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SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 34658** *Sub- No. 1*

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**U.S. ENVIRONMENTAL PROTECTION AGENCY'S REPLY  
TO PETITION OF ALASKA RAILROAD CORPORATION  
FOR DECLARATORY ORDER**

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## I. INTRODUCTION

Pursuant to 49 C.F.R. § 1104.13, the United States Environmental Protection Agency files this reply to the *Petition of Alaska Railroad Corporation for Declaratory Order*, filed with the Board on January 28, 2011. On February 16, 2011, EPA filed an unopposed petition for waiver of the filing requirements of 49 C.F.R. § 1104.7(b) and a request for extension until March 2, 2011, to reply to the petition. The Board granted EPA's request on February 17, 2011. EPA files this timely reply.<sup>1</sup>

As an initial matter, EPA notifies the Board of new information not available at the time ARRC's petition was filed. Two recent letters from the U.S. Army Corps of Engineers set forth the Corps' position that ARRC has not provided sufficient information to demonstrate compliance with the Clean Water Act's Section 404(b)(1) Guidelines and to support issuance of a Section 404 permit. EPA's similar conclusions form the basis of ARRC's petition. The Corps' letters thus call into question whether a Board ruling on the petition is appropriate at this time or will provide ARRC with relief.

Should the Board reach the preemption issue, ARRC has failed to support its assertion that the Interstate Commerce Commission Termination Act (ICCTA) preempts EPA's actions taken pursuant to Section 404 of the Clean Water Act.<sup>2</sup> The Board's actions to date make clear that Section 404, and in particular the Section 404(b)(1) Guidelines, are not preempted in this case. In fact, the Board has stated that ARRC must obtain a 404 permit, and EPA's actions here are entirely consistent with its statutory directive under Section 404. ARRC's attempt to

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<sup>1</sup> EPA discussed issues related to this reply with ARRC's counsel on February 23, 2011. During that discussion, EPA noted that its reply would be filed on March 2, 2011, in accordance with the Board's order granting extension. EPA therefore certifies that the notification requirement of 49 C.F.R. § 1104.7(b) has been met.

<sup>2</sup> 33 U.S.C. § 1344.

constrain EPA's role in ensuring compliance with the Section 404(b)(1) Guidelines should therefore be rejected. ARRC's petition also suggests a misunderstanding of ICCTA preemption as well as the relationship between National Environmental Policy Act requirements and those of Clean Water Act Section 404. Finally, ARRC has mischaracterized the nature of EPA's position in this case and fails to demonstrate that any EPA actions constitute "unreasonable interference" with interstate commerce. ARRC's petition should therefore be denied.

## II. BACKGROUND

### A. Legal Background

#### 1. CWA Section 404(b)(1) Guidelines

ARRC's petition focuses almost exclusively on the Board's NEPA analysis in this case and argues that EPA's conclusions, to the extent they differ from those of the Board, are necessarily preempted. The EPA actions about which ARRC complains, however, arise under the separate requirements of Clean Water Act Section 404(b)(1) and the Guidelines EPA has published in 40 C.F.R. Part 230. Accordingly, additional discussion of the applicable statutory context is warranted.

Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for discharges of dredge or fill material at specified sites in waters of the United States.<sup>3</sup> Section 404(b)(1) directs EPA, in conjunction with the Secretary, to develop the environmental criteria used to evaluate proposed discharges and make permit decisions.<sup>4</sup> These environmental criteria, known as the Section 404(b)(1) Guidelines, were promulgated by EPA in 1980, and set forth the basic premise that dredged or fill material should

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<sup>3</sup> *Id.* at §1344(a).

<sup>4</sup> *Id.* at §1344(b)(1).

not be discharged into an aquatic ecosystem unless it can be demonstrated that the discharge will not have an unacceptable adverse impact either individually or in combination with the impacts of other activities.<sup>5</sup>

To meet this critical requirement, the Section 404(b)(1) Guidelines provide that no discharge of dredged or fill material may be permitted if: (1) a practicable alternative exists that is less damaging to the aquatic environment; or (2) the project will cause significant degradation to waters of the United States.<sup>6</sup> Practicable alternatives include activities that do not involve a discharge of dredged or fill material into waters of the United States at the proposed location or other locations.<sup>7</sup> The regulations further define a practicable alternative as one that is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”<sup>8</sup>

The Guidelines thus require applicants to follow a sequence of avoidance, minimization and compensation in planning for development of wetland sites and to ensure that proposed projects do not cause such degradation. The Guidelines further set forth a rebuttable presumption for non-water dependent projects. When the basic purpose of a project may be accomplished without “access or proximity” to a “special aquatic site, . . . practicable alternatives that do not involve special aquatic sites [including wetlands] *are presumed to be available, unless clearly demonstrated otherwise.*”<sup>9</sup> Compliance with these Guidelines is required before

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<sup>5</sup> 40 C.F.R. § 230.1(c).

<sup>6</sup> *Id.* at §§ 230.10(a), (c).

<sup>7</sup> *Id.* at § 230.10(a)(1).

<sup>8</sup> *Id.* at § 230.10(a)(2).

<sup>9</sup> *Id.* at 40 C.F.R. § 230.10(a)(3) (emphasis added).

the Corps can issue a Section 404 permit, and demonstrating such compliance is the applicant's responsibility.<sup>10</sup>

## 2. CWA Section 404(q) Dispute Resolution Process

One of EPA's many responsibilities under Section 404 is to review and provide substantive, site-specific comments to the Corps on individual permit applications. Such comments generally include an evaluation of whether the proposed discharge complies with the Guidelines. During its review, EPA can elevate policy issues or specific permit cases in accordance with the 1992 Memorandum of Agreement (MOA) developed pursuant to CWA Section 404(q).<sup>11</sup> Such elevation increases the level of internal review within EPA and the Corps to ensure that compliance with the Guidelines is established prior to permit issuance.

Under the 404(q) MOA, elevated cases are limited to those that result in substantial and unacceptable adverse impacts to an aquatic resource of national importance (ARNI).<sup>12</sup> While not explicitly defined in the 404(q) MOA, an ARNI is considered to be a water of the United States that offers rare or unique qualities, and/or supports the protection, maintenance, or enhancement of the quality of the Nation's waters.<sup>13</sup> Identifying an ARNI is a resource-based threshold determined by a federal review agency – in this case EPA – seeking to elevate under the 404(q) MOA. The express intent of the elevation process is to resolve interagency issues regarding the impacts of a proposed discharge to minimize delays in issuing Section 404 permits.

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<sup>10</sup> *Id.* at § 230.12(a)(3)(iv); *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1269 (10<sup>th</sup> Cir. 2004).

<sup>11</sup> 33 U.S.C. § 1344(q). Section 404(q) required the Secretary of the Army to enter agreements with the EPA Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other federal agencies to minimize delays in issuing Section 404 permits. In August 1992, EPA entered into a 404(q) agreement with the Department of the Army, which applies to Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act. See [http://water.epa.gov/lawsregs/guidance/wetlands/upload/1992\\_MOA\\_404q.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/1992_MOA_404q.pdf).

<sup>12</sup> See 404(q) MOA at Part IV.1.

<sup>13</sup> See <http://water.epa.gov/type/wetlands/outreach/upload/404q.pdf>.

Among other things, this elevation process requires EPA to notify the Corps within specified time frames of its determinations regarding substantial and unacceptable impacts to an ARNI from a proposed discharge. EPA's first notification must be submitted within the comment period on the proposed permit and the second notification no later than 25 days after the comment period closes. These notification letters are generally referred to as 3(a) and 3(b) letters, in reference to their respective MOA sections.<sup>14</sup>

Notably, the Corps remains responsible for making final decisions in all elevated cases, *and no additional or higher standards are applied to permit cases that are elevated under the 404(q) process.* Identification of an ARNI does not alter the legal status of the aquatic resource identified nor does it preclude issuance of a 404 permit. Discharges to waters that have been identified as ARNIs are routinely authorized *when compliance with the Guidelines has been demonstrated.*

## **B. Factual Background**

### **1. EPA's Role in the Section 404 and NEPA Processes**

EPA has been actively engaged throughout both the NEPA and Section 404 permitting processes for this project, and has made its concerns regarding both the NEPA and Section 404 deficiencies known repeatedly and in a timely fashion. As an initial matter, EPA notes that the primary purpose of the Environmental Impact Statement (EIS) was to support the Board's decision whether to license the construction and operation of the entire 80-mile Northern Rail Extension project. The EIS was also intended to support the Corps' 404 permitting decisions as much as possible. Additional detailed information *specific to Phase 1 of the project* – the only

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<sup>14</sup> 404(q) MOA at Part IV.3(a), 3(b).

phase for which ARRC has submitted a Section 404 permit application – was not provided or analyzed during the NEPA process, as discussed in more detail below.

As ARRC correctly notes, EPA submitted written comments in response to scoping on January 13, 2006, on the draft EIS on February 2, 2009, and on the final EIS on October 9, 2009. EPA's January 2006 and February 2009 letters specifically identified the need for the project to comply with the 404(b)(1) Guidelines and to consider alternatives that would avoid wetlands and aquatic resource impacts.<sup>15</sup>

In addition, pursuant to EPA's policy under NEPA and Section 309 of the Clean Air Act, EPA rates all Draft EISs that it reviews.<sup>16</sup> In this case, EPA gave the Draft EIS a rating of EC-2 (Environmental Concerns, Insufficient Information). EPA expressed serious concerns regarding river crossings as proposed; impacts to water quality, open water habitats, wetlands, stream channels, and riparian areas; and insufficient information regarding the purpose and need for the project.<sup>17</sup> After reviewing the Final EIS, EPA informed the Board that these concerns remained unaddressed.<sup>18</sup>

EPA has similarly participated actively throughout the Section 404 permitting process. For example, EPA participated along with ARRC in several, interagency pre-application

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<sup>15</sup> Letter dated January 13, 2006, from Christine B. Reichgott, EPA Region 10, NEPA Review Unit, to David Navecky, Surface Transportation Board, at Scoping Comments, pp. 2-3, attached as Exhibit 1; Letter dated February 2, 2009, from Christine B. Reichgott, EPA Region 10, NEPA Review Unit, to David Navecky, Surface Transportation Board, at 3-4, attached to ARRC's Petition as Exhibit 1.

<sup>16</sup> See EPA's *Policy and Procedures for the Review of Federal Actions Impacting the Environment* (October 1984), available at <http://www.epa.gov/compliance/resources/policies/nepa/>.

<sup>17</sup> *Id.*

<sup>18</sup> Letter dated October 9, 2009, from Teresa Kubo, EPA Region 10, Environmental Review and Sediments Management Unit, to David Navecky, Surface Transportation Board, at 1, attached to ARRC's petition as Exhibit 2. EPA notes that the Board's Vice Chairman Mulvey stated in his dissent to the January 2010 Decision: "I cannot vote to approve this project in light of opposition from EPA, the [Alaska Department of Natural Resources], and the lack of an adequate documented purpose and need in support of the project." *Alaska Railroad Corporation - Construction and Operation Exemption - Rail Line Between North Pole And Delta Junction, AK*, Fin. Dkt. No. 34658 at 15 (Jan. 5, 2010) ("NRE Decision").

discussions, which focused on providing information and updates on ARRC's application for a Section 404 permit. Contrary to ARRC's repeated assertions, however, the Section 404 process has continued to produce significant additional information – *specific to the 404 permit application for Phase I* – that was not included in the EIS or available to EPA even as late as September 2010.

In particular, in February 2010, ARRC's consultant, HDR Alaska, Inc., provided a draft 404(b)(1) evaluation for EPA review and specifically requested EPA's comments on "any fatal flaws or information gaps."<sup>19</sup> EPA responded on March 16, 2010, with a detailed analysis of that evaluation, which concluded that ARRC had not demonstrated compliance with the 404(b)(1) Guidelines.<sup>20</sup> Among other things, EPA conveyed its opinion that ARRC had not supported its contention that there are no practicable alternatives to the preferred alternative and that based on the analysis, the least environmentally damaging practicable alternative (LEDPA) cannot be determined. As noted in EPA's response, ARRC's submission included "*additional information and data relevant to the 404(b)(1) Guidelines not contained in the Board's Draft or Final EIS.*"<sup>21</sup> ARRC's petition fails to mention this exchange or that EPA provided notice to ARRC nearly a year ago regarding deficiencies in the Section 404(b)(1) analysis.

The ongoing Section 404 permit process for Phase I has continued to produce significant additional information and detail that was not previously available to EPA. In particular, ARRC's consultant provided a considerable amount of additional, technical information *after the Corps' public notice on the proposed permit was issued* on September 15, 2010. EPA therefore

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<sup>19</sup> Email dated February 25, 2010, from Paul McLarnon, HDR, Inc., to Tracy DeGering, EPA Region 10, attached as Exhibit 2.

<sup>20</sup> Letter dated March 16, 2010, from Tracy DeGering, EPA Region 10, to Paul McLarnon, HDR Alaska, Inc. at 7, attached as Exhibit 3.

