except as otherwise provided herein, each of the Action Items identified in a CGP Inspection Report shall be completed by no later than the date(s) identified in that inspection report. The deadline for completion of each Action Item shall be selected to protect water quality and to comply with the CGP's requirement that BMP replacement or maintenance must occur prior to the next storm event unless impracticable. If the deadline for an Action Item is later determined to be impracticable, a Delayed Action Item Report must be completed as provided in Paragraph 8.b., below.

b. *Delayed Action Item Reports:* When an Action Item is delayed, a Delayed Action Item Report Form (using the form attached in Appendix D) must document and explain the impracticable circumstances for the delay in completion of that Action Item. This requirement shall not in any way be construed to preclude any of the other requirements of this Consent Decree or the CGP.

c. *Modifications to Delayed Action Item Report Form:* After the effective date of this Decree, DOT&PF may request a modification to the Delayed Action Item Report Form (*see* Appendix D) one time per year. A request for a modification to the Delayed Action Item Report Form must be sent to the NPDES Compliance Officer identified in Paragraph 35 (Notification). The NPDES Compliance Officer will have thirty (30) days to object to a modification. An objection must be in writing and provide specific reasons why a request for modification was not approved. If the NPDES Compliance Officer does not object to a modification in writing within thirty (30) days to DOT&PF, the modification is deemed approved. A modification under this subparagraph means any change to the Delayed Action

Item Report Form in Appendix D. However, under this subparagraph, an addition to the Delayed Action Item Report Form that does not limit or otherwise reduce the information required under the Delayed Action Item Report Form is not a modification requiring EPA approval.

9. Reporting:

a. *Endangerment Reports:* DOT&PF must provide to the NPDES Compliance Officer in Paragraph 35 (Notification), oral 24-hour reports and five-day written reports identifying each instance of noncompliance with the CGP that may endanger health or the environment, pursuant to the "Twenty-four Hour Reporting" provisions described in the CGP. In addition to the information required by the CGP, each oral and written report shall include the name of the Project at which the noncompliance occurred and the tracking number assigned to DOT&PF at the Project. Certification requirements described in Paragraph 36 do not apply to endangerment reports.

b. *Notices of Intent.* DOT&PF shall submit to the NPDES Compliance Officer specified in Paragraph 35 (Notification) a copy of each CGP Notice of Intent filed with the relevant permitting authority within seven (7) days of filing that Notice of Intent.

c. *Annual Report:* DOT&PF must submit to the NPDES Compliance Officer in Paragraph 35 (Notification) an Annual Report certifying DOT&PF's compliance with all requirements under the Consent Decree in the previous calendar year and/or identifying all violations of the Consent Decree during the previous calendar year. The first Annual Report, due in 2011, shall be received by EPA no later than March 31, 2011. In subsequent years of this Decree, Annual Reports shall be received by EPA no later than March 1 of the applicable calendar year. The Annual Report must be submitted in hard copy, on compact disc, or

electronically as an attachment to electronic mail. If a certification of compliance is to be provided (in the absence of any noncompliance), this certification must include statements by DOT&PF individually certifying compliance with Paragraphs 5 through 9(b). If EPA determines that the Annual Report is deficient in any respect, EPA will notify DOT&PF in writing.

DOT&PF shall have the opportunity to cure any defects, but must do so no later than thirty (30) days after receiving notice of any deficiencies. The Annual Report shall include all of the following seven (7) items related to activities carried out by DOT&PF during the previous calendar year.

(1) A worksheet identifying all instances of non-compliance with the Consent Decree. A copy of the worksheet to be used is attached hereto as Appendix E. To satisfy this portion of the Annual Report requirements, a worksheet must be filled out in its entirety, and must include specific information necessary to explain each instance of non-compliance.

(2) A worksheet identifying and providing information for all Active Projects during the previous calendar year. A copy of the worksheet to be used is attached hereto as Appendix F. The worksheet must be filled out in its entirety with all relevant Project information to satisfy this portion of the Annual Report requirements.

(3) A copy of any modified CGP Inspection Report Form, as required in 7.d., above.

(4) A copy of a modified Delayed Action Item Report Form, as required in 8.c., above.

(5) An outline of the current AK-CESCL course.

(6) The dates and location of any DOT&PF-sponsored AK-CESCL training courses.

(7) Copies of all Delayed Action Item Report Forms for all Active Projects.

Within six (6) months from the date of receipt of the Annual Report, if EPA determines that the Annual Report is deficient in any respect, EPA shall notify DOT&PF in writing of the deficiencies. If no written notice of deficiencies is issued by EPA to DOT&PF within the prescribed time period, the Annual Report shall be deemed approved.

IV. CIVIL PENALTY

10. Civil Penalty: By no later than October 1, 2010, and subject to Section VII (Obligation Subject to Appropriation) of this Consent Decree, DOT&PF shall pay to the United States a civil penalty of One Hundred Forty-Thousand Dollars (\$140,000.00), for the alleged violations of Section 402 of the CWA.

11. Payments to be Made Solely by DOT&PF: DOT&PF shall be responsible for payment of the civil penalty paid under this Consent Decree and shall not seek payments, reimbursement, indemnification or insurance coverage for this civil penalty from any contractor, subcontractor, third party, or agency of the United States.

12. Method of Payment: The One Hundred Forty-Thousand Dollars (\$140,000.00) penalty shall be made payable to the "Treasurer of the United States" by Electronic Funds Transfer ("EFT" or wire transfer) to the United States Department of Justice lock box bank, referencing DOJ 90-5-1-1-08977 and the CDCS File Number_____. A copy of the wire

transfer confirmation shall be forwarded to the United States at the addresses specified in Paragraph 35 (Notification).

