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**BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:)	
)	DOCKET NO. CWA-10-2009-0027
QUALITY ASPHALT PAVING INC.,)	
&)	CONSENT AGREEMENT AND
KIKIKTAGRUK INUPIAT CORP.)	FINAL ORDER
Respondents,)	
)	
Northwest Arctic Borough, Alaska.)	

I. AUTHORITIES

1.1. This Consent Agreement and Final Order ("CAFO") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA" or "Complainant") by Section 309(g)(2)(B) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g)(2)(B).

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA Region 10, who in turn has re delegated this authority to the Regional Judicial Officer.

1.3. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA hereby issues, and Quality Asphalt Paving Inc. and

**CONSENT AGREEMENT AND
FINAL ORDER - 1**

Docket No. CWA-10-2009-0027

**U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900 (ORC-158)
Seattle, Washington 98101
(206) 553-1796**

1 Kikiktagruk Inupiat Corporation (individually "Respondent" and collectively "Respondents")
2 hereby agree to issuance of, the Final Order contained in Part V of this CAFO.

3 **II. PRELIMINARY STATEMENT**

4 2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO
5 commences this proceeding which will conclude when the Final Order contained in Part V of
6 this CAFO becomes effective.

7 2.2. Part III of this CAFO contains a concise statement of the factual basis for the
8 alleged violations of the CWA, together with specific provisions of the CWA that Respondents
9 have alleged to have violated.

10 **III. ALLEGATIONS**

11 3.1. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of
12 pollutants into waters of the United States by any person, except as authorized by a permit issued
13 pursuant to Section 402 or 404 of the Act, 33 U.S.C. §§ 1342 or 1344. The unpermitted
14 discharge of any pollutant from a point source constitutes a violation of Section 301(a) of the
15 Act, 33 U.S.C. § 1311(a). Section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of
16 any pollutant" to include "any addition of any pollutant to navigable waters from any point
17 source." "Navigable waters" are defined as "waters of the United States." 33 U.S.C. § 1362(7).

18 3.2. Respondents are "persons" within the meaning of Sections 301(a) and 502(5) of
19 the Act, 33 U.S.C. §§ 1311(a) and 1362(5).

20 3.3. Kikiktagruk Inupiat Corporation ("KIC") owns, possesses, or controls real
21 property ("Site") approximately 8 miles northeast of Kotzebue, in Northwest Arctic Borough,
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25

1 Alaska. The Site is located within Section 23, Township 18 North, Range 17 West, Kateel River
2 Meridian, and is adjacent to Hotham Inlet.

3 3.4. The Site contains wetlands within the meaning of 33 C.F.R. § 328.3(a)7. These
4 wetlands meet the criteria for jurisdictional wetlands in the 1987 "Federal Manual for Identifying
5 and Delineating Jurisdictional Wetlands."

6 3.5. Hotham Inlet is a "navigable water" within the meaning of Section 502(7) of the
7 Act, 33 U.S.C. § 1362(7), and "waters of the United States" within the meaning of 40 C.F.R. §
8 232.2.

9 3.6. The Site's wetlands are adjacent to Hotham Inlet within the meaning of 33 C.F.R.
10 § 328.3(c), and therefore, are jurisdictional waters of the United States under the Act.

11 3.7. On December 1, 2005, KIC applied for a United States Army Corps of Engineers
12 ("Corps") Section 404 Permit to impact 2.5 acres of wetlands at the Site to extract gravel.

13 3.8. On or about December 1, 2005, at a time more fully known by Respondents, KIC
14 contracted with Quality Asphalt Paving Inc. ("QAP"), to complete the gravel extraction work at
15 the Site.
16

17 3.9. On March 29, 2006, the Corps sent a provisional Section 404 Permit to KIC with
18 a letter explaining that a final permit issuance was pending receipt of an AK Coastal
19 Management Program ("ACMP") consistency determination.

20 3.10. On or about July 12, 2006, at a time more fully known by Respondents, KIC
21 informed QAP that the ACMP determination was complete.

22 3.11. On or about July 12, 2006, at a time more fully known by Respondents, QAP
23 started work at the Site.
24

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1 3.12. On July 13, 2006, the Alaska Department of Natural Resources issued its final
2 ACMP consistency determination.

3 3.13. On July 21, 2006, the Corps faxed a copy of the signed final Section 404 Permit
4 to KIC allowing for 2.5 acres of impact to wetlands at the Site.

5 3.14. On July 24, 2006, the Corps received a complaint that work at the Site was
6 performed prior to issuance of the Section 404 Permit and that work was completed outside of
7 the permit area.

8 3.15. On July 26, 2006, the Corps sent KIC a hard copy of the signed Section 404
9 Permit.