<sup>21</sup> *Id.* at 1 (emphasis added).

requested a 30-day extension to thoroughly review the proposed permit action in light of this additional information.<sup>22</sup> The Corps granted EPA's request and extended the deadline for public, state, and federal comments to November 15, 2010.<sup>23</sup>

ARRC's final and revised Section 404(b)(1) evaluation that accompanied the permit application for Phase I contained deficiencies similar to those identified in EPA's March 2010 letter. This in turn triggered EPA's invocation of the section 404(q) process and EPA's 3(a) and 3(b) letters, which were timely issued on November 15, 2010, and December 10, 2010. These letters form the basis of ARRC's petition.<sup>24</sup>

Together, EPA's letters examine in detail various impacts of concern, including substantial effects to the natural ecology, aquatic habitats, and hydrology of the Tanana River. EPA further examined ARRC's specific claims regarding the practicability of various design alternatives.<sup>25</sup> Based on this analysis, EPA expressed its concern that ARRC "has not clearly demonstrated that the proposed project is the least environmentally damaging practicable alternative (LEDPA) and that it would not result in significant degradation to the Tanana River."<sup>26</sup> EPA further reminded ARRC that both of these factors must be met to comply with the Guidelines, that the burden of proof for demonstrating compliance is the applicant's, and that "[i]f an application contains insufficient information to establish compliance with the Guidelines,

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<sup>22</sup> Letter dated October 7, 2010, from Marcia Combes, Director, EPA Alaska Operations Office, to Colonel Reinhard W. Koenig, District Engineer, U.S. Army Corps of Engineers, Alaska District, attached as Exhibit 4.

<sup>23</sup> U.S. Army Corps of Engineers, Public Notice of Permit Application, Public Notice Revision, attached as Exhibit 5.

<sup>24</sup> Letter dated November 10, 2010, from Marcia Combes, Director, EPA Alaska Operations Office, to Colonel Richard W. Koenig, District Engineer, attached to ARRC's Petition as Exhibit 4 ("EPA 3(a) Letter"); Letter dated December 10, 2010, from Dennis J. McLerran, Regional Administrator, to Colonel Richard W. Koenig, District Engineer, attached to ARRC's Petition as Exhibit 5 ("EPA 3(b) Letter").

<sup>25</sup> EPA 3(a) Letter at 3-4; EPA 3(b) Letter at 2-4 and Supplemental Comments.

<sup>26</sup> *Id.* at 1.

then a Section 404 permit cannot be issued.”<sup>27</sup> EPA therefore concluded that the project “*as proposed* . . . does not comply with the Section 404(b)(1) Guidelines and therefore should not be authorized.”<sup>28</sup>

## 2. New Information on Section 404(b)(1) Guidelines Determination

EPA calls to the Board’s attention two recent letters from the Corps that relate directly to the claims in ARRC’s petition. First, by letter dated February 14, 2011, the Corps notified ARRC that “[a] detailed discussion of the effects of the proposed bridge design on aquatic resources *was not included in the EIS, nor have these effects been adequately discussed within the 404(b)(1) evaluation* submitted with the permit application.”<sup>29</sup> This letter further states the Corps’ conclusion that the EIS discussion entitled *Impacts to Surface Water by Alternative Segment* “does not discuss the effects of the construction of the bridge on the aquatic environment *in enough detail for the Corps to make a permit decision.*”<sup>30</sup>

The Corps also concludes that ARRC’s 404(b)(1) analysis “does not provide enough detail on the probable direct and indirect impacts to the waters of the United States (U.S.), including wetlands, due to the proposed project, nor does it provide supporting information for the conclusions.”<sup>31</sup> The Corps therefore requested specific additional information and expressly required that ARRC’s “information and analysis must demonstrate the specific nature of the anticipated effects and support your contention that these effects would not be unnecessarily adverse.”<sup>32</sup>

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<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> Letter dated February 14, 2011, from Ellen Lyons, U.S. Army Engineer District, Alaska, to Brian Lindamood, Alaska Railroad Corporation at 1, attached as Exhibit 6 (emphasis added).

<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*

Again on February 22, 2011, the Corps requested additional, detailed information on bridge design alternatives and noted further deficiencies in the record.<sup>33</sup> Among other things, the February 22 letter reminds ARRC of the Corps' stated position in December 2009 that "the current EIS does not contain enough information regarding practicability and environmental impacts of alternatives to make a permit decision."<sup>34</sup> The Corps also explained that its prior determination that a supplemental EIS would not be necessary was based on ARRC's agreement to provide additional alternatives analyses specific to bridge design in the 404(b)(1) evaluation.<sup>35</sup>

The Corps then concludes that ARRC's analysis of bridge design alternatives fails to include supporting data and modeling results and fails to support conclusions regarding both practicability and impacts to aquatic resources. Accordingly, the Corps states, "[w]e are unable to determine the benefits or impacts to aquatic habitat without a discussion of the environmental impacts of the longer bridge alternative."<sup>36</sup> The Corps further states, "[w]hile a comparison of the environmental impacts of the longer bridge alternative could show that it is not the LEDPA, this determination cannot be made until we have received information regarding the environmental impacts of the longer bridge alternative."<sup>37</sup>

These letters confirm the insufficiencies in ARRC's Section 404(b)(1) Guidelines analysis. These letters also make clear the Corps' independent determination that the current record, including the Board's EIS, *does not demonstrate compliance with the Section 404(b)(1) Guidelines or support issuance of a Section 404 permit*. The Corps' letters also demonstrate that

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<sup>33</sup> Letter dated February 22, 2011, from Ellen Lyons, U.S. Army Engineer District, Alaska, to Brian Lindamood, Alaska Railroad Corporation, attached as Exhibit 7 (emphasis added).

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.* at 3.

the Board's NEPA process did not end the analysis of alternatives and environmental impacts, to the extent necessary for compliance with Section 404(b)(1).

In addition, the Corps' letters demonstrate that significant new information *continues to become available* that relates directly to the 404(b)(1) analysis and the Corps' and EPA's review, including: (1) ARRC's Conditional Letter of Map Revision (CLOMR), submitted January 25, 2011; (2) ARRC's hydraulic comparison of bridge designs submitted February 3, 2011; (3) ARRC's response to comments on the proposed 404 permit, submitted January 19, 2011; and (4) ARRC's supplemental response to comments, submitted February 9, 2011.<sup>38</sup> Thus, ARRC's repeated assertions that EPA had all the information before it during the EIS process and that EPA is responsible for delaying the project should be flatly rejected.<sup>39</sup>

### III. ARGUMENT

#### A. A Ruling on the Petition is Premature and Will Not Afford ARRC Relief

The facts in this case, and in particular the Corps' recent letters, call into question whether the preemption issue is appropriately before the Board at this time. The Board exercises broad discretion in granting or denying petitions for declaratory order. Among other things, the Board will consider the ripeness of the controversy and may deny a petition where the need for the determination petitioners seek is premature.<sup>40</sup> Thus, the Board may deny a petition where the issues "may ultimately be determined favorably to a petitioner or may never ripen into a justiciable dispute."<sup>41</sup> Here, ARRC seeks to preempt EPA's "arguments" relating to Section

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<sup>38</sup> *Id.* at 1.

<sup>39</sup> See ARRC Petition at 8, 11, 13.

<sup>40</sup> *James Riffin d/b/a The Northern Central Railroad - Acquisition And Operation Exemption - In York County, PA*, Fin. Dkt. No. 34501, 2005 WL 420419 at \*6 (S.T.B. 2005); *USX Corp., U.S. Steel Group - Petition For Declaratory Order*, No. MC-C-30205, 1992 WL 322948 at \*2 (I.C.C. 1992).

<sup>41</sup> *Arvada Transfer Co., Inc. - Petition for Declaratory Order*, No. MC-C 30074, 1988 WL 226030 at \* 1 (I.C.C.).

404(b)(1) compliance.<sup>42</sup> Given the ongoing nature of the Section 404 permit process and the Corps' recent requests for additional information, the petition should be denied on these grounds.

As described above, EPA's actions in the ongoing Section 404 permit process are consistent with the procedures in EPA's regulations and the 404(q) MOA. The issues EPA has raised and the additional analysis needed are directly related to requirements of the Section 404(b)(1) Guidelines. In particular, EPA's comments have addressed impacts to the natural ecology, aquatic habitats, and hydrology of the Tanana River, as well as the practicability of various design alternatives.<sup>43</sup> Based on the deficiencies identified, EPA concluded that ARRC has not demonstrated that the proposed project is the LEDPA and that it will not result in significant degradation to the Tanana River.<sup>44</sup>

The Corps' recent letters confirm EPA's concerns regarding compliance with the Section 404(b)(1) Guidelines and the sufficiency of the record to support permit issuance. The Corps' letters make clear that additional information is required – particularly regarding impacts to aquatic resources and the practicability of alternatives – before Section 404(b)(1) compliance can be determined and a permit issued.<sup>45</sup> EPA's similar conclusions form the basis of ARRC's petition, which complains about EPA actions seeking to “block issuance of a Section 404 permit” and ultimately seeks a Board declaration “affirming that EPA's attempts *to prevent issuance of CWA Section 404 permits* for the NRE project are preempted.”<sup>46</sup>

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<sup>42</sup> ARRC Petition at 16.

<sup>43</sup> See EPA 3(a) Letter at 3-4; EPA 3(b) Letter at 2-4 and Supplemental Comments.

<sup>44</sup> *Id.*

<sup>45</sup> See *generally* Exhibit 6, Exhibit 7.

<sup>46</sup> ARRC Petition at 8, 15 (emphasis added).

EPA Reply to ARRC Petition  
for Declaratory Order - 12  
Finance Docket No. 34658

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Given the inadequacies that both EPA and Corps have identified, a Board ruling preempting EPA's "arguments" would be premature and would interfere with the Government's ability to conclude that this project meets the requirements of Section 404. EPA further notes that it has not taken any action that precludes ARRC from obtaining a 404 permit. None of EPA's letters suggest that a 404 permit is unavailable to ARRC or that EPA has made a decision to exercise its veto authority under Section 404(c). EPA therefore submits that the Board need not reach the preemption issue at this time.

In addition, the Corps' letters raise questions regarding the potential scope of ARRC's preemption arguments. ARRC argues throughout the petition that because EPA's conclusions regarding Section 404(b)(1) compliance differ from the Board's NEPA conclusions, they necessarily interfere with interstate commerce and unduly restrict railroad operations, and should therefore be preempted.<sup>47</sup> The Corps, however, has also determined that the EIS analyses and, by extension, the Board's conclusions, are not sufficient to demonstrate compliance with the 404(b)(1) Guidelines or to support issuance of a Section 404 permit. Following ARRC's logic, the Corps' requests for additional information would presumably also be preempted. It is also unclear whether ARRC will ultimately argue for ICCTA preemption of Corps' activities if the ongoing Section 404 permit process produces a result it finds unsatisfactory

EPA submits that the better path here is to allow the Section 404 permit process to play out – as it has to date – in accordance with the regulations. The ongoing process of information gathering by the Corps is intended to produce an application and supporting record that comply with the Guidelines so that a permit can be issued. If ARRC ultimately raises similar arguments regarding preemption of Corps actions, the Board can consider ARRC's preemption arguments

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<sup>47</sup> ARRC Petition at 8, 11, 13.

relating to both agencies' actions in one proceeding. Given that any Board ruling on preemption in the Section 404 context may potentially affect the Corps' authorities, such an approach would also afford the Board the benefit of the Corps' legal position. For these reasons, ARRC's petition should be denied.

**B. The Board has Already Determined that Section 404 is Not Preempted and EPA's Actions are Entirely Consistent with Section 404**

Should the Board reach the preemption issue, ARRC has failed to support its assertion that the ICCTA preempts EPA's actions. The Board has already determined that Section 404, including the Section 404(b)(1) Guidelines, is not preempted in this case and EPA's actions to date have been entirely consistent with the Guidelines.

As ARRC points out, the Board's January 5, 2010 decision required ARRC to obtain Section 404 authorization from the Corps for the discharge of dredged or fill material into navigable waters.<sup>48</sup> Implicit in the Board's decision is a determination that Section 404 and its associated requirements and procedures are *not preempted* by the ICCTA. The Board's decision went further, however, and expressly stated that Section 404's mitigation requirements are mandatory for this project.<sup>49</sup> In addition, rather than simply imposing a procedural obligation to seek Section 404 authorization, the Board specifically recognized that the substantive requirements of that process apply here:

[The] Corps' ongoing permitting process under section 404 of the CWA will ensure that the potential impact to wetlands resulting from this project are avoided, minimized, or appropriately mitigated.<sup>50</sup>

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<sup>48</sup> NRE Decision at 17.

<sup>49</sup> *Id.* at 11.

<sup>50</sup> *Id.* at 14.