V. INJUNCTIVE RELIEF - REVEGETATION

13. Subject to Section VII (Obligation Subject to Appropriation) of this Consent Decree, DOT&PF shall perform revegetation under the terms and conditions stated in Appendix G appended hereto and incorporated herein by reference.

VI. MITIGATION CONTRIBUTION FOR ENVIRONMENTAL PROTECTION

14. By no later than October 1, 2010, and subject to Section VII (Obligation Subject to Appropriation) of this Consent Decree, DOT&PF shall pay to the Kachemak Heritage Land Trust ("KHLT") the sum of Eight Hundred Fifty-Thousand Dollars (\$850,000.00) for KHLT to acquire and permanently conserve riparian areas, for the preservation of water quality and salmon habitat, on the Anchor River, Ninilchik River, Deep Creek, or Stariski Creek watersheds on the Kenai Peninsula, Alaska. It is the intent of the parties to maximize the amount of funds that can be applied solely to the acquisition and permanent conservation of the riparian areas for the preservation of water quality and salmon habitat; however, the parties acknowledge that certain expenses and administrative costs are necessary to accomplish the acquisitions and conservation. Such expenses may be applied to: (1) reasonable pre-acquisition expenses that apply directly to the property acquisitions and permanent conservation, including but not limited to negotiations, appraisals, surveys, title insurance, closing costs, attorney's fees and travel; and (2) perpetual management and stewardship costs, which shall be calculated according to KHLT Resolution Number 2010-08 (attached hereto as Appendix H). In addition, KHLT may charge pre-acquisition administrative costs to the Eight Hundred Fifty-Thousand Dollars (\$850,000.00)

according to the calculations and limit set forth in KHLT Resolution Number 2010-09 (attached hereto as Appendix I). DOT&PF shall not be responsible in any manner for defining, determining, or monitoring the amount of KHLT's monitoring or administrative costs.

15. To ensure that the properties proposed to be acquired and conserved by KHLT as specified in Paragraph 14 above are acceptable to the United States: (1) not more than ninety (90) days after entry of this Consent Decree, KHLT shall arrange a meeting among representatives of EPA, DOT&PF, and KHLT to discuss how best to preserve water quality and salmon habitat through KHLT's purchase and conservation of properties with the Eight Hundred Fifty-Thousand Dollars (\$850,000.00); and (2) KHLT shall provide EPA's Wetlands Compliance Officer in Paragraph 35 (Notification) with advance notice, and the opportunity to comment on and/or object to any potential property purchase by KHLT. If EPA objects to a potential purchase within thirty (30) days of the notice provided by KHLT and those objections are not resolved to EPA's satisfaction, then that potential purchase shall not be completed. In addition, KHLT shall provide DOT&PF with advance notice of any potential property purchase by KHLT. DOT&PF shall have the opportunity to comment on and/or object to KHLT's potential purchases that would affect transportation. If DOT&PF objects to such a potential purchase within thirty (30) days of the notice provided by KHLT and those objections are not resolved to DOT&PF's satisfaction, then that potential purchase shall not be completed. DOT&PF shall not unreasonably withhold its consent.

16. So that all of the property acquired by KHLT with any portion of the Eight Hundred Fifty-Thousand Dollars (\$850,000.00) remains protected in perpetuity, KHLT shall ensure that permanent deed restrictions preventing development of any part of the transferred

property that does not promote the conservation of the riparian areas, and specifically preventing usage of the property in a manner that could impair or interfere with the preservation of water quality or salmon habitat on the property, become effective upon the transfer of all of the properties to KHLT.

17. If KHLT ceases to retain ownership of any of the properties that it acquires with any portion of the Eight Hundred Fifty-Thousand Dollars (\$850,000.00), then KHLT shall ensure that, upon transfer of the lots to a new owner, KHLT or a similar conservation organization shall receive permanent conservation easements on the transferred property. The deed restrictions on the properties acquired by KHLT shall not prevent KHLT from selling or donating the property to a similar conservation organization, so long as upon transfer of the lots, KHLT or a similar conservation organization shall receive permanent conservation easements preventing development on any part of the transferred property that does not promote the conservation of the riparian areas, and specifically preventing usage of any of the property in a manner that could impair or interfere with the preservation of water quality or salmon habitat on the properties.

18. Within six (6) weeks of the acquisition of any property by KHLT with any portion of the Eight Hundred Fifty-Thousand Dollars (\$850,000.00), KHLT shall provide the United States and DOT&PF with a written report that:

- a. depicts the property acquired by KHLT;
- b. specifies the amount spent to acquire the property and the amount allotted to manage the property in order to preserve the water quality and salmon habitat in perpetuity;

c. includes copies of the documents that memorialize the acquisition of the property and the permanent deed restrictions that prevent the impairment of, or interference with, the preservation of water quality and salmon habitat on the property; and

d. describes the water quality and salmon habitat values of the property upon KHLT's acquisition.

19. KHLT shall make all reasonable efforts to use the Eight Hundred Fifty-Thousand Dollars (\$850,000.00) as described in Paragraphs 14-18 above within five (5) years after the entry of this Consent Decree. In the event that KHLT does not use the Eight Hundred Fifty-Thousand Dollars (\$850,000.00) within five (5) years after the Effective Date of this Consent Decree, then:

a. KHLT shall ensure that any remaining funds are paid into the registry of the Court;

b. the United States and DOT&PF shall identify pursuant to the procedures in Section XI (Dispute Resolution) of this Consent Decree an alternative for off-site mitigation; and

c. the funds shall be spent on that mitigation alternative.