10 3.16. On August 22, 2006, the Corps inspected the Site and discovered that fill material
11 was discharged into approximately 7 acres of jurisdictional wetlands during land clearing for the
12 gravel extraction and road construction, including overburden and gravel stockpiled in wetlands
13 at the Site beyond the 2.5 acres authorized by the Section 404 Permit.

14 3.17. On August 8, 2007, EPA inspected the Site and confirmed the Corps'
15 observations identified in Paragraph 3.16.

16 3.18. Upon information and belief, QAP used heavy equipment to place the fill material
17 into the Site's wetlands. The heavy equipment used to fill these waters is a "point source" within
18 the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).
19

20 3.19. The fill material that Respondents caused to be discharged included, among other
21 things, dirt and rock, each of which constitutes a "pollutant" within the meaning of Section
22 502(6) of the Act, 33 U.S.C. § 1362(6).
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1 After considering all of these factors, EPA has determined and Respondents agree that an
2 appropriate penalty to settle this action is in the amount of THIRTY THOUSAND SIX
3 HUNDRED DOLLARS (\$30,600). The penalty amount has been agreed upon in consideration
4 of the statutory penalty factors identified in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3).

5 The Respondents have determined their allocation of liability for this penalty amount:

6 4.3.1. Quality Asphalt Paving, Inc. agrees to pay 62.5 % of the penalty amount
7 for a total allocation of NINETEEN THOUSAND ONE HUNDRED TWENTY-FIVE
8 DOLLARS (\$19,125.00); and

9 4.3.2. Kikiktagruk Inupiat Corporation agrees to pay 37.5 % of the penalty
10 amount for a total allocation of ELEVEN THOUSAND FOUR HUNDRED SEVENTY-
11 FIVE DOLLARS (\$11,475.00).

12 4.4. Respondents consent to the issuance of the Final Order set forth in Part V, below,
13 and agree to pay their allocation of the total penalty set forth in Paragraph 4.3 within 30 days of
14 the effective date of this Final Order.

15 4.5. Payment under this CAFO shall be made by cashier's check or certified check,
16 payable to the order of "Treasurer, United States of America" and delivered to the following
17 address:
18

19 US Environmental Protection Agency
20 Fines and Penalties
21 Cincinnati Finance Center
22 P.O. Box 979077
23 St. Louis, MO 63197-9000

24 Respondents shall note on the check the title and docket number of this case.
25

**CONSENT AGREEMENT AND
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(206) 553-1796**

1 4.6. Respondents shall serve photocopies of the check described in Paragraph 4.5 on
2 the Regional Hearing Clerk and the EPA Region 10 Office of Compliance and Enforcement at
3 the following addresses:

4 Regional Hearing Clerk
5 U.S. Environmental Protection Agency
6 Region 10
7 1200 Sixth Avenue, Suite 900 (ORC-158)
8 Seattle, Washington 98101

9 U.S. Environmental Protection Agency
10 Alaska Operations Office
11 Attn: Bryan Herczeg
12 222 W. 7th Avenue, Box #19
13 Anchorage, Alaska 99513-7588

14 4.7. If either Respondent fails to pay its allocation of the total penalty assessed by this
15 CAFO in full by the due date set forth in Paragraph 4.4, that Respondent may be subject to a
16 civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and
17 additional penalties described below. In any collection action, the validity, amount, and
18 appropriateness of the penalty shall not be subject to review.

19 4.8. If either Respondent fails to pay all or any portion of its allocation of the total
20 penalty assessed by this CAFO in full by the due date set forth in Paragraph 4.4, that Respondent
21 shall be responsible for payment of the amounts described below:

22 4.8.1. Interest: Pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9),
23 any unpaid portion of the assessed penalty shall bear interest at a rate established by the
24 Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the
25 Final Order set forth in Part V, below, provided, however, that no interest shall be

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1 payable on any portion of the assessed penalty that is paid within 30 days of the effective
2 date of the Final Order.

3 4.8.2. Attorneys Fees, Collection Costs, Nonpayment Penalty: Pursuant to
4 Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9), if either Respondent fails to pay on
5 a timely basis its allocated amount of the penalty set forth in Paragraph 4.3, that
6 Respondent shall pay (in addition to any assessed penalty and interest) attorneys fees and
7 costs for collection proceedings and a quarterly nonpayment penalty for each quarter
8 during which such failure to pay persists. Such nonpayment penalty shall be in an
9 amount equal to twenty percent (20%) of the aggregate amount of that Respondent's
10 penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

11 4.9. The penalty described in Paragraph 4.3, including any additional costs incurred
12 under Paragraph 4.8, represents an administrative civil penalty assessed by EPA and shall not be
13 deductible for purposes of federal taxes.

14 4.10. This CAFO shall not relieve Respondents of their obligation to comply with all
15 applicable provisions of federal, state, or local law; nor shall the CAFO be construed to be a
16 ruling on, or determination of, any issue related to any federal, state, or local permit.