Indeed, the Board's reference to avoidance, minimization and mitigation is a direct reference to the substantive obligations that ARRC must comply with under the 404(b)(1) Guidelines.<sup>51</sup>

Similarly, the 2006 Memorandum of Understanding between the Board and the Corps regarding preparation of the EIS specifically contemplates the need for Section 404 authorization and makes clear that the Section 404(b)(1) Guidelines apply to this project.<sup>52</sup> Thus, it would appear the Board has determined that the Section 404(b)(1) Guidelines and the underlying substantive obligations are not preempted by the ICCTA.

To EPA's knowledge, at no time throughout this process has ARRC argued that the ICCTA preempts Section 404 or EPA's role in ensuring compliance with the Section 404(b)(1) Guidelines. ARRC did not appeal the Board's decision calling for Section 404 authorization and has since applied for a Section 404 permit. In addition, ARRC's February 2010 request that EPA review its draft Section 404(b)(1) evaluation, described above, demonstrates that ARRC is well aware of EPA's role in evaluating compliance with the Guidelines.

ARRC's complaint about preemption apparently now arises from EPA's 3(a) and 3(b) letters, both of which reiterate EPA's position that ARRC has failed to demonstrate compliance with the Section 404(b)(1) Guidelines.<sup>53</sup> These letters are a legitimate exercise of EPA's statutory obligation to ensure such compliance before a project can be permitted, and EPA's actions have been entirely consistent with the Section 404 regulations. ARRC's argument that

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<sup>51</sup> See 40 C.F.R. § 230.10(a), (d); Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency - The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines at II.C, available at <http://www.saw.usace.army.mil/wetlands/Policies/epa-moa.pdf>. Other than changes to specific mitigation requirements, the provisions of this MOA remain in effect. 40 C.F.R. § 230.91(e)(2).

<sup>52</sup> See Memorandum of Understanding between Surface Transportation Board and U.S. Army Corps of Engineers, Alaska District at ¶¶ 4, 5, attached as Exhibit 3 to ARRC's Petition.

<sup>53</sup> EPA 3(a) Letter at 4; EPA 3(b) Letter at 1-2.

EPA's legitimate role in this process is preempted essentially arises because ARRC disagrees with EPA's conclusions. This argument should be rejected and the petition denied.

C. ARRC Has Not Demonstrated that the ICCTA Preempts EPA Actions in this Case

Assuming any further preemption analysis is warranted, ARRC has failed to demonstrate that the ICCTA preempts EPA's statutory authority to ensure compliance with the Section 404(b)(1) Guidelines. In particular, ARRC's assertion of "disharmony" between the Board's and EPA's actions confuses the NEPA process with the Section 404(b)(1) Guidelines and mischaracterizes EPA's position. ARRC similarly fails to demonstrate that EPA's actions in this case unreasonably interfere with interstate commerce and unduly restrict railroad operations.

1. Federal Authorities Must Be Harmonized to the Extent Possible

ARRC's discussion of the standard for analyzing ICCTA preemption in the context of federal environmental law is notably incomplete. In particular, the cases ARRC cites address the Board's preemption authority over *state and local regulation*.<sup>54</sup> EPA does not dispute the Board's authority to preempt certain state and local regulations in the appropriate circumstances. Indeed, as the Board itself has recognized, the very purpose of such preemption is to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce.<sup>55</sup> To that end, the ICCTA grants the Board exclusive jurisdiction over transportation by rail carriers, including remedies relating to routes, services and facilities, and also over

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<sup>54</sup> For example, in *City of Auburn v. United States*, the Ninth Circuit explained that the ICCTA was intended to preempt a wide range of *state and local regulation* of rail activity. Thus, the court upheld the Board's determination that the ICCTA preempted state and local permitting and environmental review requirements for rail line improvements. 154 F.3d 1025, 1029-31 (9<sup>th</sup> Cir. 1998). See also *Joint Petition for Declaratory Order - Boston and Maine Corporation and Town of Ayer, MA*, Fin. Dkt. No. 33971, 2001 WL 458685 at \*5 (S.T.B. May 1, 2001) (explaining that "state and local regulation cannot be used to veto or unreasonably interfere with railroad operations"); *Friends of the Aquifer, et al.*, Fin. Dkt. No. 33966, 2001 WL 928949 at \*3-4 (S.T.B. Aug. 10, 2001) (discussing broad nature of ICCTA preemption in the context of state and local regulation).

<sup>55</sup> *Borough of Riverdale - Petition for Declaratory Order*, Fin. Dkt. No. 35299, 2010 WL 3053100 at \*1 (S.T.B. Aug. 3, 2010).

construction, acquisition, operation, abandonment, or discontinuance of certain tracks or facilities.<sup>56</sup> As ARRC correctly notes, however, this provision does not automatically preempt federal law.<sup>57</sup>

Federal courts and the Board have repeatedly stated that the ICCTA was not intended to preempt federal environmental statutes such as the Clean Water Act, the Clean Air Act, and the Safe Water Drinking Act, even where those statutory schemes are implemented in part by the states.<sup>58</sup> Thus, the Ninth Circuit has explained that the ICCTA generally does not preempt EPA-approved statewide plans implementing federal environmental law, because it is possible to harmonize the ICCTA with those federally recognized regulations.<sup>59</sup> The Board has similarly stated that its preemption decisions are not intended to interfere with the role of states in implementing federal environmental laws such as the Clean Water Act.<sup>60</sup>

EPA is not aware of any cases finding ICCTA preemption of either federal or state implementation of *federal environmental law*. The few cases that even address federal environmental laws have found ICCTA preemption where the local entity was *not acting pursuant to a federal authority*. For example, the Ninth Circuit has held that the ICCTA preempted local air emissions rules where such rules had not been submitted to EPA for approval and therefore “did not have the force and effect of federal law.”<sup>61</sup> Similarly, the Board has found that local requirements to prevent pollutant leaks were preempted where the town’s reliance on the Clean Water Act and Safe Drinking Water Act was a pretext - neither the state nor EPA had

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<sup>56</sup> 49 U.S.C. § 10501.

<sup>57</sup> ARRC Petition at 7.

<sup>58</sup> *Ass’n of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1098 (9<sup>th</sup> Cir. 2010); *Town of Ayer*, 2001 WL 458685 at \*5; *Friends of the Aquifer*, 2001 WL 928949 at \*4; *Cities of Auburn and Kent, WA - Petition For Declaratory Order*, Fin. Dkt. No. 33200, 1997 WL 362017 at \*4 (S.T.B. July 1, 1997).

<sup>59</sup> *American Railroads*, 622 F.3d at 1097.

<sup>60</sup> *Auburn and Kent*, 1997 WL 362017 at \*4.

<sup>61</sup> *American Railroads*, 622 F.3d at 1098.

expressed water quality concerns.<sup>62</sup> These cases suggest that the result may have been different had those entities been acting pursuant to federal authority.

EPA notes in particular that ARRC cites *Dakota, Minn. & E. R.R. Corporation v. South Dakota*, to support its argument that requiring additional mitigation beyond that required by the Board is “prohibited” by the ICCTA.<sup>63</sup> At issue in *Dakota*, however, was whether the ICCTA preempted a state eminent domain law, which only allowed a railroad to exercise eminent domain for public necessity purposes if it had the financial resources to fund environmental mitigation.<sup>64</sup> The *Dakota* court concluded, “[b]y requiring the Governor to examine these aspects of the project in the context of determining financial feasibility, the State is implying that the Governor has authority to require additional safety measures or environmental mitigation on top of that required by the STB. Such power amounts to regulation of the railroads and is prohibited.”<sup>65</sup> The *Dakota* case does not apply here because, as noted above, ICCTA preemption of state environmental laws that regulate railroads is a settled matter and is not at issue in this petition.

Where federal environmental law is involved, however, the applicable rule is as follows: if an apparent conflict exists between the ICCTA and a federal law, courts must harmonize the two, giving effect to both laws to the extent possible.<sup>66</sup> As the Ninth Circuit explained in *American Railroads*, the requirement to harmonize federal law is a *different rule* than that for

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<sup>62</sup> *Town of Ayer*, 2001 WL 458685 at \*7.

<sup>63</sup> ARRC Petition at 12, citing 236 F. Supp. 2d 989, 1009 (D.S.D. 2002), *rev'd on other grounds*, 362 F.3d 512 (8th Cir. 2004).

<sup>64</sup> *Dakota*, 236 F. Supp. 2d at 998.

<sup>65</sup> *Id.* at 1009.

<sup>66</sup> *American Railroads*, 622 F.3d at 1098.

determining preemption of state and local regulation, which looks to the “unreasonable interference” test.<sup>67</sup> ARRC’s preemption arguments fail under the appropriate analysis.

2. ARRC’s Effort to Demonstrate “Disharmony” Misconstrues the Relationship Between NEPA and the Section 404(b)(1) Guidelines

ARRC’s attempt to demonstrate that EPA’s actions pursuant to Section 404 cannot be harmonized with the Board’s confuses NEPA requirements with those of the Section 404(b)(1) Guidelines. ARRC also misreads the regulations to mean that the NEPA alternatives analysis somehow constrains the Corps’ from evaluating all practicable alternatives, as required by Section 404 of the Clean Water Act and the Guidelines.

As discussed above, ARRC has not argued that the ICCTA preempts Clean Water Act Section 404 automatically or in its entirety. In other words, these statutes and their associated requirements can be read in harmony. ARRC asserts, however, that EPA is creating “discord” by revisiting issues “that the Board fully addressed in the EIS” or that EPA should have raised sooner.<sup>68</sup> ARRC therefore argues broadly that the Board’s EIS has already addressed EPA’s concerns regarding: (1) the purpose and need for the project; (2) practicability of alternatives; (3) impacts to aquatic resources; and (4) impacts to Tanana River resources.<sup>69</sup> To the extent EPA seeks anything beyond the Board’s EIS determinations, ARRC argues, EPA’s actions are not in harmony with the Board’s and should be preempted.

ARRC’s argument overlooks the differences between NEPA and Section 404(b)(1) requirements. NEPA requires that the action agency’s analysis include detailed consideration of “all reasonable alternatives,” including alternatives not within the agency’s jurisdiction and the

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<sup>67</sup> *Id.* ARRC also fails to demonstrate that EPA’s actions unreasonably interfere with interstate commerce or restrict railroad operations. *See infra* at pp. 24-28.

<sup>68</sup> ARRC Petition at 2, 8, 13.

<sup>69</sup> *Id.* at 8-12.

alternative of no action.<sup>70</sup> In addition, it is well-settled that NEPA is procedural in nature. While NEPA requires that agencies take a “hard look” at the environmental consequences of proposed action, it does not mandate a particular outcome or require that the agency select a particular alternative.<sup>71</sup>

The Section 404(b)(1) Guidelines, on the other hand, require an analysis of all “practicable” alternatives.<sup>72</sup> Importantly, the Guidelines *prohibit the discharge* of dredged or fill material if a less-damaging practicable alternative exists, provided the alternative does not have other significant adverse environmental consequences.<sup>73</sup> As noted above, practicability is specifically defined in the regulations and includes alternatives that do not involve a discharge into waters of the United States.<sup>74</sup> For non-water dependent projects such as the Northern Rail Extension, practicable alternatives that do not involve discharges to wetlands or other special aquatic sites are presumed to be available and less damaging “*unless clearly demonstrated otherwise.*”<sup>75</sup>

Courts have recognized the differing focuses of the analyses under Section 404(b)(1) and NEPA. For example, the Ninth Circuit has explained that the Section 404(b)(1) analysis is “primarily (but not exclusively) concerned with the aquatic ecosystem ... while the NEPA analysis is more broad and procedurally oriented.”<sup>76</sup> Similarly, the 10<sup>th</sup> Circuit has explained that unlike the “least damaging practicable alternative” analysis under Section 404, NEPA does

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<sup>70</sup> 42 U.S.C. § 4332(2)(c), 40 C.F.R. § 1502.14.

<sup>71</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-53 (1989); *Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 370-71 (1989).

<sup>72</sup> 40 C.F.R. § 230.10(a).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at § 230.10(a)(1).

<sup>75</sup> *Id.* at § 230.10(a)(3) (emphasis added).

<sup>76</sup> *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 955 (9<sup>th</sup> Cir. 2008).

not mandate a particular result.<sup>77</sup> Thus, under Section 404, “it is not sufficient for the Corps to consider a range of alternatives to the proposed project: the Corps must rebut the presumption that there are practicable alternatives with less adverse environmental impact.”<sup>78</sup> For non-water dependent projects such as the Northern Rail Extension, this burden is heaviest. The Corps may not issue a Section 404 permit in such cases “unless the applicant, ‘with independent verification by the [Corps],...provide[s] detailed, clear and convincing information *proving*’ that an alternative with less adverse impact is ‘impracticable.’”<sup>79</sup> EPA’s position in the 3(a) and 3(b) letters is that ARRC has not met that burden here.