20. With regard to DOT&PF's payment of the Eight Hundred Fifty-Thousand Dollars (\$850,000.00) to KHLT, DOT&PF certifies the truth and accuracy of each of the following:

a. as of the date of executing this Consent Decree, DOT&PF is not required to make the payment by agreement, grant, or as injunctive relief awarded in any other action in any forum;

b. DOT&PF was not planning or intending to make any such payment other than in settlement of the claims resolved in this Consent Decree;

c. DOT&PF has not received, and is not negotiating to receive, credit for the payment in any other enforcement action; and

d. DOT&PF will not receive any reimbursement for any portion of the payment from any other person or entity.

VII. OBLIGATIONS SUBJECT TO APPROPRIATION

21. It is the expectation of the United States and DOT&PF that DOT&PF will obtain funding to fulfill its obligations under this Consent Decree. DOT&PF agrees to utilize its best efforts to obtain sufficient funding through the State of Alaska budgetary process to fulfill its obligations under this Consent Decree.

22. If funds to fulfill any of DOT&PF's obligations under this Decree are not approved through the State of Alaska budgetary process, or if DOT&PF fails to timely perform any obligation set forth herein based on a lack of appropriated funds, the United States and DOT&PF shall attempt informally in accordance with Paragraph 60 (Informal Dispute Resolution) to address potential adjustments to DOT&PF's obligations under this Decree that require the payment or appropriation of such funds. If no agreement is reached between the United States and DOT&PF, then the United States may, in its sole discretion, move the Court to vacate all or any portion of this Decree. DOT&PF's failure to secure sufficient funds through the State of Alaska shall not be a defense to the United States' motion to vacate all or any portions of this Decree. If the Decree is vacated, then the claims in the Complaint shall be revived, and DOT&PF shall not assert, plead, or raise in any fashion on behalf of any party any defense or

avoidance based on the running of any statute of limitations, laches, or other principle concerning the timeliness of commencing a civil action with respect to any claims in the Complaint.

VIII. GENERAL PROVISIONS

23. Continuing Jurisdiction of the Court: The Court shall retain jurisdiction to enforce the terms and conditions of this Decree, to resolve disputes arising hereunder, and for such other action as may be necessary or appropriate for construction or execution of the Decree. During the pendency of the Consent Decree, the United States or DOT&PF may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

24. Parties Bound: In accordance with the provisions of Federal Rules of Civil Procedure 65, the provisions of this Decree shall apply to and be binding upon the United States, DOT&PF, and KHLT.

25. Not an Admission: Nothing in this Consent Decree shall constitute an admission of fact or law by the United States or DOT&PF.

26. Costs of Suit: Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action.

27. DOT&PF Responsibility: Without imposing individual liability, the obligations of this Consent Decree shall apply to and be binding upon DOT&PF, its officers, directors, agents, employees and servants, and their successors and assigns, and any other entities or persons otherwise bound by law. DOT&PF shall make available on the internet a copy of this Consent Decree to all officers, directors, agents, employees and servants, and their successors and assigns, whose duties might reasonably include compliance with any provision of this

Decree. DOT&PF also shall make available on the internet a copy of this Consent Decree to all Contractors and any other contractors that DOT&PF retains to comply with or meet the objectives of this Decree. In any action to enforce this Decree, DOT&PF shall not assert as a defense to a finding of liability the failure of any person, firm, or corporation acting in concert or participation with DOT&PF to take any actions necessary to comply with this Decree, unless DOT&PF establishes that the failure resulted from a Force Majeure Event as set forth in Section XII, below; provided, however, that DOT&PF may assert such failure as a mitigating factor for the purposes of any related civil penalty, injunctive relief, or other remedy sought against DOT&PF; provided, further, that the United States may assert that such failure should not be considered as a mitigating factor.

28. No Warranty by the Plaintiff: The United States does not, by its consent to entry of this Decree, warrant or aver in any manner that DOT&PF's compliance with this Decree will result in compliance with the provisions of applicable federal or state laws, regulations, or CGP or 404 Permit conditions. DOT&PF shall remain responsible for compliance with this Decree, the Clean Water Act, any permit, and any other applicable state, federal, or local law or regulation.

29. Final Judgment: Upon approval and entry of this Decree by the Court, this Decree shall constitute a final judgment between and among the United States and DOT&PF.

30. Purpose of Decree: This Decree is intended to settle the claims brought against DOT&PF in the Complaint. All obligations in this Decree shall have the objective of causing DOT&PF to be and remain in full compliance with the Act, the regulations and permits issued pursuant to the Act, as well as state laws, regulations, and permits authorized pursuant to the Act.

31. Right of Entry: Until termination of this Decree, the United States and its representatives, contractors, consultants, and attorneys shall each have the authority to enter at all reasonable times and upon presentation of credentials, any Project in the State of Alaska or any location at which records relating to this Decree are kept for the purposes of:

- a. monitoring DOT&PF's compliance with this Decree;
- b. verifying any data or information submitted by DOT&PF pursuant to this Decree;
- c. reviewing and copying any records required to be kept by DOT&PF pursuant to this Decree; and
- d. inspecting and evaluating DOT&PF's revegetation activities.

32. No Limitation on Other Rights of Entry: Nothing in Paragraph 31 (Right of Entry) or any other provision of this Decree shall be construed to limit any statutory right of entry or access or other information gathering authority pursuant to any federal, state, or local law.