17 4.11. Respondents, or the undersigned representatives of the Respondents, certify that
18 they are fully authorized to enter into the terms and conditions of this CAFO and to bind
19 Respondents to this document. This CAFO may be executed in multiple counterparts, each of
20 which shall be deemed to have the same force and effect as an original. A facsimile signature
21 shall be treated as an original.
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4.12. Except as described in Subparagraph 4.8.2, above, all the parties to the above-captioned matter shall bear their own costs in bringing or defending this action.

4.13. Respondents expressly waive any rights to contest the allegations and to appeal the Final Order set forth in Part V, below.

4.14. The provisions of this CAFO shall bind Respondents and their officers, directors, agents, servants, employees, successors, and assigns.

4.15. The above provisions are STIPULATED AND AGREED upon by Respondents and EPA.

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FOR RESPONDENTS

DATED:

QUALITY ASPHALT PAVING, INC.

Oct. 31, '08

Susan E. Reeves

Susan E. Reeves
Reeves Amodio LLC
Counsel for Quality Asphalt Paving, Inc.

**CONSENT AGREEMENT AND
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FOR RESPONDENTS

DATED:

KIKIKTAGRUK INUPIAT CORPORATION

3 November 2008



Karl Potts
As President of Kikiktagruk Inupiat Corporation

**CONSENT AGREEMENT AND
FINAL ORDER - 11**

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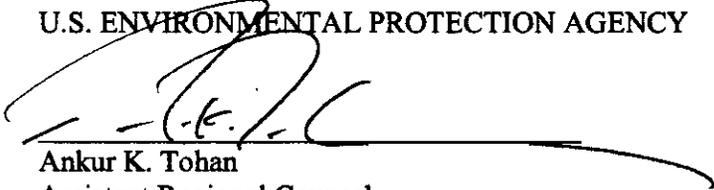
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FOR COMPLAINANT

DATED:

11-10-2009

U.S. ENVIRONMENTAL PROTECTION AGENCY



Ankur K. Tohan
Assistant Regional Counsel
For Complainant

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**CONSENT AGREEMENT AND
FINAL ORDER - 12**

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1
2 **V. FINAL ORDER**

3 It is hereby ordered and adjudged as follows:

4 5.1. The terms of the foregoing Consent Agreement are hereby ratified and
5 incorporated by reference into this Final Order. Respondents are hereby ordered to comply with
6 the foregoing terms of the settlement.

7 5.2. This CAFO shall constitute a settlement by EPA of all claims for civil penalties
8 pursuant to the CWA for the violations alleged in Part III, above. In accordance with 40 C.F.R.
9 § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue
10 appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
11 This CAFO does not waive, extinguish, or otherwise affect Respondents' obligations to comply
12 with all applicable provisions of the CWA, the CWA regulations, and/or any CWA permits.

13 5.3. In accordance with Section 309(g)(1) of the Act, 33 U.S.C. § 1319(g)(1), and 40
14 C.F.R. § 22.38(b), the Alaska Department of Environmental Conservation has been given an
15 opportunity to consult with EPA regarding the assessment of the administrative civil penalty
16 against Respondents.

17 5.4. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), EPA has
18 published public notice of its intent to assess an administrative penalty against Respondents and
19 invited public comment in accordance with 40 C.F.R. § 22.45. More than forty 40 days have
20 elapsed since the issuance of this public notice, and EPA has received no petitions to set aside
21 this Consent Agreement or Final Order.

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**CONSENT AGREEMENT AND
FINAL ORDER - 13**

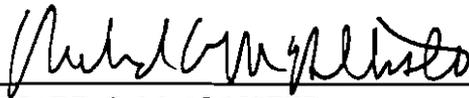
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5.5. This Final Order shall become effective upon filing.

SO ORDERED this 29th day of December, 2008.



RICHARD G. McALLISTER
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

**CONSENT AGREEMENT AND
FINAL ORDER - 14**

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**U.S. Environmental Protection Agency, Region 10
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Seattle, Washington 98101
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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **Consent Agreement and Final Order** in **In the Matter of: Quality Asphalt Paving, Inc. And Kikiktagruk Inupiat Corporation, DOCKET NO.: CWA-10-2009-0027** was filed with the Regional Hearing Clerk on December 30, 2008.

On December 30, 2008 the undersigned certifies that a true and correct copy of the document was delivered to:

Ankur Tohan, Esquire
US Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on December 30, 2008, to:

Susan E. Reeves
Reeves Amodio LLC
500 L Street, Suite 300
Anchorage, Alaska 99501

Karl Potts, President
Kikiktagruk Inupiat Corporation
373-A Second Avenue
P.O. Box 1050
Kotzebue, Alaska 99752

DATED this 30th day of December 2008.



Carol Kennedy
Regional Hearing Clerk
EPA Region 10