In sum, the fact that both EPA and the Corps have requested additional information to demonstrate compliance with the Section 404(b)(1) Guidelines is not evidence of “disharmony” with the Board’s NEPA conclusions. Rather, Section 404(b)(1) requires an analysis focused on specific criteria and imposes a substantive requirement on the selection and authorization of alternatives that does not apply under NEPA. ARRC is therefore incorrect in asserting that the Board’s analyses regarding purpose and need, alternatives, or impacts necessarily addressed the Guidelines’ requirements. The Corps’ February 14 and February 22 letters demonstrate as much.

3. The Guidelines Do Not Restrict the Evaluation of Practicable Alternatives to Those Considered Under NEPA

Petitioners misread the Guidelines to mean that the NEPA alternatives analysis somehow restricts or prohibits the Corps from evaluating all practicable alternatives as required by Section

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<sup>77</sup> *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1277 (10<sup>th</sup> Cir. 2004). The difference NEPA and the 404(b)(1) Guidelines analyses is also evidenced by the lower level of scrutiny a court employs when reviewing an agency’s NEPA compliance. *Id.*

<sup>78</sup> *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1262, n.12 (10<sup>th</sup> Cir. 2003).

<sup>79</sup> *Flowers*, 359 F.3d at 1269 (emphasis in original).

404.<sup>80</sup> Nothing in the regulations suggests the prohibition ARRC asserts. Based on this misreading, ARRC also erroneously asserts that “[t]he underlying premise of EPA’s practicability arguments is a rejection of the alternatives analysis in the EIS.”<sup>81</sup>

The Guidelines expressly describe the relationship between NEPA and Section 404(b)(1), making clear that the analyses are not co-extensive:

For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, *will in most cases* provide the information for the evaluation of alternatives under these Guidelines. *On occasion*, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.<sup>82</sup>

This regulation makes clear that in some, *but not all instances*, the information provided by a NEPA analysis will provide information for a 404(b)(1) Guidelines analysis. The regulation also explains that “on occasion” NEPA may address a broader range of alternatives than what is required under a 404(b)(1) Guidelines analysis. ARRC’s suggestion that this regulation somehow *prohibits* the Corps from considering a broader range of alternatives than the Board considered in the EIS is flatly incorrect. Nothing in this regulation limits the Corps from considering practicable alternatives that were not considered under NEPA.

#### 4. ARRC Mischaracterizes EPA’s Position on the Preferred Alternative and Permit Issuance

In an effort to portray EPA’s actions as creating “discord,” ARRC also mischaracterizes EPA’s position regarding permit issuance and the preferred alternative. First, contrary to ARRC’s assertion, EPA is not seeking to block permit issuance or “demanding the Corps reach a

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<sup>80</sup> ARRC Petition at 11.

<sup>81</sup> *Id.*

<sup>82</sup> 40 C.F.R. § 230.10(a)(4) (emphasis added).

different conclusion from the Board.” In reviewing projects for Section 404(b)(1) compliance, EPA is neither an opponent nor proponent of an applicant’s proposal. Rather, EPA’s involvement has been focused on ensuring that the proposed project is the least environmentally damaging practicable alternative (LEDPA), as required by the Guidelines. In this case, EPA has never recommended that a Section 404 permit be denied altogether; on the contrary, EPA’s comments make clear that the record must support selection and authorization of the LEDPA.

ARRC also mischaracterizes EPA’s statement in a February 2009 letter, supporting the selection of ARRC’s routes as the preferred alternative.<sup>83</sup> In fact, EPA’s statement was more qualified than ARRC represents; EPA specifically called for “adjustments that can be made within each preferred alternative to provide better protection or further minimize impacts to various resources, particularly impacts to water quality, open water habitats, wetlands, stream channels, and riparian areas.” ARRC also omits the following critical language, in which EPA specifically seeks refinement of the alternatives for Section 404(b)(1) compliance:

*EPA recommends that any preferred alternative identified by the STB in the final EIS be further refined to further reduce project impacts, particularly to water quality, surface waterbodies and wetlands. This refinement will also help to ensure compliance with Clean Water Act (CWA) 404(b)(1) guidelines. When preferred alternatives are identified, EPA encourages the designation and complete description of material sites, construction camps, and staging areas, and a thorough analysis of the anticipated impacts associated with each of these locations.*<sup>84</sup>

Thus, ARRC’s characterization that EPA’s current position regarding compliance with the 404(b)(1) Guidelines contradicts its position during the EIS process and represents “a dramatic shift” is incorrect.

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<sup>83</sup> ARRC Petition at 11-12.

<sup>84</sup> EPA’s February 2, 2009 Letter, attached to ARRC’s Petition as Exhibit 1, at 3-4 (emphasis added).

Moreover, EPA's statements regarding the preferred alternative were made in February 2009 - a year before ARRC provided additional information on alternatives and impacts in its draft Section 404(b)(1) evaluation. In addition, as discussed above, significant additional information regarding alternatives designs and hydrologic impacts was provided in the fall of 2010, and additional information continues to be developed and submitted. EPA's statement - based on information available at the time - does not relieve ARRC from the need to demonstrate compliance with the 404(b)(1) Guidelines during the Section 404 permit process. EPA's position that ARRC has not demonstrated that the preferred alternative is the LEDPA is further supported by the Corps' February 14 and February 22 letters.

ARRC also incorrectly asserts that the preferred alternative identified in the Board's final EIS equates to selection of the LEDPA under Section 404, stating "When the Board's EIS excluded alternatives that were deemed unreasonable, it by definition found those same alternatives impracticable under the Guidelines."<sup>85</sup> ARRC cites no statement that the Board's alternatives analysis in the EIS addressed the practicability requirements of the Section 404(b)(1) Guidelines. And again, the Corps' February 14 and February 22 letters demonstrate that ARRC's assertion is not correct. ARRC's submittal of its Section 404(b)(1) evaluation *after* the Board's decision is further evidence that demonstrating compliance with the Guidelines is a separate from the NEPA process.

**5. ARRC Fails to Demonstrate that EPA Actions Constitute Unreasonable Interference**

Even applying the "unreasonable interference" test, ARRC's arguments fail. In applying this test, the Board examines whether the requirements in question would "unduly restrict the

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<sup>85</sup> ARRC Petition at 11.

railroad from conducting its operations, or unreasonably burden interstate commerce.”<sup>86</sup> The

Board considers this a “fact-bound” question and examines each case to determine:

the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.<sup>87</sup>

The Board has further stated that “individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce.” In addition, to pass the unreasonable interference test, a regulation must not prevent the railroad from conducting business in a sensible fashion, and must be settled and definite enough to avoid open-ended delays.<sup>88</sup> To be found non-discriminatory, an environmental regulation must also address general concerns without targeting the railroad industry.<sup>89</sup> For that reason, the ICCTA generally does not preempt state or local laws of general applicability.

ARRC has not addressed these specific factors for “unreasonable interference.” In fact, a closer examination of these specific factors demonstrates that ARRC’s arguments fail. First, the Section 404(b)(1) Guidelines are regulations of general applicability that apply to any Section 404 permit applicant seeking to discharge dredged or fill material into waters of the United States. The Guidelines address general concerns; the stated general purpose is to “restore and maintain the chemical, physical, and biological integrity of waters of the United States through

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<sup>86</sup> *Id.* at \*6.

<sup>87</sup> *Id.*

<sup>88</sup> *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d at 533, 541 (6<sup>th</sup> Cir. 2008) (quoting *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 253 (3d Cir. 2007).

<sup>89</sup> *Id.*

the control of discharges of dredged or fill material.”<sup>90</sup> The Guidelines are not targeted to the railroad industry nor is EPA applying the Guidelines in a discriminatory manner against ARRC.

Second, the EPA’s effort to ensure ARRC’s compliance with the Section 404(b)(1) Guidelines is not being used as a pretext to frustrate railroad activity or development. Despite ARRC’s assertions to the contrary, EPA is not seeking to block issuance of a Section 404 permit for the Phase I development, or to otherwise “thwart” the Northern Rail Extension. Rather, as discussed above, EPA’s actions have been focused on ensuring that ARRC has made the specific demonstrations required by the Section 404(b)(1) Guidelines – with adequate supporting data and analysis – before a Section 404 permit is issued.<sup>91</sup>

Third, the Guidelines’ requirements themselves and EPA’s associated actions are settled and definite and do not impose an open-ended delay. As discussed above, EPA identified a number of specific deficiencies in ARRC’s Section 404(b)(1) evaluation nearly a year ago, many of which remain unaddressed.<sup>92</sup> Also, ARRC continues to develop and submit additional technical information that is related directly to the 404(b)(1) analysis and the Corps’ and EPA’s review.<sup>93</sup> Any delays in Section 404(b)(1) compliance and permit issuance have been and remain within ARRC’s control and turn on its willingness to provide the specific information required by the Clean Water Act and requested by EPA and the Corps.

Finally, ARRC has not shown that EPA’s actions are preventing it from conducting business in a sensible fashion. As noted above, critical considerations include the degree of impact on interstate commerce and the burden on rail transportation. ARRC offers no specifics

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<sup>90</sup> 40 C.F.R. § 230.1(a).

<sup>91</sup> *See supra*, at pp. 6-9.

<sup>92</sup> *See supra*, at p. 7.

<sup>93</sup> *See supra*, at p. 11.

as to how demonstrating compliance with the Section 404(b)(1) Guidelines will actually interfere with interstate commerce or burden rail operations.

ARRC seeks preemption of four EPA “arguments” relating to the purpose and need for the project, alternatives, impacts to aquatic resources, and the determination that the Tanana River is an ARNI. For each argument, however, ARRC offers only the same, repeated assertion - that EPA’s 404(b)(1) conclusions differ from the Board’s NEPA conclusions and therefore necessarily interfere with interstate commerce and unduly restrict railroad operations:

- “EPA is taking these actions with full knowledge – and apparent disregard – of the Board’s decision authorizing the NRE.... EPA’s attempts to thwart the NRE project are unduly restricting ARRC’s operations and unreasonably interfering with interstate commerce....”<sup>94</sup>
- “EPA’s attempt to prevent the issuance of a Section 404 permit by arguing that the Corps should evaluate alternatives considered and rejected by the Board unduly restricts ARRC’s planned rail operations and unreasonably interferes with interstate commerce.”<sup>95</sup>
- “By issuing a contrived ARNI designation more than a year after publication of the Board’s Final EIS, EPA is unduly restricting ARRC’s operations and unreasonably burdening interstate commerce.”<sup>96</sup>
- “By continuing to press [its] arguments in communications to the Corps, EPA is impinging on the Board’s jurisdiction, with the effect of unduly restricting ARRC’s operations and unreasonably interfering with interstate commerce.”<sup>97</sup>

Simply stating that EPA arguments or communications unreasonably interfere with interstate commerce does not make it so. Otherwise, any federal agency disagreement with the Board would result in unreasonable interference with interstate commerce or, in other words, automatic preemption.

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<sup>94</sup> ARRC Petition at 8.

<sup>95</sup> *Id.* at 11.

<sup>96</sup> *Id.* at 13.

<sup>97</sup> *Id.* at 13.

Moreover, ARRC's "unreasonable interference" argument regarding EPA's identification of the Tanana River as an ARNI misconstrues the effect of that action. As discussed above, identification of an ARNI is solely for the purpose of triggering the interagency review process under the 1992 404(q) MOA. EPA's use of the 404(q) process does not prevent issuance of a 404 permit by the Corps, nor does it add significant delays to the review of an application or issuance of a permit.<sup>98</sup> Instead, it allows for the timely resolution of issues between the Corps and EPA using agreed-upon methods and deadlines.

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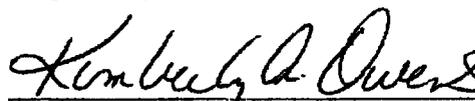
<sup>98</sup> *See supra*, at pp. 4-5.

#### IV. CONCLUSION

ARRC has failed to sustain its assertion that the ICCTA preempts EPA's "arguments" seeking compliance with the Section 404(b)(1) Guidelines. The Corps' recent correspondence makes clear that ARRC's petition is premature. In addition, the Board has determined that Section 404 is not preempted in this case and EPA's actions have been consistent with the 404 permit process. ARRC's efforts to demonstrate "disharmony" misread both the Section 404(b)(1) Guidelines and EPA's position in this case. Finally, ARRC fails to show that EPA's arguments unreasonably interfere with interstate commerce and fails to even address the specific factors for this determination. ARRC's petition should therefore be denied.