33. Preservation of Records:

a. In addition to complying with any other applicable local, state, or federal records preservation requirements, until one (1) calendar year after termination of this Decree, DOT&PF shall preserve at least one (1) legible copy of all Records in its possession, custody, or control. For the purposes of this paragraph, the period of preservation for any Records required to be created or maintained by a specific portion of this Decree shall be one (1) calendar year after the date of termination of that portion of this Decree, pursuant to Paragraph 41 (Termination of Decree).

b. For the purposes of this paragraph, "Records" shall mean any record, report, information, document, or photograph required to be created or maintained pursuant to the requirements set forth in: (i) this Decree; (ii) the applicable CGP; (iii) the CGP stormwater requirements of the Clean Water Act; or (iv) applicable federal, state, and local laws and regulations regarding document preservation, including, without limitation, the Alaska Construction Manual and the State of Alaska's document retention requirements.

c. Within thirty (30) days of retaining or employing any agent, consultant, or contractor for the purpose of carrying out the terms of this Decree, DOT&PF shall enter into an agreement with any such agent, consultant, or contractor requiring such person to provide to DOT&PF a copy of all Records.

d. Upon request by the United States, DOT&PF shall deliver any such Records to EPA. DOT&PF may assert that certain Records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If DOT&PF asserts such a privilege, it shall provide the United States with the following: (1) the title of the Records; (2) the date of the Records; (3) the name and title of the author of the Records; (4) the name and title of each addressee and recipient; (5) a description of the subject of the Records; and (6) the privilege asserted by DOT&PF. However, no documents, reports, records, photographs, or other information required to be created or generated pursuant to this Consent Decree shall be withheld on the grounds that they are privileged.

34. Authority to Sign Decree: The undersigned representatives of DOT&PF and KHLT certify that each is authorized to enter into this Decree on behalf of that party and to

execute and legally bind the party to the terms and conditions of this Decree, and that each meets the requirements for authorized signatory found in 40 C.F.R. § 122.22.

35. Notification:

a. When written notification or communication is required by the terms of this Decree, such notification or communication shall be addressed to the following individuals at the addresses specified below (or to such other addresses as may be designated by written notice to the parties):

As to the United States:

For DOJ:

Chief, Environmental Defense Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Ph: 202.514.2219
Fax: 202.514.8865

Mark A. Nitczynski, Attorney
U.S. Department of Justice
1961 Stout Street – 8th Floor
Denver, CO 80294
mark.nitczynski@usdoj.gov
Ph: 303.844.1498
Fax: 303.844.1350

Chief, Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Ph: 202.514.5271
Fax: 202.514.0097

David F. Askman, Attorney
U.S. Department of Justice
1961 Stout Street - 8th Floor
Denver, CO 80294
david.askman2@usdoj.gov
Ph: 303.844.1381
Fax: 303.844.1350

For EPA:

Ankur Tohan
Assistant Regional Counsel
U.S. EPA, Region 10
1200 6th Ave, Suite 900 (ORC-158)
Seattle, Washington 98101
tohan.ankur@epa.gov
Ph: 206.553.1796
Fax: 206.553.0163

Kristine Karlson
NPDES Compliance Officer
U.S. EPA, Region 10
1200 6th Ave, Suite 900 (OCE-133)
Seattle, Washington 98101
karlson.kristine@epa.gov
Ph: 206.553.0290
Fax: 206.553.1280

Phil North
Wetlands Compliance Officer
U.S. EPA, Region 10
Kenai River Center
514 Funny River Road
Soldotna, Alaska 99669
north.phil@epa.gov
Ph: 907.714.2483
Fax: 907.260.5992

As to DOT&PF:

DOT&PF Chief Engineer
Attn: Roger Healy
Division of Design & Engineering Services
State of Alaska, DOT&PF
PO Box 112500
3132 Channel Drive
roger.healy@alaska.gov
Juneau, AK 99811-2500
Ph: 907.465.6958

For the 404 Portions only:
Regional Preconstruction Engineer
Attn: K. Kim Rice
State of Alaska, DOT&PF
PO Box 196900
Anchorage, AK 99510-6900
kkim.rice@alaska.gov
Ph: 907.269.0588

With copies to:

Chief Assistant Attorney General – Transportation Section
Attn: James Cantor
Alaska Department of Law
1031 W. 4th Street, Suite 200
Anchorage, AK 99501
jim.cantor@alaska.gov
Ph: 907.269.5165

As to KHLT (with respect to the Notification requirements in Section VI only):

Marie McCarty
Executive Director
Kachemak Heritage Land Trust
315 Klondike Avenue
Homer, AK 99603
marie@kachemaklandtrust.org
Ph: 907.235.5263

b. Notifications to or communications with DOT&PF or the United States shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested or by date/time stamp if submitted by electronic mail. Notifications may be made by overnight or U.S. Express mail with delivery confirmation.

36. Certification of Reports and Submissions: Except as otherwise expressly provided in this Decree, any report or other document submitted by DOT&PF pursuant to this Decree which makes any representation concerning compliance or noncompliance with any requirement of this Decree shall be certified by an authorized officer of DOT&PF. The certification shall be in the following form:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: _____
Name: _____
Title: _____
Date: _____

37. Entire Agreement: This Decree is the final, complete, and exclusive agreement between the parties. The parties acknowledge that there are no inducements, promises, representations, agreements, or understandings relating to the settlement other than those expressly contained in this Decree.