Dated this 2<sup>nd</sup> day of March, 2011

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

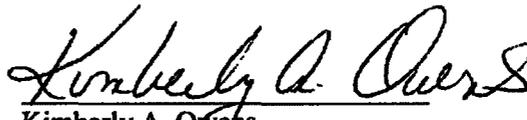
I hereby certify that copies of the foregoing U.S. ENVIRONMENTAL PROTECTION AGENCY'S REPLY TO PETITION OF ALASKA RAILROAD CORPORATION FOR DECLARATORY ORDER and accompanying exhibits were filed electronically today with the Surface Transportation Board and served by electronic mail, based on the consent of each party, upon the following:

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Kimberly A. Owens  
US EPA Region 10

DATED this 2<sup>nd</sup> day of March 2011

Official File



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 10**  
1200 Sixth Avenue  
Seattle, WA 98101

January 13, 2006

Reply To  
Attn Of: ETPA-088

Ref: 05-063-STB

Mr. David Navecky  
Surface Transportation Board  
Case Control Unit  
1925 K Street, NW  
Washington, DC 20423-0001

Dear Mr. Navecky:

The U.S. Environmental Protection Agency (EPA) Region 10, has reviewed the October 26, 2005, Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) and Notice of Availability (NOA) of the Draft Scope of Study for the proposed Northern Rail Extension Project between Eielson Air Force Base (North Pole, Alaska) and Fort Greeley (Delta Junction, Alaska). Our review of the NOI and NOA was conducted in accordance with our responsibilities under the National Environmental Policy Act (NEPA) and Clean Air Act §309, and the Clean Water Act.

EPA appreciates the opportunity for early involvement in the planning process by providing scoping comments on the proposed Northern Rail Extension Project. The enclosed comments are provided to inform the Surface Transportation Board (STB) of issues that warrant consideration during the planning process for the EIS.

Although EPA is not a formal cooperating agency, we would appreciate the continued early coordination and involvement with your office throughout the development of this EIS. We would be available to work with your agency to review and comment on preliminary sections of the document. If you have any questions regarding our comments, please do not hesitate to contact Mark Jen of my staff in the Alaska Operations Office in Anchorage by phone at (907) 271-3411 or by email at [jen.mark@epa.gov](mailto:jen.mark@epa.gov). We look forward to continued involvement in this important project.

Sincerely,

A handwritten signature in black ink, appearing to read "Christine B. Reichgott".

Christine B. Reichgott, Manager  
NEPA Review Unit

Enclosure

cc: Brett Flint, Alaska Railroad Corporation



**EPA REGION 10  
SCOPING COMMENTS  
ON THE NORTHERN RAIL EXTENSION PROJECT**

**SCOPING SUMMARY REPORT**

As indicated in the NOI, at the conclusion of the scoping and comment period, a Final Scope of Study for the EIS will be issued. We support the development of such a document and recommend that it include a summary that identifies the types of comments raised during scoping, and demonstrates how these comments will be addressed in the EIS.

**DEFINING THE PROJECT AREA**

The EIS should clearly identify and delineate the project area to be analyzed for the Northern Rail Extension Project. The project area should be broad in scope to allow full consideration of the direct, indirect, and cumulative impacts resulting from this proposed project. The project area should not be restricted to a narrow corridor of the proposed rail line Right-of-Way (ROW). The project area for EIS analysis should include the proposed military training sites, such as the Tanana Flats/Blair Lakes and Donnelly training areas. The project area should encompass the communities within the rail corridor (e.g. North Pole, Salcha, Big Delta, Delta Junction) and potentially affected communities outside the rail corridor (e.g. Fairbanks, Anchorage, Seward, and Whittier). Furthermore, we recommend that the EIS include a discussion of how the project area was identified for the analysis in the EIS.

**PURPOSE AND NEED**

The EIS should include a clear and concise statement of the underlying purpose and need for the proposed action; consistent with the NEPA implementing regulations (see 40 CFR 1502.13). In presenting the purpose and need for this project, the EIS should reflect not only that of the Surface Transportation Board and the project proponent, but also that of the broader public interest and need. The purpose and need statement should be broad enough so that it would not preclude consideration and evaluation of the full range of reasonable and feasible alternatives and not unduly constrain the range of reasonable alternatives. The purpose and need statement should clearly reflect the construction and operation of the northern rail line extension to support all known public, private, and government interests. In particular, a rail line extension would provide for military training and access to military training areas, as well as enhance other military actions.

**ALTERNATIVES ANALYSIS**

Alternatives Criteria Development. The EIS should identify specific criteria that would be used to (1) develop a range of reasonable alternatives, (2) eliminate alternatives considered, and (3) select the agency preferred alternative. These criteria should be based on factors such as conservation of important aquatic and terrestrial habitats, maintaining wildlife and fish passage, economics, and public safety. The alternatives criteria should also incorporate substantive issues identified during the public scoping process and tribal consultation. The EIS should discuss the rationale and basis for how these criteria were developed.

**Range of Reasonable Alternatives.** The proposed alternatives to be evaluated in the EIS should represent the full spectrum of actions that could fulfill the purpose and need for this project. The range of reasonable alternatives should not only evaluate different rail alignments and right-of-ways (ROWs). We recommend that the EIS include reasonable alternatives and would request that the following be considered:

- A rail line extension ROW along the North side of the Tanana River and parallel to the Richardson Highway;
- A surface highway along the South side of the Tanana River

Alternatives that were considered but rejected from further evaluation should also be discussed in the EIS. The basis and rationale for why such alternatives were rejected should be included and based on the alternatives criteria.

Early involvement and continued coordination on the proposed range of reasonable alternatives is an effective way to capture and address ideas and concerns of interested parties. Such an approach allows for project refinements and adjustments which could minimize project delays later in the process. For example, we encourage STB to provide the range of reasonable alternatives to Tribes, agencies, and the public for review and comment prior to selection of the preferred alternative and release of the Draft EIS.

#### **RESOURCES OF CONCERN**

**Aquatic Resources.** Project construction, operation, and maintenance will likely affect aquatic resources: water quality, open water habitats, wetlands, stream channels, and riparian areas. These resources will experience varying degrees of encroachment and alteration of their hydrologic functions, and project encroachment may degrade the habitat for fish and other aquatic biota. For any impacts that cannot be avoided through siting and design, the EIS should describe the types, location, and estimated effectiveness of best management practices (BMPs) applied to minimize and mitigate impacts to aquatic resources.

The EIS should describe aquatic habitats in the affected environment (e.g., habitat type, plant and animal species, functional values, and integrity) and the environmental consequences of the proposed alternatives on these resources. Impacts to aquatic resources should be evaluated in terms of the aerial (acreage) or linear extent to be impacted and by the functions they perform.

The proposed activities would require a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers (ACOE). For wetlands and other special aquatic sites, the Section 404(b)(1) guidelines establish a presumption that upland alternatives are available for non-water dependent activities. The 404(b)(1) guidelines require avoidance, minimization, and compensation for unavoidable wetland impacts. The EIS should discuss in detail how planning efforts (and alternative selection) conform with Section 404(b)(1) guidelines sequencing and criteria. The EIS should discuss alternatives that would avoid wetlands and aquatic resource impacts from fill placement, construction, and other activities before proceeding to minimization/mitigation measures.

To meet the requirements of the Clean Water Act, the EIS should identify all water bodies and aquatic resources likely to be impacted by the project, the nature of the potential impacts, and the specific pollutants likely to impact those waters.

**Ecological Connectivity.** The proposed 80-mile long rail line could potentially contribute to fragmentation and direct loss of terrestrial and aquatic habitat. We have concerns that the rail extension may create a barrier to free migration and movement of terrestrial and aquatic species in the Tanana Flats/River Valley. In addition, there may be potential effects on the ecological processes, such as hydrology, movement of nutrients and sediment. The EIS should evaluate and discuss the potential adverse impacts to the ecological connectivity and ecological processes of the project area. The EIS should identify the critical areas of terrestrial wildlife movement and stream crossings, and measures and opportunities for maintaining existing wildlife crossings and corridors for resident species. Furthermore, there is a potential for collisions between locomotives and terrestrial wildlife crossing the rail line. Measures should be included to avoid and minimize such conflicts. Mitigation measures should be provided in the EIS to ensure safe movement of wildlife within the project area. The rail line should be designed to maintain the integrity of natural ecological processes, particularly hydrological processes and connectivity.

**Invasive Species.** Ground disturbing activities provide an opportunity for establishment of non-native invasive species. In compliance with NEPA and with the Executive Order 13112, the EIS should evaluate the potential impacts resulting from the introduction of non-native invasive species. This evaluation should identify the types of invasive species and discuss the potential pathways for introduction of such species during construction and operation of this project. During construction activities, we recommend that disturbed areas be revegetated using native species and that there be ongoing maintenance (wholly or primarily non-chemical means) to prevent establishment of invasive species in areas disturbed by project activities.

### **ENVIRONMENTAL CONSEQUENCES**

The EIS should provide a detailed environmental baseline within the project area and the environmental consequences (e.g., direct, indirect, and cumulative impacts) associated with each proposed action alternative, including the no action alternative.

**Direct Effects.** The direct effects should include those caused by the construction, operation and maintenance of the Northern Rail Line Extension. If the purpose and need for this action is to provide access for military training, then the direct effects of the military training on the environmental resources should be evaluated. Military training sites, such as the Tanana Flats/Blair Lakes and Donnelly areas cover over one million acres of the project area. The potential effects from military training and maneuvers on these resource areas should be analyzed and discussed in the EIS. The types of military training, equipment used, and frequency of training should be considered in the evaluation of direct effects to the resource areas.

**Indirect (Induced) Effects.** There may be potential adverse indirect (induced) effects resulting from this project. We recommend that the EIS thoroughly evaluate and discuss the indirect (induced) effects resulting from the construction and operation of the Northern Rail Extension project. This evaluation should include both short-term and long-term effects. The following development activities and actions should be addressed in the EIS:

- Urbanization – residential, commercial, industrial
- Economic Development
- Transportation – highways, rail lines (Alaska to Canada Rail Link), airstrips, ports/harbors, and other infrastructure
- Energy – electric power lines/grids, natural gas pipeline
- Resource Extraction – hard rock, coal, coal bed methane, oil and natural gas
- Tourism and recreation – fishing, hunting, trapping, snow machining,
- Subsistence – fishing, hunting, trapping, berry picking
- Agriculture – timber harvesting, farming, livestock
- Military – National Missile Defense (NMD)

**Land Use Planning.** Indirect (induced) effects include potential for long-term unplanned and unmitigated development resulting from this project, which could be a concern. Presently, there is minimal development within the Tanana River Valley. This area supports extensive wetlands and aquatic resources, wildlife habitat, and important fish bearing streams. We recommend that the EIS analyze and disclose the indirect (induced) effects of unplanned and unmitigated future development within the project area in the absence of any comprehensive land use plan. The analysis should discuss the environmental, social, and economic consequences. EPA recommends that a commitment be made to work collaboratively with local, state, and federal governments, private property owners, and interested parties to develop a comprehensive land use plan for the Tanana River Valley to guide future indirect (induced) growth and development in the project area.

#### **CUMULATIVE EFFECTS ANALYSIS**

This EIS should describe in detail the assumptions, methodology, and framework for developing the cumulative effects analysis (CEA) that is consistent with CEQ's guidance for *Considering Cumulative Effects under the National Environmental Policy Act*. The EIS should establish the geographic scope and timeframe for the CEA.

**Reasonably Foreseeable Future Actions.** As part of the CEA, the EIS should evaluate the past, present, and reasonably foreseeable future actions associated with this project. The reasonably foreseeable future actions should include those actions that may occur in areas within and adjacent to the project area. Examples of reasonably foreseeable future actions that should be considered in the EIS include the following:

- Alaska-Canada Rail Link
- Natural Gas Pipeline
- Fairbanks Intermodal Transportation Center (FIC)

When identifying reasonably foreseeable future actions to be addressed in the CEA, criteria should be developed to systematically separate those actions which are "reasonably foreseeable future actions" versus those that are considered "speculative or distant actions." Criteria to identify the reasonably foreseeable future actions could be based on the geographic scope and timeframe identified for this cumulative effects analysis.

**Regional Climate Change.** There is growing scientific evidence to support the concern that continued increases in greenhouse gas emissions resulting from human activities will contribute to climate change. Climate change should be considered a reasonably foreseeable future impact and should be evaluated through the NEPA process. This EIS should consider how changing conditions due to climate change could potentially influence STB's proposed actions and should also consider how the proposed actions, alternatives, goals and objectives may influence the emissions and sinks of greenhouse gases, contributing to or reducing impacts to climate change.

#### **PUBLIC PARTICIPATION AND ENVIRONMENTAL JUSTICE**

The EIS should describe what efforts will be taken to ensure effective and meaningful participation by Tribes and the public. We recommend that Tribal and Public Participation Plans be developed and implemented for this project. These plans should outline and describe the process for engaging Tribes and the public in the development of the EIS so that there is a commitment and understanding of the participation process.