38. Modification: The deadlines set forth in this Decree may be modified by this Court in accordance with Section XI (Dispute Resolution) or by written agreement of the

affected parties and notification to the Court. Modifications by agreement of the affected parties shall be effective ten (10) days after the date the notice is filed with the Court unless otherwise ordered by the Court. With respect to all other provisions of this Decree, except as expressly provided in Paragraphs 5, 7, 8, and Section XI (Dispute Resolution), there shall be no modification of this Decree without written agreement of the affected parties to this Decree and approval by the Court. Unanticipated or increased costs or expenses associated with the implementation of actions called for by this Decree and economic hardship or changed financial circumstances shall not serve as a basis for modifications of this Decree.

39. Public Notice: The parties acknowledge and agree that the final approval and entry of this Decree is subject to the requirements of 28 C.F.R. § 50.7, which provides that notice of proposed consent decrees be given to the public and that the public shall have at least thirty (30) days in which to make any comments. The United States may withhold or withdraw its consent to this Decree based on such comments.

40. Agreement to Entry of Decree: The United States agrees not to move for entry of this Consent Decree until ninety (90) days after DOT&PF signs the Decree. DOT&PF agrees not to oppose entry of this Decree by this Court or to challenge any provision of this Decree.

41. Termination of Decree:

a. *Termination of Section III Requirements*: No sooner than three (3) years after entry of this Decree, DOT&PF may request the United States' consent to termination of any or all of the requirements in Section III (Compliance Program) of this Decree, including any or all of the requirements in Paragraph 5 (Training), Paragraph 6 (Construction and SWPPP

Requirements), Paragraph 7 (Inspection Program), Paragraph 8 (Project Maintenance), and Paragraph 9 (Reporting).

b. *Termination of Other Consent Decree Requirements:* No sooner than four (4) years after entry of this Decree, DOT&PF may request the United States' consent to termination of any or all of (i) the requirements in Section V (Injunctive Relief – Revegetation); (ii) the requirements of Section VI (Mitigation Contribution for Environmental Protection); and/or (iii) the remainder of this Consent Decree.

c. In seeking the United States' consent under this Paragraph 41, DOT&PF shall certify and demonstrate that as of the date of making its request to terminate:

(1) DOT&PF has paid all monies, civil penalties, interest, and stipulated penalties due under this Decree;

(2) DOT&PF is in compliance with each portion of the Consent Decree for which DOT&PF seeks termination;

(3) For each portion of the Decree for which DOT&PF seeks termination, as of the date DOT&PF provides any request to terminate, (i) EPA has not provided DOT&PF with any Notice of Dispute regarding that portion of the Decree invoking the Dispute Resolution provisions of this Decree which dispute is still pending and (ii) there are no unresolved matters subject to dispute resolution pursuant to Section XI (Dispute Resolution) regarding that portion of the Decree; and

(4) No enforcement action under this Decree is pending regarding the portion of the Consent Decree for which DOT&PF seeks termination. For the purposes of this

provision, an enforcement action means any CWA § 309(a) order issued, or any administrative or judicial action that EPA files, to enforce any CWA provision referenced in this Decree.

d. The United States shall notify DOT&PF in writing within thirty (30) days of receiving a request to terminate by DOT&PF whether it does or does not object to the termination of the Decree or any portion of it. If the United States consents to the request to terminate, then the parties shall jointly file a motion to terminate with the Court. In that event, the Court shall enter an order terminating this Decree, or the specific portion thereof. If the United States does not object to DOT&PF's request to terminate within thirty (30) days of receiving a request to terminate, DOT&PF may file a motion to terminate this Decree, or any portion thereof. The motion shall contain a certification that DOT&PF has fulfilled the conditions in Paragraph 41.c., as of the date of DOT&PF's request for termination under subparagraphs 41(a) or 41(b).

e. If the United States objects to DOT&PF's request to terminate within thirty (30) days of receiving it, the parties will work together for a period of at least thirty (30) days in an effort to informally resolve any disputes. The Decree shall remain in effect pending resolution of the dispute by the parties, or, ultimately, the Court.

f. If the parties are unable to informally resolve a dispute regarding termination under this paragraph, then DOT&PF may file a motion to terminate with the Court in accordance with the applicable Federal Rules of Civil Procedure and local rules of the District Court. If the Court finds based on a preponderance of the evidence that DOT&PF has fulfilled the conditions in Paragraph 41.c., as of the date of DOT&PF's request for termination under

subparagraphs 41(a) or 41(b), it shall order this Decree, or the specific portion thereof, terminated.

g. Any dispute involving DOT&PF's right to terminate the Decree, or any portion thereof, shall not be subject to the dispute resolution process of Section XI (Dispute Resolution).

IX. EFFECT OF DECREE

42. Scope of Consent Decree: This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against DOT&PF under CWA Section 301 concerning the Sites.

43. Covenants Not to Sue by Plaintiff: In consideration of the payment of the penalty required by Paragraph 10 (Civil Penalty) and compliance by DOT&PF with the terms of Paragraphs 5 through 9 (Compliance Program) of this Decree, the United States hereby covenants not to sue or take administrative action against DOT&PF pursuant to the Clean Water Act or any state law authorized pursuant to 33 U.S.C. § 1342(b) for civil violations or alleged civil violations of the conditions, limitations, and requirements of the CGP at the Section 402 Sites as alleged in the Complaint through the date of lodging of this Decree. In consideration of compliance by DOT&PF with the terms of Paragraph 13 (Injunctive Relief - Revegetation) and Paragraphs 14 through 20 (Mitigation Contribution for Environmental Protection) of this Decree, the United States hereby covenants not to sue or take administrative action against DOT&PF pursuant to the Clean Water Act for civil violations or alleged civil violations of Clean Water Act sections 301 and 404, 33 U.S.C. §§ 1311, 1344, at the Section 404 Sites as alleged in the Complaint through the date of lodging of this Decree.

44. No Effect on Third Parties: This Decree does not limit or affect the rights of DOT&PF or of the United States against any third parties not party to this Decree, nor does it limit the rights of third parties not party to this Decree against DOT&PF, except as otherwise provided by law. This Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Decree.

45. United States' Reservations of Rights:

- a. The United States reserves all rights not expressly waived in this Decree.
- b. The United States reserves all rights and remedies, legal and equitable, available to enforce the provisions of this Decree and applicable law.
- c. The United States reserves the right to seek and obtain criminal sanctions against any person, including DOT&PF.
- d. The United States reserves the right to undertake any action against any person, including DOT&PF in response to conditions which may present an imminent and substantial endangerment to the public health or welfare or the environment.

46. DOT&PF's Reservation of Rights: Except as provided by the express terms of this Decree, DOT&PF reserves any rights or defenses available to it in any future action brought by the United States pursuant to the Clean Water Act or any other statutes, regulations, or rules.

47. Not a Permit Modification: This Decree is neither a permit nor a modification of existing permits under any federal, state, or local law, and in no way relieves DOT&PF of its responsibilities to comply with any applicable federal, state, or local law, regulation, or permit.

48. Injunction Regarding Future Discharges: Except as in accordance with this Consent Decree, DOT&PF is enjoined from discharging dredged or fill material into waters of

the United States at any of the Section 404 Sites, unless such discharge complies with the provisions of the CWA and its implementing regulations.

49. Effect of Nationwide Permit 32: The parties acknowledge that Nationwide Permit 32, found at 61 Fed. Reg. 65,913 (Dec. 13, 1996), authorizes the fill that was placed in response to the October and November, 2002, 100-year flood events at the Section 404 Sites to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 (61 Fed. Reg. 65,913) authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree at the Section 404 Sites. Any such discharge of dredged or fill material necessary for work required by Appendix G, Revegetation Plan, of the Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

50. Agency Discretion: Nothing in this Consent Decree shall limit the otherwise existing ability of EPA to modify, suspend, revoke or deny any CGP issued under Section 402 of the CWA, 33 U.S.C. § 1342. Nothing in this Consent Decree shall limit the otherwise existing ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke, or deny any individual, nationwide, or regional general 404 Permit, nor shall this Consent Decree limit the EPA's otherwise existing ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. §1344(c).

X. STIPULATED PENALTIES

51. Stipulated Penalty Amounts: If the United States determines that DOT&PF has failed to fully or timely comply with the following requirements of this Decree, and subject to

Section VII (Obligation Subject to Appropriation) of this Consent Decree, DOT&PF shall pay stipulated penalties in the following amounts:

- a. for a failure to timely train DOT&PF Regional Stormwater Specialists, Project Engineers, and Stormwater Inspectors assigned to a Project in accordance with Paragraph 5(a), \$750.00 per person for each missed deadline. This \$750.00 per person violation shall continue to accrue for every fourteen (14) day-period that passes in which the person fails to timely receive the applicable training;
- b. for failure to meet SWPPP requirements in accordance with Paragraph 6(a) - \$750.00 per omission;
- c. for failure to either (i) reference a BMP manual or publication, or (ii) state that no BMP manual or publication was used, in accordance with Paragraph 6(b) - \$250.00 per omission;
- d. for failure to stabilize a Project prior to Seasonal Thaw in accordance with Paragraph 6(c) - \$5,000.00 per Project per year;
- e. for a failure to conduct pre-construction inspections in accordance with Paragraph 7(a) - \$2,000.00 per Project;
- f. for failure to conduct and record CGP Inspections in accordance with Paragraph 7(b) & (c) - \$750.00 per inspection;
- g. for failure to timely accomplish BMP maintenance and/or repairs in accordance with Paragraph 8 - \$500.00 per Project per day until the BMP maintenance and/or repair is completed, not to exceed a total stipulated penalty for all Projects of \$250,000.00 per year under this subpart;

h. for failure to provide a timely oral endangerment report of violations or for a deficient oral endangerment report in accordance with Paragraph 9(a) - \$750.00 for the first day the report is late or deficient, and then an additional \$750.00 for every fourteen (14) day period that passes without the required information being provided, but no stipulated penalty under this subpart shall continue to accrue once a written endangerment report has been submitted to EPA;

i. for failure to provide a timely written endangerment report of violations or for a deficient written endangerment report in accordance with Paragraph 9(a) - \$750.00 for the first day the report is late or deficient, and then an additional \$750.00 for every fourteen (14) day period that passes without the required information being provided;

j. for failure to timely submit copies of NOIs in accordance with Paragraph 9(b) - \$250.00 per NOI;

k. for a failure to submit an Annual Report or, except as provided in Paragraph 54 (Accrual of Stipulated Penalties), a failure to timely cure a deficient Annual Report per Paragraph 9(c) - \$750.00 per day the report is late or not timely cured, with the total stipulated penalty under this subpart not to exceed \$75,000.00 per year;

l. for reports required under Section IV.G of Appendix G, Revegetation Plan, either a failure to submit such a report or, as provided in Paragraph 54 (Accrual of Stipulated Penalties), a failure to timely cure a deficient report per Paragraph IV.G.3 of Appendix G, Revegetation Plan - \$375.00 per day the report is late or deficient;

m. for failure to perform monitoring in accordance with Section IV.D of Appendix G, Revegetation Plan - \$7,500.00 per monitoring period each year; and

n. for failure to meet any of the Success Criteria set forth in Sections I.C, II.C or III.C of Appendix G, Revegetation Plan - \$7,500.00 per site listed in Appendix G, Revegetation Plan per year.