The proposed action may result in disproportionately high and adverse human health or environmental effects to minorities and/or low income populations within the project area. The EIS should include an Environmental Justice (EJ) analysis which would include all possible measures to identify community issues, as part of the scoping or an ongoing process, and how the information was used. The EIS should discuss how the affected communities have had meaningful input on the decisions making process for this project. The EIS should describe what was done to inform the EJ communities about the project and the potential impacts it would have on their communities. As a recommendation, the EJ analysis for this EIS should include the following level of information:

- Description of the efforts that have/will be taken to inform the communities about the impacts of the project and to ensure "meaningful public participation" by the potentially impacted communities/individuals;
- Identify low income and people of color (minority) communities in the impact area(s) of the project;
- Detail in the EIS, what was heard from the community about the project during the public participation sessions by detailing the impacts identified by you and the communities (perceived and real);
- Address whether these impacts are likely to occur and to whom and evaluate all impacts for their potential to disproportionately impact low income and/or people of color (minority) communities;

- Describe how what was heard from the public was/will be incorporated into the decisions that were made about the project (such as the development of alternatives or choice of alternatives).
- Propose off-setting mitigation for the impacts that will or are likely to occur.

### **TRIBAL CONSULTATION**

Based on our experience working with Tribes in Alaska, a Tribal Government-to-Government Consultation plan is often used in outline the process for working effectively with Tribal Governments. EPA does not consider public meetings to fulfill the requirement for Tribal Government-to-Government consultation. A Tribe does not have to be formally designated a Cooperating Agency for this project in order for Government-to-Government consultation to occur. Consultation and coordination with Tribal Governments should continue well after the scoping process by maintaining regular meetings. Whether these meetings occur face to face in local communities, telephone conference calls, or statewide tribal conferences, continuous engagement with Tribes is an important element in meaningful Tribal involvement in the NEPA process.

Traditional Ecological Knowledge. The Tribal Government-to-Government consultation process is an opportunity to gather traditional ecological knowledge (TEK) about local subsistence resources, usual and accustomed use areas, and cultural resources. Traditional Ecological Knowledge, in addition to strong scientific data, should be used to develop alternatives, evaluate the environmental consequences of project alternatives, and identify appropriate mitigation measures. Furthermore, we recommend that the EIS integrate TEK into the NEPA planning process and use TEK to assist the STB in making a decision regarding this project.

### **COST-BENEFIT ANALYSIS**

The EIS should provide an overall cost-benefit analysis for this project. This cost estimate should include an itemized breakdown of the proposed costs for construction and operation of each proposed action alternative, as well as the benefits associated with each. In addition, the EIS should include a discussion of the underlying methodology, assumptions, and framework for this analysis. This analysis is important to compare the relative costs and benefits associated with each action alternative and to provide for better public understanding of how economic factors are considered in the agency decision-making process. Furthermore, during the Clean Water Act Section 404 permit application review, the cost-benefit analysis would be used to determine the "practicability" of the agency preferred alternative.

### **ACCIDENTAL SPILLS**

Characterization and Evaluation of Risk. The proposed Northern Rail Extension project would be constructed and operated between North Pole and Fort Greeley (80 miles) for the movement of military personnel, equipment, supplies, weaponry, civilians and commercial freight. The proposed rail line would be constructed adjacent to the Tanana River, and would eventually cross the Tanana River and the Delta River. With additional access to remote areas and movement of freight and military equipment/supplies, there is an increased risk of potential

spills of materials into waters of the United States, including wetlands. To address the concern of the potential for accidental spills associated with this project, we recommend that the EIS include a characterization of the type of accidental spills, and evaluation of the risks associated with accidental spills from materials being transported along the Northern Rail Extension during frozen and unfrozen conditions. This evaluation should include an inventory of the different types of materials (hazardous, non-hazardous, etc.) that may potentially be transported via this new rail line, and an assessment of their environmental and public health effects. The EIS should also include a discussion of the volumes and frequency for which this material may be transported along the rail line.

**Spill Response Planning.** The EIS should discuss the potential spill response planning for this project in the event of an accidental spill in both frozen and unfrozen conditions. Our concern is that in more remote areas of Alaska, the response time to the site would be extended. The EIS should describe the spill response planning process and measures that would be taken to respond to accidental spills in the project area.

#### **MITIGATION MEASURES**

Mitigation measures should be included in the EIS to avoid, minimize, rectify, reduce, and compensate for project impacts. The EIS should describe the mitigation measures that would be implemented for this project. Mitigation measures identified during scoping, tribal consultation, public and agency coordination should be reflected in the development of the range of reasonable alternatives.

#### **EIELSON BRANCH REALIGNMENT**

It is our understanding that the project proponent, ARRC, is pursuing the Eielson Branch Realignment project concurrent with the Northern Rail Extension project in the Fairbanks/North Pole area. The Eielson Branch Realignment project proposes to reconstruct 16 miles of existing track between Fort Wainwright and Eielson Air Force Base. The Federal Railroad Administration (FRA) and the Federal Transit Administration (FTA) are the Federal co-lead agencies which are planning to prepare an Environmental Assessment for the Eielson Branch Realignment.

NEPA allows for integration of processes into early planning and combining environmental documents with other documents to reduce delay and duplication of effort. The Northern Rail Extension project appears to be dependent upon the Eielson Branch Realignment project as a connected action and may best be evaluated in one NEPA document.

----- Forwarded by Tracy DeGering/R10/USEPA/US on 02/18/2011 01:38 PM -----

From "McLarnon, Paul" <Paul.McLarnon@hdrinc.com>  
To Tracy DeGering/R10/USEPA/US@EPA  
Cc "Dalton, Mark" <Mark.Dalton@hdrinc.com>  
Date 02/25/2010 01:15 PM  
Subject RE: Northern Rail Extension - Phase 1

Hi Tracy,

Sorry to hear you cannot attend in person, we will coordinate with the Corps in Fairbanks to make sure there is a teleconference number available for you to call. A specific agenda has not been developed to date, but we are hoping the discussion will center around the draft 404(b)(1) and an overall project update. As for the Draft 404(b)(1) there will be a final version yet to come and we were hoping that you could provide comments on any fatal flaws or information gaps you see with the document.

If you have any questions or concerns please feel free to contact me any time.

Paul

-----Original Message-----

From: DeGering.Tracy@epamail.epa.gov [mailto:DeGering.Tracy@epamail.epa.gov]  
Sent: Thursday, February 25, 2010 12:33 PM  
To: McLarnon, Paul  
Subject: RE: Northern Rail Extension - Phase 1

Hi Paul,

No worries. Thanks for re-sending the attachments! I don't think I'll be able to attend the Mar 3 meeting in person, but will plan to participate by phone. Is there an agenda for what will be discussed in particular?

I see that the evaluation is no longer titled "preliminary draft"; is there another deadline by which you are requesting comments? Or is this the final version that will be submitted with the permit application and we're just getting a sneak peek of it?

Thanks again,  
Tracy



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
ALASKA OPERATIONS OFFICE  
Room 537, Federal Building  
222 W. 7th Avenue, #19  
Anchorage, AK 99513-7588**

March 16, 2010

Mr. Paul McLarnon  
HDR Alaska, Inc.  
2525 C Street, Suite 305  
Anchorage, AK 99503

RE: Northern Rail Extension Project, Section 404(b)(1) Evaluation

Dear Mr. McLarnon,

The U.S. Environmental Protection Agency (EPA) has received and reviewed the Section 404(b)(1) Evaluation for the Alaska Railroad Corporation (ARRC) Construction and Operation of a Rail Line Between North Pole and Delta Junction, Alaska (Evaluation), distributed via email on February 24, 2010. We appreciate the opportunity to informally review and share our concerns and expect that they will be given serious consideration. Thank you for providing additional background information and data not contained in either the Draft or Final Environmental Impact Statement (EIS) developed by the Surface Transportation Board (STB). This additional detail greatly improves our understanding of and ability to evaluate the proposal.

Pursuant to our responsibilities under the National Environmental Policy Act (NEPA), we reviewed and commented on both the Draft and Final EIS and expressed the following areas of concern pertaining to Section 404 of the Clean Water Act (CWA):

- Potential impacts to water quality, open water habitats, wetlands, stream channels, and riparian areas;
- Impacts to ecological connectivity which would result from rail line and road construction and operation, as well as river crossings;
- Lack of sufficient information on the purpose and need for the project, as well as impacts related to potential material sites, construction camps, and staging areas;
- Lack of justification for a maintenance road, given that ARRC rail line is operated and maintained without such a road in other areas; and
- Limited consideration given to wildlife crossings, full span bridges, noise/vibration reduction measures



The following additional comments are in response to the information contained in the 73-page Evaluation, dated February 2010, and prepared by HDR Alaska, Inc. on behalf of ARRC. Our comments address the requirements of the Section 404(b)(1) Guidelines relative to articulating a project's overall project purpose, determining the practicability of project alternatives, identification of the least environmentally damaging practicable alternative, as well as deficiencies in the Evaluation that limit its use in supporting a 404 permitting decision.

### **Section 404(b)(1) Guidelines**

Section 404 of the CWA established the permitting program for the discharge of dredged and fill material into waters of the United States (U.S.) at specified disposal sites. This program is co-administered by the U.S. Army Corps of Engineers (Corps) and EPA. Section 404(b)(1) required the EPA, in conjunction with the Corps, to develop guidelines for the specification of disposal sites. The guidelines, referred to as the 404(b)(1) Guidelines (Guidelines), were to be patterned after the ocean discharge criteria developed by Congress and included in the CWA.

The purpose of the Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the U.S. through control of discharges of dredged or fill material. They were codified in regulation (40 CFR Part 230) in 1980 and form the substantive environmental criteria used by the Corps when they review proposed discharges and issue permits under Section 404. The Guidelines prohibit issuance of a permit that would cause an avoidable or significant adverse impact to waters of the U.S. As indicated in the Evaluation, §230.10 of the Guidelines contains four principle requirements for compliance.

Compliance with the Guidelines is required before a 404 permit can be issued by the Corps, and demonstrating compliance is the responsibility of the applicant. Failure to "*clearly demonstrate*" that there is no "*practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem*", in accordance with §230.10(a), renders the project noncompliant with the Guidelines. If an application contains insufficient information to determine compliance, the Guidelines require that no permit be issued.

### **Alternatives Analysis**

Pursuant to §230.10(a), an alternatives analysis is conducted to identify practicable alternatives to a proposed discharge. An alternative is practicable if it is available and capable of being done and would achieve the overall project purpose. Practicable alternatives with fewer adverse impacts are presumed to exist for non-water dependant activities, unless "*clearly demonstrated otherwise.*" The environmental impacts of the various practicable alternatives are then compared so that the Corps can ensure it is authorizing only the practicable alternative which generates the least environmental damage. This alternative is referred to as the Least Environmentally Damaging

Practicable Alternative (LEDPA). Except as permitted under Section 404(b)(2), the Guidelines prohibit the authorization of any alternative that is not the LEDPA.

The Evaluation states, on page 3, that practicable alternatives for a project are a subset of the project's reasonable alternatives under NEPA. This is a mischaracterization of the Guidelines. NEPA requires the evaluation of *reasonable* alternatives to the proposed action, whereas the Guidelines require the analysis of *practicable* alternatives. The alternatives analysis required by the Guidelines is not limited to the alternatives evaluated in the NEPA document. The identification of practicable alternatives to be analyzed is constrained only by the definition of a practicable alternative (see Definition of Practicability on page 4).

By limiting the alternatives to those contained in the EIS, ARRC has limited the value of its Evaluation. And because it is almost certain that practicable alternatives exist that were not evaluated, it cannot be demonstrated that ARRC's preferred alternative is the LEDPA. Until compliance with the Guidelines can be demonstrated, no permit may be issued.

#### **Overall Project Purpose**

The evaluation of practicable alternatives occurs "*in light of the overall project purposes*" [§230.10(a)(2)]: Identifying the overall project purpose is a critical first step in determining the practicability of alternatives, as it establishes the sideboards for the alternatives analysis. It is at this stage that the purpose and need for a proposed action can be evaluated to determine whether modal alternatives would achieve the overall project purpose.

As noted in the Evaluation, it is the responsibility of the Corps to identify the overall project purpose, who shall, "*in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and public's perspective*" [33 CFR 325 Appendix B, Section 9(b)(4)]. The overall project purpose, as identified by the Corps, is independent of the project purpose and need identified in NEPA documents. While two of the three project purposes (paraphrased) are to "transport, via rail, cargo and passengers between Fairbanks and Delta Junction as an alternative to existing transportation modes", it must first be demonstrated that a need exists for rail as an alternative to existing transportation modes. If this cannot be demonstrated, then the basic project purposes should be redefined as "to transport cargo and passengers between Fairbanks and Delta Junction;" and the alternatives analysis may determine that existing transportation modes are achieving that purpose.

The data provided to demonstrate real project needs are, at present, inadequate. For example, the Evaluation states, as an overall project purpose, the need to provide safe, reliable, year-round ground access to U.S. military training areas (TAs). To the best of our knowledge, however, the Department of Defense (DoD) has not identified such a need. Absent an identification of military need for the rail access and bridge by DoD, the use of military need as a basic project purpose seems inappropriate. Until/unless a

military need for the project can be demonstrated, the Guidelines would direct a finding that the no-build alternative is a practicable alternative for project components which are linked solely to military need for the extension. Given the most compelling project purpose is to support military needs related to surface transportation and access, we believe DoD should, at minimum, be a participant—if not the applicant—in the permitting process. If safe, reliable, year-round ground access to the TAs is a need of both the Army and Air Force, and a bridge across the Tanana River is the only means of accomplishing this, then they should not hesitate to identify this need and request authorization for its construction.

EPA continues to question the need for the overall project when there are alternatives not involving special aquatic sites that would appear to meet certain identified needs. Passenger service between Fairbanks and Delta Junction, for example, might be able to be adequately provided with an increase in shuttle service, which is currently limited to one round-trip per day, Monday through Friday. This appears to be a viable alternative to a rail line, particularly when the current or projected future demand for commuting via train has not been demonstrated. ARRC's expectation "that military personnel would make up the bulk of passengers that might be transported along the proposed rail extension," (12) is unsupported in the document by any data.

Numerous project needs appear speculative, with such words as "could", "may", "if", and "potentially" used throughout the Evaluation, implying a degree of uncertainty—a "build it and they will come" approach. This same opinion was given by the STB's own Vice Chairman, identified in the STB's final Record of Decision document. Without compelling evidence of current demand, and/or a demonstration that existing capacity is inadequate to meet future demands, the no-build alternative must be presumed to be a practicable alternative to meeting the transportation needs of the area, and the discharge of fill into waters of the U.S. for the proposed project cannot be authorized.

### **Definition of Practicability**

*"An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes" [§230.10(a)(2)].* As discussed above, the overall project purpose plays a critical role in determining whether a particular alternative is practicable or not. The consideration of cost, existing technology, and logistics is to determine whether one or more of these factors render an alternative unavailable and/or incapable of being done. This is a very high standard, and an alternative must be demonstrated to be impracticable before it can be excluded from the analysis.

Evaluating practicability is a conclusive determination; that is to say, an alternative either is or is not practicable. Alternatives are evaluated independently. It is inappropriate to compare one alternative against another in determining practicability, for an alternative cannot be more or less practicable than another. The tables and discussion provided under Section 3.5.3, LEDPA Conclusions, wrongly take three alternatives, and, upon comparing cost, existing technology, and logistics for each, eliminates two of them and

identifies a single *overall* practicable alternative. All three bridge, levee, and access road alternatives are practicable, as they are all available and capable of being done and should all be evaluated as part of the identification of the LEDPA.

The purpose of consideration of cost is not to compare the cost of different alternatives but to determine whether or not the costs of a specific alternative are so prohibitively high (beyond industry standard) that the alternative is rendered unavailable and incapable of being done. As stated in the preamble to the Guidelines: *"The consideration of cost is not an economic analysis."* *"The mere fact that an alternative may cost somewhat more does not necessarily mean it is unreasonably expensive and therefore not practicable"* (45 FR 85339). For these reasons, statements in the Evaluation, such as those below, cannot be supported:

- "A bridge of this length would cost \$80 to \$100 million more than the crossing proposed for Salcha Alternative Segment 1 (the Salcha crossing option), making this a cost-prohibitive option. This bridge length is not practicable due to cost" (31).
- "...the Road and River levee alignments were eliminated in part because both would be more costly (and thus less practicable) than the Shore alignment" (50).

The consideration of existing technology and logistics are handled similarly to that of cost. For example, an alternative which requires the use of advanced (but existing) technology that is available and capable of being done (e.g., horizontal directional drilling versus trenching) is a practicable alternative. Similarly, an alternative which is logistically more complex but is still available and capable of being done (e.g., transporting longer bridge beams) is a practicable alternative.

It is EPA policy that use of life cycle including maintenance cost in the 404(b)(1) determination of practicable alternatives is inappropriate. The EPA considers maintenance and operating costs or long term costs over the life cycle of the project (i.e., life cycle costs) as "cost of doing business." It does not affect the capability of a project to be done, and thus is not appropriate to be considered for determination of practicable alternatives under the Guidelines. The 404 permit action that is the subject of the Corps' inquiry involves a permit application for the discharges of dredged and/or fill material associated with the construction of a rail line project, therefore it is appropriate to consider only construction costs of the alternatives (i.e., capital costs) and not allow consideration of life cycle costs associated with these alternatives.

The reference to a 2005 study by the University of Alaska Fairbanks indicates twenty "possible" Tanana River crossings were identified, only three of which were evaluated more closely as potentially viable locations for a crossing to the Tanana River to access the Tanana Flats TA (26). The evaluation does not, however, address how cost, existing technology, and/or logistics render the other 17, seemingly practicable, alternatives unavailable and/or incapable of being done.

**Least Environmentally Damaging Practicable Alternative**

The Guidelines are explicit in that “*no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences*” [§230.10(a)]. A permit cannot be issued in circumstances where a less environmentally damaging practicable alternative for the proposed discharge exists (except as provided for under Section 404(b)(2)).

A 3,300-foot bi-modal bridge across the Tanana River and a Shore alignment levee have been identified as ARRC’s preferred and least environmentally damaging practicable alternatives. Given this, the following statements from the Evaluation raise questions about the conclusions of practicability:

- “Overall impacts to the aquatic environment from the 3,300-foot bridge in its present configuration would be greater than for the 4,500-foot bridge option but less than for the 3,000-foot bridge” (49).
- “While the 3,300-foot bridge proposed by ARRC may not have the most minimal footprint in the aquatic environment...ARRC believes that this is the least environmentally damaging *practicable* option for the Tanana River bridge” (49).
- “The Road alignment for the levee would have fewer direct impacts to the aquatic environment than the other remaining alternative, the Shore alignment” (50).
- “While the levee constructed along the Shore alignment may not have the most minimal footprint in the aquatic environment, it does greatly reduce other environmental impacts” (50).

From EPA’s perspective, not all practicable alternatives appear to have been considered and disclosed in the Evaluation. We believe a levee to be an avoidable impact that is a result of designing and selecting a bridge with only the bridge footprint in mind; that is to say, we believe a bridge design exists for which a levee is not needed. Until demonstrated otherwise, EPA does not consider a levee to be a necessary project component. We encourage ARRC to consider spanning the entire braidplain of the Tanana River, not just the main, active channel, as depicted in the figures included in Attachment A. Avoiding placement of solid fill within the braidplain would reduce, if not eliminate, the backwater effect and, ultimately, the need for a levee, thereby reducing impacts. Eliminating the levee, in turn, negates the need for protection of the Tanana River’s left bank.

While not specified in the evaluation, it is our understanding that the design of the bridge alternative is based on an optimal speed of 79mph at which passenger, but not freight, trains would travel. EPA does not, however, view speed as a limiting factor to designing an alternative which would be the LEDPA. A reduction in speed through a short stretch

of track would be a logistic factor which could make such an alternative practicable, and ARRC should explore this possibility.

Additionally, although alternative options for the additional infrastructure (described under Section 3.6) associated with Phase 1 have not been developed, they should not, as the Evaluation implies, undergo an independent evaluation from the bridge, levee, and access road or “major components of Phase 1” (52). As noted above and in the Evaluation, the proposed bank protection is directly linked to bridge design, as are the Boundary and Beebe Slough bridges and proposed maintenance road.

Once all environmental impacts of the various practicable alternatives have been compared, the Corps can only authorize the practicable alternative which generates the least environmental damage.

### **Project Phasing**

Phasing of the project does not affect the requirements of the Guidelines to consider the project phases as a single and complete project for evaluation under Section 404(b)(1) of the CWA.

While sufficient funding exists only for Phase 1 at this time, EPA does not support the issuance of a permit to ARRC for this (or any) single phase. Project components proposed under Phase 1 would not meet ARRC’s overall project purpose of providing freight and passenger rail service to the area southeast of North Pole, Alaska, including the Tanana Flats and Donnelly Training Areas (TAs) and the Delta Junction area. The proposed project is a single and complete project, and so any evaluations and regulatory actions should be predicated as such.

### **Other**

During our attempt to review the U.S. Army Alaska’s “projected troop growth” and “ability to deploy rapidly during crisis operations worldwide” (11), we discovered the web link to the referenced Center for Environmental Management of Military Lands EIS (<http://www.cemml.colostate.edu/AlaskaEIS/eis.htm>) does not work.

### **Summary**

In its current form, the Evaluation does not adequately demonstrate how the applicant’s proposed project complies with the Guidelines. Specifically:

1. The basic project purpose is too speculative and lacks supporting information to serve as the basis for an evaluation of compliance with the Guidelines.
2. The range of alternatives is artificially constrained by the ambiguously defined project purpose. A more appropriate project definition could lead to the conclusion that there are other, less damaging alternatives to meeting the

demonstrated transportation needs.

3. The presumption that there are alternatives to non-water dependent activities which would not involve a discharge of fill (or which would involve less discharge), has not been rebutted. Consequently, we believe that the no-build alternative may be a viable alternative, at least to some portions of the proposed project.
4. ARRC has not provided adequate information to support its contention that there are no practicable alternatives to the preferred alternative.
5. Selection of the LEDPA can only be made after considering all practicable alternatives. Since it appears not all practicable alternatives were evaluated, it cannot be demonstrated that the preferred alternative is the LEDPA.

Thank you again for the opportunity to informally review and provide comments on the February 2010 Section 404(b)(1) Evaluation. While I am scheduled to be out of the office March 26-April 5, 2010, please feel free to contact me at (907) 271-3419 or by email at [degering.tracy@epa.gov](mailto:degering.tracy@epa.gov) with any questions you may have.

Sincerely,



Tracy DeGering  
Aquatic Resources Unit



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
ALASKA OPERATIONS OFFICE  
Room 537, Federal Building  
222 W. 7th Avenue, #19  
Anchorage, AK 99513-7588**

October 7, 2010

Colonel Reinhard W. Koenig  
District Engineer, Alaska District  
Post Office Box 6898  
Elmendorf AFB, Alaska 99506-0898

**RE: Public Notice POA-2008-53, Tanana River, Alaska Railroad Corporation**

Dear Colonel Koenig:

The U.S. Environmental Protection Agency Region 10 (EPA) is in receipt of Public Notice POA-2008-53, Tanana River which describes a proposed project to construct Phase 1 of an approximately 80-mile long railway extension from Fairbanks to Delta Junction. Phase 1, involving a proposed crossing of the Tanana River near Salcha, Alaska, would result in approximately 145.5 acres of permanent impacts and 21.5 acres of temporary impacts to wetlands and navigable waters of the U.S. In accordance with the 1992 Clean Water Act Section (CWA) 404 (q) Memorandum of Agreement, Part II, Paragraph 4, EPA is requesting that the comment period for the above-referenced proposal be extended an additional 30 calendar days.

This time extension is necessary to perform a thorough review of the action proposed in the public notice, as well as a considerable amount of additional information provided to us by the project consultant, HDR Alaska, Inc., after the public notice was issued on September 15, 2010. EPA requires additional time to review both the public notice and supplemental information, and is committed to sending comments by close of business on November 15, 2010.

While we are sensitive to possible implications of a delayed decision, we believe that the additional time is necessary to ensure that all of the environmental factors are given appropriate consideration in this matter. If you have further questions or comments concerning the above request, please do not hesitate to have your staff contact Ms. Tracy DeGering at (907) 271-3419, in our Anchorage Operations Office.

Sincerely,

A handwritten signature in cursive script that reads "Marcia Combes".

Marcia Combes, Director  
Alaska Operations Office



cc (via e-mail):

**DeGering.Tracy@epa.gov, U.S. Environmental Protection Agency**  
**Christy.A.Everett@usace.army.mil, U.S. Army Corps of Engineers**  
**Ellen.H.Lyons@usac.army.mil, U.S. Army Corps of Engineers**  
**Paul.McLarnon@hdrinc.com, HDR, Alaska Inc.**



US Army Corps  
of Engineers  
Alaska District

# Public Notice of Application for Permit

Regulatory Division (1145)  
CEPOA-RD  
2175 University Avenue, Suite 201E  
Fairbanks, Alaska 99709-4927

**PUBLIC NOTICE DATE:** September 15, 2010

**EXPIRATION DATE:** November 15, 2010

**REFERENCE NUMBER:** POA-2008-53

**WATERWAY:** Tanana River

**\*\*\*PUBLIC NOTICE REVISION\*\*\***

On September 15, 2010, the Alaska District Corps of Engineers published a Public Notice for Department of the Army (DA) permit number POA-2008-53, Tanana River for a DA permit application from the Alaska Railroad Corporation, construct Phase 1 of an Approximately 80 mile long railway extension from Fairbanks to Delta Junction. The proposed project is located within sections 13, 14, 23, 24, 26, T. 4 S., R. 3 E., and sections 18, 19 and 30 of T. 4 S., R. 4 E., Fairbanks Meridian; USGS Quad Map Fairbanks C-1; Latitude 64.5591° N., Longitude 147.0716° W.; near Salcha, Alaska.

The Public Notice comment period has been extended until **November 15, 2010**.