52. Payment of Stipulated Penalties: Upon DOT&PF's receipt from the United States of a written demand for payment of the penalties, and subject to Section VII (Obligation Subject to Appropriation) of this Consent Decree, all penalties owed to the United States under this Section shall be due and payable within thirty (30) days of the appropriation addressed in Section VII, unless DOT&PF invokes the procedures under Section XI (Dispute Resolution). DOT&PF shall forward the amount due by Electronic Funds Transfer ("EFT") to the United States Department of Justice lockbox bank referencing DOJ case number 90-5-1-1-08977 and the CDCS file number _____ in accordance with instructions provided by the United States upon entry of this Decree. Any EFTs received at the United States Department of Justice lockbox bank after 11:00 a.m. (Eastern Time) will be credited on the next Business Day. After payment, DOT&PF shall mail a cover letter specifying the amount and date of payment, civil docket number and reason for payment, to the United States in accordance with Paragraph 35 (Notification).

53. Waiver of Stipulated Penalties: DOT&PF may request, in writing, that the United States waive stipulated penalties which have been assessed pursuant to Paragraph 51 (Stipulated Penalty Amounts). The United States may, in its sole discretion, waive such claims.

54. Accrual of Stipulated Penalties: Except as otherwise provided in this paragraph, stipulated penalties shall begin to accrue on the day after performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the

noncompliance or completion of the activity. Except as provided in the third sentence of this paragraph, stipulated penalties for filing a deficient report shall begin to accrue on the day when EPA notifies DOT&PF of the deficiency. Stipulated penalties for filing a deficient Annual Report or a report required under Section IV.G of Appendix G, Revegetation Plan, shall begin to accrue thirty (30) days after EPA notifies DOT&PF of the deficiency, unless DOT&PF has cured the deficiencies within thirty (30) days in accordance with Paragraph 9.c. or Paragraph IV.G.3. of Appendix G, Revegetation Plan, in which case no stipulated penalties shall accrue. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Decree. Except as specifically provided herein, stipulated penalties shall accrue regardless of whether the United States has notified DOT&PF of a violation.

55. No Effect on Obligation to Comply: The payment of penalties shall not alter in any way DOT&PF's obligation to comply with the requirements of this Decree.

56. Effect of Dispute Resolution: Penalties shall continue to accrue during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the United States that is not appealed to this Court, DOT&PF shall pay accrued penalties determined to be owing to the United States within thirty (30) days of the agreement or the receipt of the United States' decision or order, subject to Section VII (Obligation Subject to Appropriation) of this Consent Decree;

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, DOT&PF shall pay all accrued penalties determined by the Court to be owed within thirty (30) days of receipt of the Court's decision or order, except as provided in

subparagraph c. of this paragraph, and subject to Section VII (Obligation Subject to Appropriation) of this Consent Decree;

c. If the Court's decision is appealed by any party, DOT&PF shall pay all accrued penalties determined by the District Court to be owing into an interest-bearing escrow account within thirty (30) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every thirty (30) days. Within fifteen (15) days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States or to DOT&PF to the extent that they prevail.

57. Interest on Late Payment: If DOT&PF fails to pay stipulated penalties when due, DOT&PF shall pay interest accrued at the rate established by the Secretary of the Treasury under 28 U.S.C. § 1961 beginning upon the day the stipulated penalties were due.

58. Non-Exclusivity of Remedy: Stipulated penalties are not the United States' exclusive remedy for violations of this Decree. The United States expressly reserves the right to seek any other relief it deems appropriate, including but not limited to, action for statutory penalties, contempt, or injunctive relief against DOT&PF. However, the amount of any statutory penalty assessed for a violation of this Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Decree for the same violation.

XI. DISPUTE RESOLUTION

59. Exclusive Remedy: Unless otherwise expressly provided for in this Decree, the Dispute Resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under this Decree; provided, however, Dispute Resolution under this Section shall not apply to KHLT. However, the procedures set forth in this Section shall not apply to

actions by the United States to enforce obligations of DOT&PF that have not been disputed in accordance with this Section.

60. Informal Dispute Resolution: Any dispute subject to dispute resolution under this Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen on the day one party delivers to the other party a written Notice of Dispute, or on the day following delivery by overnight courier or three (3) days following delivery by U.S. Mail. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed sixty (60) days from the date the dispute arises, unless that period is modified by written agreement. If the parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within forty-five (45) days after the conclusion of the sixty (60) day informal negotiation period, DOT&PF seeks to petition the Court as set forth in Paragraph 61 (Petitions to the Court).