**AVAILABILITY OF COMPLETE PUBLIC NOTICE:** A copy of the full public notice with attachments may be downloaded at <http://www.poa.usace.army.mil/reg/PNNew.htm>.

All other information contained in the previous notice remains the same. Please bring this announcement to the attention of anyone you know who is or may be interested. Please contact **Ellen Lyons** at (907) 474-2166, by fax at (907) 474-2164, or by email at [Ellen.H.Lyons@usace.army.mil](mailto:Ellen.H.Lyons@usace.army.mil) if further information is desired concerning this notice.

District Engineer  
U.S. Army, Corps of Engineers



REPLY TO  
ATTENTION OF:

**DEPARTMENT OF THE ARMY  
U.S. ARMY ENGINEER DISTRICT, ALASKA  
REGULATORY DIVISION  
WESTSIDE BUSINESS PARK  
2175 UNIVERSITY AVENUE, SUITE 201E  
FAIRBANKS, ALASKA 99709-4927**

February 14, 2011

Regulatory Division  
POA-2008-53

Mr. Brian Lindamood  
Alaska Railroad Corporation  
P.O. Box 107500  
Anchorage, Alaska 99510-7500

Dear Mr. Lindamood:

This is in regard to your application for a Department of the Army (DA) permit, file number POA-2008-53, Tanana River. The following request for information was generated from a review of the 404(b)(1) analysis submitted in May 2010, the 2011 CLOMR received January 25, 2011, the Hydraulic Comparison Between Proposed 3300 foot bridge and 3960 foot bridge submitted February 03, 2011, the STB FEIS with appendices, your response to comments submitted January 19, 2011, and the agencies' comments on the Public Notice.

A detailed discussion of the effects of the proposed bridge design on aquatic resources was not included in the EIS, nor have these effects been adequately discussed within the 404(b)(1) evaluation submitted with the permit application. As you know, it is the EPA's position that the proposed project would have substantial and unacceptable adverse impacts on the Tanana River. The information and analysis requested below is needed to fully respond to EPA's comments.

The EIS, under the discussion of *Impacts to Surface Water by Alternative Segment*, regarding the Salcha Alternative Segment 1 states that: "the large-bridge crossing at the Tanana River would be designed to pass the 100-year flood and be navigable for a maximum boat size, (depending on U.S. Guard [sic] [USCG] criteria). Further, the piers placed within the channel would alter flood hydraulics, causing increased scour surrounding the piers, which would result in downstream aggradation and increase the potential for overbank flooding and ice or debris jams. Detailed analyses of the Tanana River crossing has been conducted on only a preliminary level and effects to flood hydraulics during high-flow events are unknown. Thus, conservatively, this structure could result in high impacts." (page 4-18) This statement does not discuss the effects of the construction of the bridge on the aquatic environment in enough detail for the Corps to make a permit decision. The Factual Determination in the 404(b)(1) analysis submitted in May of 2010, specifically: (b) Water circulation, fluctuation, and salinity determinations; (c) Suspended particulate/turbidity determinations; and (h) Determination of secondary effects on the aquatic ecosystem;

does not provide enough detail on the probable direct and indirect impacts to waters of the United States (U.S.), including wetlands, due to the proposed project, nor does it provide supporting information for the conclusions. The 2011 CLOMR, 404(b)(1) and response to comments do discuss the effects of the construction of the bridge on water surface elevations, velocities and shear stress. However you have not fully explained how these changes would affect channel morphology over time; or what secondary effects may occur.

Most of your analysis focuses on the 100 year event. However, on pages 15 and 16 of the response to comments, you state that the flow in the Tanana River at the 2 year event would increase by the amount restricted from Piledriver Slough, (50 cfs out of 74,900 cfs...0.07%). You also state that the rail embankment and levee would constrict flows in the main Tanana River from 3600 feet to 3300 feet. Therefore, the proposed project would result in the constriction of the active braidplain, (mature vegetation to mature vegetation, not counting the island), by 8%. It would also result in a small increase in the amount of flow that is anticipated to move through this opening. This is reflected in the modeling results which show an increase in velocities from 9 ft/s to 10 ft/s in the main channel. Additionally, the "Modeled Water Depths" for the 2-year flood, included in the response to comments, show increased water depth upstream of the bridge, an increase in inundation on the left bank upstream of the proposed rail embankment, and a decrease in inundation on the left bank downstream of the proposed rail embankment. On page 29 of the response to comments you discuss the halting of channel migration in either direction at the bridge site, and to the east along the levee.

Given that the 1.5 to 2 year event is often described as the channel forming flow, please discuss how the impacts the bridge will have on the two year event as described above, will affect channel morphology over time, (both upstream and downstream of the bridge). Please also discuss how changes in inundation during a two year event, and changes in natural flow patterns due to the construction of the rail embankment, may impact wetlands distribution over time, specifically on the west bank. The following are examples of some of the possible effects that should be considered when conducting the analysis: "The discharge of dredged or fill material can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, non-fluctuating water level. Such water level modifications may change salinity patterns, alter erosion or sedimentation rates, aggravate water temperature extremes, and upset the nutrient and dissolved oxygen balance of the aquatic ecosystem. In addition, these modifications can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change adjacent, upstream, and downstream areas" (CFR 40 Part 404(b)(1) Sec. 230.24, Normal Water Fluctuations). Please reference any data or other information that supports your conclusions. Your information and analysis must demonstrate the specific nature of the anticipated effects and support your contention that these effects would not be unacceptably adverse.

I am currently reviewing your supplemental response to comments submitted on February 9, 2011. Additional requests for clarification of information submitted to date may still be required.

Please be aware that all substantive comments on projects proposed to be authorized must be given full consideration in making our public interest review determination, as required by law.

Please contact me via email [Ellen.H.Lyons@usace.army.mil](mailto:Ellen.H.Lyons@usace.army.mil), by mail at the address above, or by phone (907) 474-2166, if you have questions.

Sincerely,



Ellen Lyons  
Project Manager

CF: Brian Lindamood: [LindamoodB@akrr.com](mailto:LindamoodB@akrr.com)  
Barbara Hotchkin: [Hotchkinb@akrr.com](mailto:Hotchkinb@akrr.com)  
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Donald Perrin: [donald.perrin@alaska.gov](mailto:donald.perrin@alaska.gov)



REPLY TO  
ATTENTION OF:

**DEPARTMENT OF THE ARMY  
U.S. ARMY ENGINEER DISTRICT, ALASKA  
REGULATORY DIVISION  
WESTSIDE BUSINESS PARK  
2175 UNIVERSITY AVENUE, SUITE 201E  
FAIRBANKS, ALASKA 99709-4927**

February 22, 2011

Regulatory Division  
POA-2008-53

Mr. Brian Lindamood—  
Alaska Railroad Corporation  
P.O. Box 107500  
Anchorage, Alaska 99510-7500

Dear Mr. Lindamood:

This is in regard to your application for a Department of the Army (DA) permit, file number POA-2008-53, Tanana River. The following request for information was generated from a review of the 404(b)(1) analysis submitted in May 2010, the 2011 CLOMR received January 25, 2011, the Hydraulic Comparison Between Proposed 3300 foot bridge and 3960 foot bridge submitted February 03, 2011, the STB FEIS with appendices, your response to comments submitted January 19, 2011, and the agencies' comments on the Public Notice. I have also reviewed your supplemental response to comments submitted on February 9, 2011. This letter is related to the request for information sent in a letter dated February 14, 2011.

The need for a design alternatives analysis sufficient for NEPA and the 404(b)(1) analysis has been discussed throughout the EIS, pre-application and application process, (for example, March 20, 2009 meeting; letter from the USACE to the ARRC, dated December 10, 2009; phone call to Paul McLarnon on December 2, 2010; meeting on December 14, 2010). In a letter from the USACE to the ARRC, dated December 10, 2009, we stated that "the current EIS does not contain enough information regarding practicability and environmental impacts of alternatives to make a permit decision." Our decision in a letter to ARRC dated March 26, 2010 stating that "given the information available to us at this time, we have determined that a supplemental EIS will not be necessary for this project" was based on ARRC's agreement to provide additional alternatives analysis specific to the bridge design within their 404(b)(1) evaluation.

The 404(b)(1) analysis submitted in May 2010 discusses three bridge length alternatives, a 3000' bridge, a 3300' bridge and a 4,050' bridge. However, no data or modeling results to support your conclusions were provided in the document. The modeling results of various bridge lengths analyzed were requested in an October 12, 2010 meeting, and again in a meeting on December 14, 2010. The "Hydraulic Comparison between Proposed 3300-ft Bridge and Levee, and 3960-ft Bridge and Levee" was submitted February 3, 2011 and provided a summary of the effect of a 3300' bridge and a 3960' bridge on water surface elevations, velocities and shear stress.

However, a 3960' bridge is not discussed in the 404(b)(1) document nor in any of the other information provided to us to date. The discussion and analysis of the bridge length alternatives in these two documents needs to be consistent. Additionally, if longer bridge lengths were analyzed, (for example, a 4500' bridge as discussed in the 2011 CLOMR), please provide the results of your analysis. Also, the 404(b)(1) analysis should be updated to reflect the construction of 165' bridge span lengths. The current document discusses the construction of 150' span lengths.

The information submitted to date does not fully support your claim that a longer bridge is not practicable when considering cost, logistics and existing technology. Although the longer bridge may cost more, this fact is not sufficient to eliminate it from practicability. On page 22 of the January 19, 2011 Response to Agency Comments you cite a \$7 million cost for the construction of each additional pier and span. Given this number, and assuming a 3950' bridge as modeled in the Hydraulic Comparison, I estimated the need for 4 additional piers and spans which would be an increase in cost of \$28 million. This is an increase in cost of 15.5% over the current Phase I cost estimate of \$180 million. This percent increase in the cost to build the bridge does not eliminate a 3950' long bridge from being a practicable alternative.

Additionally, while a longer bridge may result in the need to relocate Piledriver Slough, this does not eliminate the alternative from being a practicable alternative. In your February supplemental response to comments you state that "the relocation of Piledriver Slough would result in additional costs and the loss of additional private property and not result in any measurable benefit to aquatic habitat within Piledriver Slough or the Tanana River." As stated above, additional cost does not necessarily eliminate an alternative from being practicable. Without specific information regarding the cost estimate, including the cost of moving Piledriver Slough and acquiring additional properties as necessary, we cannot determine if the alternative is practicable. Also, we are unable to determine the benefits or impacts to aquatic habitat without a discussion of the environmental impacts of the longer bridge alternative, with a comparison to the impacts anticipated due to the proposed 3300' bridge.

On page 7 of the February 9, 2011 "Response to USACE permit info request" you state "the bridge structure as proposed represents a considerable reduction of impacts than what was considered in the EIS." This is not backed up by any data or supporting documentation, such as figures, impact comparison tables, or explanation of the impacts to aquatic resources. As stated above, and in our letter dated February 14, 2011, the effects analysis provided to date for the proposed project is not sufficient. This is true for the longer bridge alternative also. You go on to state that "the arbitrary mandate to extend the bridge length at great cost to ARRC, resulting in considerable impacts to the north bank by pushing the railroad across Piledriver Slough, the Old Richardson Highway, and into private residences, is neither practicable, nor reasonable, within the context of this application or the EIS." Again, this is not backed up by a cost analysis, figures showing where the track would have to be located given the design constraints, or a description and comparison of impacts.

While a comparison of the environmental impacts of the longer bridge alternative could show that it is not the LEDPA, this determination cannot be made until we have received information regarding the environmental impacts of the longer bridge alternative. A comparison of the direct and secondary impacts to the Tanana River, (as requested in our letter dated February 14, 2011), for each bridge length alternative should be included in the alternatives analysis. If you have additional information to support your contention that the longer bridge is not practicable due to cost, logistics or existing technology, please provide that also. Please ensure that a plan view drawing of the longer bridge and the approaching rail embankment is included in your discussion. This drawing should show the rail alignment, the proposed relocation of the slough, the private property which would be impacted, etc. The relocation of Piledriver Slough to the west side of the rail embankment at the point where the embankment impinges on the slough should be considered and discussed, (and shown on plans), as part of the alternative.

Where the activity associated with the placement of fill material in a special aquatic site does not require access or proximity to or locating within the special aquatic site in order to fulfill its basic purpose (i.e., the activity is not water dependent) the 404(b)(1) Guidelines pose two rebuttable presumptions: 1) practicable alternatives not involving special aquatic sites are presumed to be available, and 2) practicable alternatives not involving discharges to special aquatic sites are presumed to have less adverse impact on the aquatic ecosystem. Please note, that for non-water dependent projects it is the applicant's responsibility to clearly and convincingly rebut these two presumptions [CFR 230.10(a)(3)].

Please contact me via email [Ellen.H.Lyons@usace.army.mil](mailto:Ellen.H.Lyons@usace.army.mil), by mail at the address above, or by phone (907) 474-2166, if you have questions.

Sincerely,



Ellen Lyons  
Project Manager

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