61. Petitions to the Court: In the event that the parties cannot resolve a dispute by informal negotiations as set forth above, the following procedures shall control:

a. DOT&PF may seek judicial review of the dispute by filing with the Court and serving on the United States a motion requesting judicial resolution of the dispute. The motion shall contain a written statement of DOT&PF's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of this Decree.

b. The United States shall respond to DOT&PF's motion within forty-five (45) days of receipt of the motion, unless the parties stipulate otherwise.

c. DOT&PF may file a reply memorandum within thirty (30) days of receipt of the United States' response.

d. In any dispute under this paragraph, DOT&PF shall bear the burden of demonstrating that its position complies with this Decree and the Clean Water Act and that DOT&PF is entitled to relief under applicable law. The United States reserves the right to argue that its position (a) is reviewable only on the administrative record and (b) shall be upheld unless arbitrary and capricious or otherwise not in accordance with law. For purposes of this Decree, the administrative record shall comprise the Statements of Position exchanged by the parties pursuant to Paragraph 60 (Informal Dispute Resolution), including any documents attached to or incorporated by reference in those Statements. DOT&PF reserves the right to argue that (i) its position is based on a reasonable interpretation of facts, a statute, regulation, or permit, or a reasonable interpretation of this Decree and (ii) the matter is not reviewable only on the administrative record or under an arbitrary and capricious standard of review and that the United States' litigation position is not entitled to any deference.

62. Expedited Review: If the United States believes that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the sixty (60) day period for informal negotiations. In any dispute under this paragraph, DOT&PF shall bear the burden of demonstrating that its position complies with this Decree and the Clean Water Act, and that DOT&PF is entitled to relief under applicable law.

63. Effect on DOT&PF's Other Obligations: The invocation of dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of

DOT&PF under this Decree unless the United States agrees in writing or the Court orders otherwise.

64. Computation of Time: The computation of any period of time set forth in this Section XI (Dispute Resolution) shall be governed by Rule 6 of the Federal Rules of Civil Procedure.

XII. FORCE MAJEURE

65. Definition of Force Majeure: DOT&PF shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by a Force Majeure Event. A “Force Majeure Event” is any event beyond the control of DOT&PF, its contractors, or any entity controlled by DOT&PF that delays the performance of any obligation under this Decree despite DOT&PF’s best efforts to fulfill the obligation. For the purposes of fulfilling the requirements of Appendix G, Revegetation Plan, “Force Majeure Event” includes, but is not limited to: failure to obtain required permits despite the timely submission of applications for those permits; acts of vandalism; and flood events exceeding the 25-year recurrence interval. “Best efforts” includes anticipating any potential Force Majeure Event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. “Force Majeure Event” does not include DOT&PF’s financial inability to perform any obligation under this Decree. Failure to apply for a required CGP or 404 Permit or approval or to provide in a timely manner all information required to obtain a CGP or 404 Permit or approval that is necessary to meet the requirements of this Decree, or failure of DOT&PF to approve contracts shall not, in any event, be considered Force Majeure Events.

66. Required Notification for Force Majeure:

a. DOT&PF shall, as required below in this subparagraph, notify the United States orally and by electronic or facsimile transmission as soon as possible, but not later than five (5) days after the time DOT&PF first knew of, or in the exercise of reasonable diligence under the circumstances should have known of, any event which might constitute a Force Majeure Event. The United States may designate an alternative representative to receive oral and email notification at its discretion by sending DOT&PF a written designation in accordance with Paragraph 35 (Notification).

(1) For obligations related to the Section 404 sites, DOT&PF shall make the notification required by this paragraph to the Wetlands Compliance Officer in Paragraph 35 (Notification); if the Wetlands Compliance Officer is unavailable by telephone, DOT&PF may satisfy the telephone notice requirement by leaving a voice message or sending an email to the person stating that DOT&PF had called to notify EPA pursuant to this paragraph.

(2) For all other obligations under this Consent Decree, DOT&PF shall make the notification required by this paragraph to the NPDES Compliance Officer in Paragraph 35 (Notification); if the NDPEs Compliance Officer is unavailable by telephone, DOT&PF may satisfy the telephone notice requirement by leaving a voice message or sending an email to the person stating that DOT&PF had called to notify EPA pursuant to this paragraph.

b. The written notice DOT&PF submits pursuant to this paragraph shall indicate whether DOT&PF claims that the delay should be excused due to a Force Majeure Event. The notice shall describe in detail the basis for DOT&PF's contention that it experienced a delay due to a Force Majeure Event, the anticipated length of the delay, the precise cause or

causes of the delay, the measures taken or to be taken to prevent or minimize the delay, and the timetable by which those measures will be implemented. DOT&PF shall adopt all reasonable measures to avoid or minimize such delay. Failure to so notify the United States shall render this Section XII (Force Majeure) void and of no effect as to the event in question, and shall waive DOT&PF's right to obtain an extension of time for its obligations based on such event.

67. Procedures for Extension: If the United States finds that a delay in performance is, or was, caused by a Force Majeure Event, the United States shall extend the time for performance, in writing, for a period to compensate for the delay resulting from such event, and stipulated penalties shall not be due for such a period. In proceedings on any dispute regarding a delay in performance, the dispute resolution provisions of Section XI (Dispute Resolution) shall apply, and DOT&PF shall have the burden of proving: (a) that the noncompliance at issue was caused by circumstances entirely beyond the control of DOT&PF and any entity controlled by DOT&PF, including its contractors and consultants; (2) that DOT&PF or any entity controlled by DOT&PF could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

68. Operations After Force Majeure Event: DOT&PF shall consult with EPA to determine when to begin or resume the operations that had been affected by any Force Majeure Event.

69. Effect on Other Obligations: Compliance with a requirement of this Decree shall not by itself constitute compliance with any other requirement. An extension of one compliance date based on a particular event shall not automatically extend any other compliance date.

DOT&PF shall make an individual showing of proof regarding the cause of each delayed incremental step or other requirement for which an extension is sought.

SO ORDERED this 21st day of September 2010

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE