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January 28, 2011

VIA HAND DELIVERY



The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: Alaska Railroad Corporation
STB Finance Docket No. 34658

Dear Secretary Williams,

Enclosed for filing are the original and ten (10) copies of a Petition of Alaska Railroad Corporation for Declaratory Order, and our check in the amount of \$1,400 for the filing fee. Expedited handling is requested for this Petition.

Please acknowledge receipt of the Petition for filing by date-stamping the enclosed extra copy and returning it via our messenger. If you have any questions or need additional information, please let me know.

Respectfully submitted,

Jay C. Johnson

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34658

**PETITION OF
ALASKA RAILROAD CORPORATION
FOR DECLARATORY ORDER**

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**PETITION OF
ALASKA RAILROAD CORPORATION
FOR DECLARATORY ORDER**

Petitioner Alaska Railroad Corporation (“ARRC”) hereby petitions the Surface Transportation Board (“Board”), pursuant to its discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, to issue an order declaring that the U.S. Environmental Protection Agency (“EPA”) may not impede the issuance of U.S. Army Corps of Engineers permits under Clean Water Act Section 404 for ARRC’s proposed Northern Rail Extension (“NRE”) project. Because such efforts by EPA intrude upon the Board’s exclusive jurisdiction over transportation by rail carriers, unduly restrict railroad operations and place an unreasonable burden on interstate commerce, they are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”). ARRC is filing this petition to remove the uncertainty about the scope of preemption under ICCTA that EPA has created, and to allow the project approved by the Board to proceed in a timely manner.¹

¹ As discussed in more detail below, the NRE project is being funded in significant part by federal money that will likely expire if construction has not begun by June 2011. Accordingly, it is essential that ARRC be able to move forward with the NRE project as soon as possible. Because EPA’s attempts to prevent the Corps from issuing a Section 404 permit are preventing ARRC from moving forward, ARRC requests expedited handling of this petition for a declaratory order.

INTRODUCTION

The NRE project underwent an extraordinarily thorough environmental review process prior to receiving Board approval. Independent third-party consultants selected by the Board spent nearly four years preparing and refining an Environmental Impact Statement (“EIS”), with the unprecedented cooperation of eight federal and state agencies. Public and agency comments were received, reviewed and responded to, including extensive comments submitted by EPA. The Board’s decision approving the NRE took the EIS and agency comments into account and imposed a number of mitigation measures designed to minimize environmental impacts.

Much of the Board’s work in responding to agency comments and developing mitigation measures for the NRE was done in furtherance of the Board’s policy to harmonize federal statutory schemes wherever possible. In most cases, that policy results in a decision that satisfies all of the relevant federal, state and local agencies. Here, however, EPA seems determined to create discord. Apparently dissatisfied with the Board’s careful response to its comments on the EIS, EPA is now using many of those same arguments—as well as some new arguments that it failed to mention during the Board’s four-year environmental review process—to claim that the NRE “should not be authorized” by the Corps of Engineers. In so doing, EPA is using the Corps’ Section 404 permitting process to circumvent the Board’s decision.

EPA’s effort to revive its criticisms of the NRE project by demanding that the Corps not issue a Section 404 permit, and by threatening to veto any permit that the Corps does issue, contravenes the Board’s exclusive jurisdiction over rail projects, unduly restricts ARRC’s operations and places an unreasonable burden on interstate commerce. Accordingly, ARRC asks the Board to declare that EPA’s ongoing efforts to prevent the issuance of a Section 404 permit for the NRE project are preempted under ICCTA.

BACKGROUND

A. Environmental Review and Board Approval

In November 2005, the Board's Section of Environmental Analysis ("SEA")² noticed its intent to prepare an EIS for the NRE project in the Federal Register. 70 Fed. Reg. 65976 (Nov. 1, 2005). Eight federal and state agencies, including the U.S. Army Corps of Engineers ("Corps"), acted as cooperating agencies during preparation of the EIS. After public comment on the scope of the EIS and substantial study by an independent third-party contractor, the Board issued a Draft EIS in December 2008. The Draft EIS was also subject to public and agency comment, including from EPA, which expressed "Environmental Concerns" in a letter dated February 2, 2009. *See* Ex. 1. The Final EIS, which addressed all public and agency comments on the draft document, was issued in September 2009. On October 9, 2009, EPA submitted a second letter to SEA describing its continued concerns about the potential environmental impacts of the NRE project. *See* Ex. 2.

All of these materials were before the Board on January 5, 2010 when it granted ARRC's petition seeking exemption from the prior approval requirements of 49 U.S.C. § 10901. The Board's decision means that "ARRC may build any of [the Board's] preferred alternatives and connector segments, subject to compliance with the environmental mitigation measures" listed in an appendix to the decision. *Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line Between North Pole and Delta Junction, AK* – Fin. Dkt. No. 34658 at 14 (Jan. 5, 2010) (*NRE Decision*). Notably, as part of its decision, the Board found that the SEA had "responded to all of the substantive comments in the Final EIS." *Id.* at 7-8.

² SEA is now known as the Office of Environmental Analysis ("OEA").

The Board’s January 5 decision specifically responded to the argument in EPA’s October 9, 2009 letter that “the purpose and need for the rail line was not ‘clearly identified’ in the Final EIS.”³ *Id.* at 9. The Board disagreed, concluding that the EIS adequately addressed purpose and need “by stating that the NRE will allow: (1) the movement of commercial freight . . .; (2) passenger transportation that could support tourism; and (3) dependable year-round access to the U.S. Army and U.S. Air Force training areas at Tanana Flats and Donnelly.” *Id.* The Board also noted EPA’s concerns regarding environmental impacts, but determined that “EPA has not provided credible evidence that the proposed construction of 80 miles of rail line – with SEA’s environmentally preferred alternatives and its extensive environmental mitigation recommendations – in an area now served solely by the Richardson Highway would not be in the public interest.” *Id.* at 10.

To ensure environmental quality concerns were appropriately addressed in the implementation of the project, the Board’s decision imposed a number of mitigation conditions on ARRC. Among the Board’s conditions is a requirement that ARRC obtain permits from the Corps under Section 404 of the Clean Water Act (“CWA”) for the discharge of dredged or fill material into navigable waters. *See id.* at 11; 33 U.S.C. § 1344(a). In particular, the Board required ARRC to seek Corps approval before constructing a bridge across the Tanana River near Salcha, Alaska, as well as culverts and other structures that may affect the flow of the river and the surrounding wetlands. *NRE Decision* at 17.

B. Section 404 Permit Application and EPA’s Section 404(q) Elevation Letters

Consistent with the Board’s decision approving the NRE project, ARRC has applied for a Section 404 permit from the Corps. As a cooperating agency, the Corps agreed to rely as much

³ The Final EIS responded to EPA’s February 2009 comment letter in detail.

as possible on the Board's EIS in making its Section 404 permitting decision. *See* Ex. 3 at 2. To assist the Corps in its work, ARRC has also provided the agency with a substantial evaluation of the NRE that is specific to factors that the Corps considers pursuant to the CWA Section 404(b)(1) Guidelines. ARRC's Section 404(b)(1) evaluation addressed, among other things, the practicability and environmental impacts of both the project and several alternatives. With this information in hand, the Corps issued a Public Notice of ARRC's application for the permit on September 15, 2010.

On November 15, 2010, the Director of the Alaska Operations Office for EPA Region X sent a letter to the Corps invoking EPA's authority under an inter-agency Memorandum of Agreement ("MOA") that governs EPA's exercise of its Section 404 permit veto powers. *See* Ex. 4 ("November Letter"). In the November Letter, EPA wrote that the NRE "may have substantial and unacceptable impacts" to the Tanana River, which the EPA apparently now considers to be an Aquatic Resource of National Importance ("ARNI").⁴ Ex. 4 at 2. The November Letter also outlines EPA's objections to the Corps' alternatives analysis and the purpose and need for the project as a whole.

On December 10, 2010, EPA Region X's Administrator transmitted an additional letter concluding that the NRE "will have substantial and unacceptable adverse effects on an ARNI, the Tanana River." Ex. 5 at 4 ("December Letter"). A "Supplemental Comments" attachment to the December Letter contains detailed objections to the NRE's "overall project purpose," the selection of the Board's environmentally preferred alternative as the least environmentally

⁴ Despite the extensive EIS process conducted by the Board, EPA did not suggest at any time before the November Letter that it considered the Tanana River to be an ARNI.

damaging practicable alternative, and various other aspects of the NRE project.⁵ *See id.*, Supp. Cmts. The December Letter explicitly concluded that the NRE project “does not comply with the [Section 404(b)(1)] Guidelines, and therefore ***should not be authorized.***” (Emphasis added.) *Id.* at 4.

ARGUMENT

The Administrative Procedure Act (“APA”) authorizes federal agencies to issue declaratory orders “to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e); *see National Solid Wastes Mgmt. Ass’n – Petition for Declaratory Order*, Fin. Dkt. No. 34776 at 4 (Mar. 8, 2006). It is not necessary for controversy or uncertainty to blossom into concrete injury before the Board acts on a petition. Rather, “[t]he Board has broad discretion in determining whether to issue a declaratory order.” *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, Fin. Dkt. No. 34914 at 3 (June 25, 2007) (declaring, in advance of petitioner’s request for authority to construct a new rail line, that state and local environmental laws were preempted). The Board has in fact exercised its discretion on several previous occasions to issue declaratory orders that “remove uncertainty about the scope of federal preemption” under ICCTA. *Borough of Riverdale – Petition for Declaratory Order*, Fin. Dkt. No. 35299 at 4 (Aug. 3, 2010); *see also, e.g., City of Alexandria, Va. – Petition for Declaratory Order*, Fin. Dkt. No. 35157 (Feb. 17, 2009). ARRC is seeking a similar declaratory order regarding the scope of ICCTA preemption as it applies to EPA’s ongoing efforts to prevent the Corps from permitting the NRE project.

⁵ The attachment to EPA’s February 2009 comment letter took a completely different view of the alternatives, stating that “EPA believes that the ARRC preferred routes represent the alternatives which cause the least impact to a variety of environmental resources, and supports the selection of these alternatives by STB as its preferred alternative(s).” Ex. 1 at 3. The Board’s January 5 decision determined that the ARRC preferred routes were the environmentally preferred alternative. *See NRE Decision* at 8.

I. ICCTA preempts the application of federal law in a manner that unduly restricts rail operations or unreasonably burdens interstate commerce.

When Congress enacted ICCTA, it not only gave the Board exclusive jurisdiction over rail transportation, it also added a broadly-worded preemption clause to the statute as a means of enforcing that jurisdiction. ICCTA section 10501(b) accordingly provides that:

The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules . . . , practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switch, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”

49 U.S.C. § 10501(b); *see also* *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA*, Fin. Dkt. No. 33971 at 7 (May 1, 2001) (*Town of Ayer*) (noting that Congress “broadened” the Board’s preemption authority when it passed ICCTA). The expansiveness of this preemption provision has been repeatedly emphasized by both the Board and the courts. *See, e.g., Friends of the Aquifer*, Fin. Dkt. No. 33966 at 4 (Aug. 10, 2001); *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998).

Despite the breadth of Section 10501(b)’s preemption provision, the Board follows a policy under which other federal statutes “should be harmonized” with ICCTA to the extent possible. *Town of Ayer* at 10 n.28. Federal law is therefore not preempted automatically when the Board acts on a matter within its jurisdiction. Rather, preemption is employed only when a law “is being *applied* in such a manner as to unduly restrict the railroad from conducting its

operations or unreasonably burden interstate commerce.” *Friends of the Aquifer*, Fin. Dkt. No. 33966 at 5-6 (emphasis added). As was explained in another matter, “[f]ederal environmental statutes . . . continue to apply to railroads to the extent that they would not unreasonably interfere with interstate commerce.” *Arizona Eastern Railway – Construction and Operation – In Graham County, Arizona*, Fin. Dkt. No. 34836 at ES-3 (Apr. 6, 2009). Whether federal law is being applied in a manner that brings it into conflict with ICCTA’s preemption provision “is a fact-bound question.” *Town of Ayer* at 9.

II. EPA’s Efforts To Prevent Issuance Of A Section 404 Permit For The NRE Project Are Preempted By ICCTA.

The facts in this case make it clear that EPA’s efforts to block the issuance of a Section 404 permit for the NRE cannot be harmonized with ICCTA. EPA’s recent letters are either revisiting issues that the Board fully addressed in its EIS and January 5 decision, or raising new questions that EPA could easily have asked during the nearly four-year environmental review process at the Board. Under the guise of its CWA responsibilities, EPA is demanding that the Corps reach a different conclusion from the Board, and not issue a Section 404 permit for the NRE project. EPA is taking these actions with full knowledge—and apparent disregard—of the Board’s decision authorizing the NRE. Because EPA’s attempts to thwart the Board-approved NRE project are unduly restricting ARRC’s operations and unreasonably interfering with the interstate commerce that will traverse ARRC’s proposed NRE rail line, they cannot be allowed to stand under ICCTA.

A. The Board has already addressed EPA’s purpose and need arguments.

The most prominent example of EPA’s disregard for the Board’s determinations is its continued effort to argue that ARRC has not produced sufficient support for the project’s statement of purpose and need. This argument appears in the November Letter, December

Letter, and the “Supplemental Comments” enclosed with the December Letter. *See* Ex. 4 at 4 (stating that the EPA found during the EIS process that “there was insufficient information regarding the purpose and need for the project”); Ex. 5 at 2 (“As EPA stated in our comments on the EIS, we believe that there is insufficient information provided to justify the applicant’s need and purpose.”); Ex. 5, Supp. Cmts. at 2 (“In the current project record, EPA believes that the information provided is not adequate to support the project purpose as the applicant has defined it.”). As noted above, the Board has already heard and rejected this argument. *NRE Decision* at 9.

The statement of purpose and need in the Board’s EIS is threefold: (1) to provide freight rail service as a safe, reliable and efficient transportation alternative; (2) to provide an alternative means of passenger transportation that could support tourism; and (3) to allow reliable and efficient year-round access to training areas used by the U.S. military. In developing this statement, the Board—quite properly—gathered information concerning the project from ARRC. “When an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application.” *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). In fact, the permitting agency has an affirmative “**duty** to take into account the objectives of the applicant’s project.” *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1270 (10th Cir. 2004). Nothing in NEPA authorizes federal agencies to “redefine the goals of the proposal that arouses the call for action” or to “evaluate alternative means” of achieving an agency-defined “general goal.” *Citizens Against Burlington*, 938 F.2d at 199 (internal quotation marks omitted). On these grounds, and in light of

its broad discretion to accept a project applicant's purpose and need, the Board rejected EPA's criticism of the EIS's statement of purpose and need.⁶ *See NRE Decision* at 9-10.

EPA's letters not only ignore the Board's January 2009 decision, they give no weight whatsoever to the fact that the basic purpose of ARRC's NRE project is to construct a new rail line as an *alternative to existing modes* of transportation. Instead, EPA contends that the NRE's "basic project purposes" are "to transport cargo and passengers between Fairbanks and Delta Junction." Ex. 5, Supp. Cmts. at 2. This reconceived "general goal," EPA argues, could be satisfied by alternatives that do not involve construction of a new rail line. *See id.* By contending in the context of the Corps' Section 404 permit review that the project alternatives should not be limited by ARRC's goal of constructing a new rail line, EPA is essentially challenging the Board's jurisdiction over the NRE. Any such effort to displace the Board's regulation of rail transportation is plainly prohibited under ICCTA. *See Humboldt Baykeeper v. Union Pacific Railroad Company*, Civ. No. 06-02560, 2010 WL 2179900 at *2 (N.D. Cal. May 27, 2010) (noting that ICCTA preempts any "regulation" that has "the effect of managing or governing rail transportation") (citations omitted).

B. EPA's new practicability arguments were addressed in the Board's EIS, and conflict with EPA's prior position on alternatives.

In addition to its purpose and need objections, EPA claims that ARRC "has not provided sufficient information to support a determination that alternative bridge designs and/or crossing

⁶ EPA's argument in its November Letter that "[w]ithout 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" (Ex. 4 at 4) also directly contradicts the Board's decision on the issue. Relying on ICCTA's presumption in favor of rail construction to reject the No-Build alternative, the Board explained that selecting the No-Build option "would fail to extend ARRC's existing freight rail and passenger service and the benefits that are likely to result from this proposal." *NRE Decision* at 1.

locations are not practicable.” *See* Ex. 5 at 2. This argument not only disregards the Board’s findings on this point, it also completely contradicts EPA’s own position during the EIS process.

The underlying premise of EPA’s practicability arguments is a rejection of the alternatives analysis in the EIS. Indeed, the December Letter explicitly asserts that “[t]he alternatives analysis required by the [Section 404(b)(1)] Guidelines is not limited to the alternatives evaluated in the NEPA document.” Ex. 5, Supp. Cmts. at 5. This assertion is wrong as a matter of law. The applicable regulations specifically state that “the analysis of alternatives required for NEPA environmental documents . . . will in most cases provide the information for the evaluation of alternatives under these Guidelines.” 40 C.F.R. § 230.10(a)(4). And while “[o]n occasion,” a NEPA review “may address a *broad*er range of alternatives than required to be considered” under the Guidelines, “or may not have considered the alternatives in sufficient detail,” there is no suggestion that an evaluation pursuant to Section 404(b)(1) would ever require study of new alternatives. *Id.* (emphasis added). When the Board’s EIS excluded alternatives that were deemed unreasonable, it by definition found those same alternatives impracticable under the Guidelines. 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. Therefore, EPA’s actions are preempted by ICCTA.

In addition, any EPA claim that the Board’s environmentally preferred alternative should not be approved by the Corps is completely disingenuous in light of EPA’s February 2009 comments on the Board’s Draft EIS. Those comments explicitly endorsed the “ARRC preferred routes” as “the alternatives which cause the least impact to a variety of environmental resources.” Ex. 1 at 3. And while EPA’s comments noted several “adjustments” that it could be

made, the agency explicitly “support[ed] the selection of [ARRC’s preferred] alternatives by STB as its preferred alternative(s).” *Id.* The Board ultimately selected the alternatives endorsed by EPA as the preferred alternatives in the EIS. The dramatic shift in EPA’s December Letter—which demands that the Corps consider already-rejected routes and crossing locations for the NRE project—makes clear that EPA is causing the disharmony between federal statutes that necessitates ICCTA preemption.⁷

C. The Board’s EIS carefully evaluates the potential environmental impacts of the NRE project raised in EPA’s letters.

Similar problems exist with EPA’s argument that the NRE will have unacceptable adverse impacts on fish and wildlife. *See* Ex. 4 at 2-3; Ex. 5 at 2-4. The Board thoroughly addressed environmental impacts, including potential impacts on fish and wildlife, in its decision approving the NRE. In fact, the Board established “extensive mitigation [requirements] to minimize the impact to fisheries,” including measures related to “the proper design of bridges and culverts and the timeframe and manner in which rail construction must be conducted.” *NRE Decision* at 14. By asserting that the NRE project poses unacceptable risks to fisheries and wildlife, EPA is either ignoring the Board’s mitigation requirements or suggesting that additional requirements should be imposed, both of which are impermissible. Requiring “additional . . . environmental mitigation on top of that required by” the Board “amounts to regulation of the railroads,” and is therefore “prohibited” by ICCTA. *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989, 1009 (D.S.D. 2002), *rev’d on other grounds*, 362 F.3d 512 (8th Cir. 2004).

⁷ EPA’s February comments gave the Draft EIS an “EC-2” rating, indicating that the agency had “concerns,” but not “objections,” and did not find the EIS to be “environmentally unsatisfactory.” Ex. 1 at 1, 7.

EPA's concerns over the NRE project's impacts on fish and wildlife ostensibly derive from the agency's belief that the Tanana River is an aquatic resource of national importance. Yet, neither EPA's February 2009 public comments on the Draft EIS nor its October 2009 comments on the Final EIS make any mention of the Tanana River as an ARNI. The unilateral declaration of the Tanana River's ARNI status in EPA's November 2010 letter to the Corps appears to be the first suggestion that the river has "national importance." The agency's revelation about the Tanana's value is not based on new facts or information unavailable during the Board's EIS process, but on mundane data concerning the size of the river basin, the number of species supported by the river and the use of surrounding lands by wildlife species.

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. EPA's November Letter declaring the Tanana River and ARNI vitiates the Board's extensive efforts during the EIS process to harmonize its jurisdiction over the NRE project with EPA's responsibilities under the CWA. When an agency insists on applying a federal statute in a manner that cannot be harmonized with the Board's jurisdiction, ICCTA must prevail. Accordingly, EPA's after-the-fact determination that the Tanana River is an ARNI is preempted under ICCTA.

* * *

In sum, EPA's principal arguments against the issuance of a Section 404 permit for the NRE are simply restatements of arguments the Board has either already addressed, or could have addressed if they had been timely raised. By continuing to press these 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.

ARRC accordingly seeks a declaration that EPA's effort to prevent the Corps from issuing a Section 404 permit is preempted by ICCTA and the Board's decision approving the NRE project.

More specifically, ARRC requests that the Board declare:

- (1) EPA's arguments questioning the purpose and need for the NRE project are preempted by ICCTA and the Board's January 2010 decision approving the project.
- (2) EPA's arguments demanding that the Corps consider alternatives other than those approved by the Board's January 2010 decision are preempted by ICCTA.
- (3) EPA's arguments alleging that the NRE project will have unacceptable adverse impacts on fisheries and wildlife are preempted by ICCTA and the environmental mitigation measures included in the Board's January 2010 decision.
- (4) EPA's determination that the Tanana River is an ARNI is preempted by ICCTA and by EPA's failure to raise the issue prior to the Board's January 2010 decision.

ARRC further requests that the Board's decision make clear that *any* effort by EPA to apply the CWA in a manner that undermines the Board's jurisdiction, unduly restricts railroad operations, or unreasonably burdens interstate commerce will be preempted by ICCTA.

III. ARRC Requests Expedited Handling Of This Petition.

EPA's November and December Letters urging the Corps not to grant a Section 404 permit to ARRC are part of a process—embodied in an inter-agency memorandum—that can take months to complete. If at the end of that process, EPA decides to begin a Section 404(c) veto process, it could many more months before a final decision is reached. ARRC does not have that kind of time. In the year since the Board approved the NRE project, ARRC has been working diligently to obtain the permits that the Board identified as mitigation measures. If ARRC does not begin construction on Phase I of the project before June 2011, \$60 million in

federal funding will likely expire. Without that funding, the Board-approved NRE project may never be built at all.

The opponents of the NRE project are undoubtedly aware of the impending expiration of ARRC's funding. Should they succeed in delaying the Corps' permit decision a few more months, it will become impossible for ARRC to begin construction on time. Thus, a decision from the Board on ARRC's petition is important not only for its substance, but also for its timing. ARRC requests an expedited decision from the Board because a determination that EPA's efforts to prevent issuance of the Section 404 permit are preempted will be close to meaningless if it comes too late to preserve ARRC's funding.

The Board has considered the effect of a decision on the applicant's funding in several previous instances. *See, e.g., Port of Moses Lake – Acquisition Exemption – Moses Lake, Wash.*, Fin. Dkt. No. 34936 at 7 (Aug. 27, 2009) (finding that applicant's request to expedite decision to "facilitate . . . efforts to obtain funding" was "reasonable"); *BNSF Rwy. Co. – Lease & Operation Exemption – Interlocker Plant of the Ill. Cent. R.R. Co.*, Fin. Dkt. No. 34976 at 3 (Feb. 23, 2007) (granting expedited treatment in light of "time-sensitive funding" issues). ARRC's request for expedited treatment of this petition is similarly reasonable. Time is of the essence for ARRC's federal funding, and ultimately for the entire NRE project.

CONCLUSION

For all of the reasons stated above, ARRC requests that the Board issue a declaration affirming that EPA's attempts to prevent the issuance of CWA Section 404 permits for the NRE project are preempted, and therefore cannot continue. In particular, ARRC asks that the Board's declaration state:

- (1) EPA's arguments questioning the purpose and need for the NRE project are preempted by ICCTA and the Board's January 2010 decision approving the project.
- (2) EPA's arguments demanding that the Corps consider alternatives other than those approved by the Board's January 2010 decision are preempted by ICCTA.
- (3) EPA's arguments alleging that the NRE project will have unacceptable adverse impacts on fisheries and wildlife are preempted by ICCTA and the environmental mitigation measures included in the Board's January 2010 decision.
- (4) EPA's determination that the Tanana River is an ARNI is preempted by ICCTA and by EPA's failure to raise the issue prior to the Board's January 2010 decision.

ARRC further requests that the Board expedite its decision in this matter in light of the serious federal funding issues ARRC is facing.

Dated: January 28, 2011

Respectfully Submitted,



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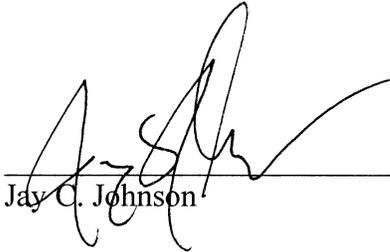
Counsel for Petitioner Alaska Railroad
Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2011, a copy of the foregoing Petition for Declaratory Order was served by overnight delivery on:

Colonel Richard W. Koenig
District Engineer, Alaska District
U.S. Army Corps of Engineers
P.O. Box 6898
Elmendorf AFB, AK 99506-0898

Dennis J. McLerran
Region Administrator
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140



Jay C. Johnson

1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

EI - 16382
Redd 2/10/09

February 2, 2009

Reply To
Attn Of: ETPA-088

Ref: 05-063-STB

Mr. David Navecky
STB Finance Docket No. 34658
Surface Transportation Board
395 E Street S.W.
Washington, DC 20423-0001

Dear Mr. Navecky:

The U.S. Environmental Protection Agency (EPA) Region 10, has reviewed the draft Environmental Impact Statement (EIS) for the proposed project to **Construct and Operate a Rail Line Between North Pole, Alaska and Delta Junction, Alaska** (CEQ No. 080524) in accordance with our responsibilities under the National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act. Section 309, independent of NEPA, specifically directs EPA to review and comment in writing on the environmental impacts associated with all major federal actions. Under our policies and procedures we also evaluate the document's adequacy in meeting NEPA requirements.

The draft EIS was prepared to provide the Surface Transportation Board (STB) with information to evaluate a proposal from the Alaska Railroad Corporation (ARRC) to construct and operate approximately 80 miles of new rail line, and associated support infrastructure, in the area south of North Pole, Alaska. The draft EIS divided the proposed project into various common, connector, and alternative segments and contains alternatives that reflect each of these identified segments. The proposed action represent the ARRC's preferred routes. The STB has not identified any preferred alternatives in the draft EIS.

EPA commends the STB for its approach in establishing segments and associated alternatives for evaluation; a thorough discussion of mitigation measures; tribal involvement and consultation efforts; the inclusion of greenhouse gas emissions analysis; and finally, the sponsorship of a public transportation project. Based on our review, we have rated the proposed action EC-2 (Environmental Concerns, Insufficient Information). This rating and a summary of our comments will be published in the *Federal Register*. A summary of the rating system we used in conducting our review of the draft EIS is enclosed for your reference.

EPA has concerns regarding impacts to water quality, open water habitats, wetlands, stream channels, and riparian areas. We are also concerned about ecological connectivity from rail line and road construction and operation, as well as river crossings as proposed. We believe that there is insufficient information regarding the purpose and need for the project, as well as

impacts related to potential material sites and construction camps and staging areas. The draft EIS also does not reflect the recent EPA decision to designate a portion of the Fairbanks North Star Borough as non-attainment for PM 2.5 or the delegation of the National Pollution Discharge Elimination System (NPDES) program to the State of Alaska. Finally, EPA questions the need for a maintenance road to run the length of the line given that ARRC rail line is operated and maintained without such a road in other areas. We encourage STB to continue to refine segment alternatives for the final EIS in order to minimize these impacts in final preferred route development.

EPA appreciates the opportunity to provide comments on the STB Northern Rail Extension draft EIS. If you have any questions regarding our comments, please contact me at (206) 553-1601. Please also feel free to contact Jennifer Curtis of my staff in the Alaska Operations Office in Anchorage at (907) 271-6324 or curtis.jennifer@epa.gov.

Sincerely,

/s/

Christine B. Reichgott, Manager
NEPA Review Unit

Enclosures

ENCLOSURE 1**USEPA DETAILED COMMENTS ON THE SURFACE TRANSPORTATION BOARD NORTHERN RAIL EXTENSION DRAFT ENVIRONMENTAL IMPACT STATEMENT****Purpose and Need**

In our January 13, 2006, scoping comments, EPA advised the STB that the EIS should include a clear and concise statement of the underlying purpose and need for the proposed action, and clearly reflect the construction and operation of the extension to support all known public, private, and government interests. We also recommended an overall cost-benefit analysis for the project be completed. The draft EIS does include such a statement, but does not provide any data to support the project utility and need identified, such as estimated number of passenger and freight trips per day, or discussion of the interest of the US Army and US Air Force, or private industry (tourism, agriculture, mining and petrochemical) to utilize the proposed service. It also does not include a discussion of the economic benefit or comparability with the current highway travel.

If data regarding the interest of residents, the military, or private industry to utilize the proposed service exists, or an economic analysis of comparable passenger and freight costs is available, EPA recommends that this information be included in the final EIS in order to support the purpose and need. In addition, if information concerning closure or inaccessibility of the Richardson Highway is available, this should be included to support the explanation of a needed road travel alternative. If this information is currently not available, EPA recommends that surveys or other data collection efforts be conducted to obtain this information, and the results included in the final EIS.

Agency Preferred Alternative(s)

EPA recognizes that the STB did not identify a preferred alternative for each of the project segments, and that this is standard practice for many agencies or projects. As such, EPA reviewed and evaluated each of the proposed alternatives for each segment, focusing on ARRC's preferred segments, which were identified in the draft EIS as the Proposed Action. Overall, EPA believes that the ARRC preferred routes represent the alternatives which cause the least impact to a variety of environmental resources, and supports the selection of these alternatives by STB as its preferred alternative(s). There are, however, adjustments that can be made within each ARRC 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. One such adjustment is the consideration of full span bridges for stream, river and wetland crossings. Another is reducing the footprint of the road, or eliminating road segments as possible, as well as construction camps and staging areas.

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.

Salcha Alternative Segment 1 Option 1

In general, EPA supports the selection of Option 1 for the Salcha Alternative Segment 1 due to what appears to be the need for the placement of less fill than Option 2. The angle or approach of the proposed levee, however, does not appear to be consistent with the upstream hydrology of the Tanana River, and appears to be designed in such a manner that will require continual maintenance and dredging.

EPA recommends that the STB further explain the design of the levee or, if not practical, reconsider the design of the levee to ensure that it aligns with the hydrological dynamics of the Tanana River in order to avoid or reduce regular maintenance and repair.

Road Construction

The draft EIS indicates that ARRC is interested in constructing a road paralleling the entire length of the rail line extension, said to be constructed before and for the purpose of aiding in the construction and maintenance of the rail line (page 2-22). The document does not, however, explain that other sections of rail line throughout the state do not require such a road, and that maintenance can be performed from the rail line itself via hi-rail equipment.

If this project area is unique and necessitates the construction of a maintenance road, EPA recommends that this should be fully explained in the final EIS. Additionally, if the road is intended to serve other purposes (e.g., military training activities), this should also be disclosed fully in the final EIS.

Air Quality

A small portion of the Fairbanks North Star Borough, including the City of Fairbanks and the City of North Pole, has recently been designated as a PM 2.5 non-attainment area. The designation is based on the 2005-2007 data from the Fairbanks PM 2.5 monitor. Based on EPA's analysis, local heating emissions from woodstoves, distillate oil, industrial sources and mobile emissions contribute to primary and secondarily formed PM 2.5 that violate the standard during stable weather events associated with extremely strong temperature inversions. Currently the draft EIS does not contain discussion regarding this designation or its potential impact on the project.

EPA recommends that STB work with EPA and the Alaska Department of Environmental Conservation (ADEC) to determine what effect this recent designation may have on this project, and to revise the air quality analysis in the final EIS as needed.

Spill Response

The STB has determined that the potential for hazardous material spills from leaks, derailment or collisions is low, and the occurrence is infrequent, and thus will have

low impacts. Past ARRC fuel spills have demonstrated, however, that when a major spill does occur, such as the December 1999, Gold Creek spill, response is often slowed or complicated by remoteness of the site, as well as limitations in spill response resource availability, and the resulting impacts can be substantial. Given that ARRC trains contain up to 125 cars, and fuel tanker cars contain up to 23,000 gallons of fuel per car, a worst case scenario derailment or collision could result in hundreds of thousands of gallons of product being released into the environment, which could immediately contaminate a major surface water body.

EPA requests that STB reconsider the assumption that a hazardous material spill will result in low impacts given that low frequency and probability does not affect magnitude of the impact should such a spill occur.

Potential Impacts to Chena Slough

The Chena Slough is a Category 5 CWA Section 303(d) waterbody (AK Id. No. 40506-002) listed for non-attainment of the petroleum hydrocarbons, oil and grease sediment standards for petroleum products and sediment in 1994. Project components of the North Common Segment appear to be within the Chena Slough watershed. ADEC records indicate nonpoint source problems result from surface water run-off, road construction, site clearing, and de-watering activities from gravel operations. According to the Alaska's Final 2008 Integrated Water Quality Monitoring and Assessment Report published by ADEC on April 1, 2008, the State is currently reviewing water quality assessment data collected in 2005 and 2007 to determine if a Total Maximum Daily Load Limit (TMDL) is needed on this waterbody. This information is currently not included in the draft EIS.

EPA recommends that STB include information concerning the 303(d) listing of the Chena Slough if the project has the potential to contribute to the pollutant loading of the slough. EPA also recommends that STB and ARRC work closely with ADEC if a TMDL is developed in order to meet the pollutant limits during construction and operation.

NPDES Program Delegation

On October 31, 2008, EPA approved the State of Alaska's National Pollutant Discharge Elimination System (NPDES) Program application. The State's program is called the Alaska Pollutant Discharge Elimination System (APDES) Program. Authority over the federal permitting and compliance and enforcement programs is being transferred to ADEC over three years, beginning at program approval. EPA will retain oversight of the program. Given the project schedule, EPA anticipates that all program components, including domestic wastewater and stormwater, will be delegated to the State before project construction begins. The draft EIS does not currently reflect this recent change to NPDES program administration and oversight.

EPA recommends that the final EIS reflect the change in permitting authority for point source and stormwater discharges where appropriate.

Consideration of Climate Change Impacts

EPA appreciates the STB's consideration of the greenhouse gas emissions and subsequent analysis of the project's potential contribution to climate change. EPA believes, however, that the draft EIS does not adequately consider the effects of climate change on the project, particularly given the anticipated rates of change to permafrost thaw as well as water quantity and availability. Given that the current estimates of permafrost temperature change is approximately 2°C, and the depth of thaw has increased in many areas in Interior Alaska, this could have significant impacts on project design, maintenance and route development. There currently exists several reports and resources through entities such as the Intergovernmental Panel on Climate Change (IPCC) and the Arctic Impact Climate Assessment initiative that discuss the range of changes that are anticipated for permafrost and water availability in interior Alaska.

EPA recommends that the STB consider direct, indirect and cumulative impacts to the project due to climate change, particularly impacts due to the anticipated loss of permafrost and changes in water availability, and discuss these impacts in the final EIS. EPA also recommends that potential project adaptation measures be proposed in the final EIS as needed.

Compensatory Mitigation for Losses of Aquatic Resources; Final Rule

The "Compensatory Mitigation for Losses of Aquatic Resources; Final Rule" (commonly referred to as the Final Mitigation Rule), was published in the Federal Register on April 10, 2008 and became effective on June 9, 2008. The regulations establish performance standards and criteria for the use of permittee-responsible compensatory mitigation, mitigation banks, and in-lieu programs to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits. The draft EIS currently includes a statement that compensatory mitigation for unavoidable impacts to wetlands shall be implemented as part of the U.S. Army Corps of Engineers Section 404 permit.

EPA notes that compensatory mitigation is not restricted to just wetlands, but to all waters of the U.S., and recommends that the final EIS acknowledge compliance with this Final Mitigation Rule.

**U.S. Environmental Protection Agency Rating System for
Draft Environmental Impact Statements
Definitions and Follow-Up Action***
Environmental Impact of the Action

LO – Lack of Objections

The U.S. Environmental Protection Agency (EPA) review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

EC – Environmental Concerns

EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce these impacts.

EO – Environmental Objections

EPA review has identified significant environmental impacts that should be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no-action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

EU – Environmentally Unsatisfactory

EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potential unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

Adequacy of the Impact Statement

Category 1 – Adequate

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis of data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

Category 2 – Insufficient Information

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses or discussion should be included in the final EIS.

Category 3 – Inadequate

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the National Environmental Policy Act and or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

* From EPA Manual 1640 Policy and Procedures for the Review of Federal Actions Impacting the Environment. February, 1987.

2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
ECOSYSTEMS, TRIBAL AND
PUBLIC AFFAIRS

October 9, 2009

Mr. David Navecky
STB Finance Docket No. 34658
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

**RE: EPA comments on the STB FEIS for the ARRC Northern Rail Extension Project
EPA Project No.:05-063-STB**

Dear Mr. Navecky:

We have reviewed the **Final Environmental Impact Statement (EIS) for Alaska Railroad Corporation Construction and Operation of a Rail Line Between North Pole and Delta Junction, Alaska (CEQ No. 20090327)** in accordance with our responsibilities under the National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act.

EPA previously expressed substantial environmental concerns with the draft EIS based on potential impacts to water quality, open water habitats, wetlands, stream channels, and riparian areas. We also expressed concerns about impacts to ecological connectivity from rail line and road construction and operation, as well as river crossings. We also asserted that the information regarding the purpose and need for the project was insufficient, as was information on impacts related to potential material sites and construction camps and staging areas.

In addition, we requested more information regarding the EPA designation of Fairbanks North Star Borough as non-attainment for PM 2.5 and the delegation of the National Pollution Discharge Elimination System (NPDES) program to the State of Alaska. Finally, EPA questioned the need for a maintenance road to run the length of the line given that ARRC rail line is operated and maintained without such a road in other areas. We encouraged the STB to continue to refine segment alternatives for the final EIS in order to minimize these impacts in final preferred route development.

After reviewing the final EIS, we have determined that our environmental concerns relating to the project remain, as do our concerns regarding the justification of the project's Purpose and Need and the maintenance road. Additionally, we believe the current Purpose and Need is in conflict with the ICC Termination Act 1995, STB's authorizing statute, which states that the policy of the federal government is to "ensure development...of a **sound** rail transportation system...to meet the **needs** of the **public** and **national defense**." This public and/or national defense need has yet to be clearly identified, and no cost analysis has been

developed to determine the economic feasibility or soundness of the project. We recommend that this information be developed prior to the issuance of the Record of Decision (ROD). We also encourage the STB to consider including additional commitments in the ROD, such as wildlife crossings, full span bridges, noise/vibration reduction measures, etc., to further mitigate the impacts to aquatic and terrestrial resources.

Also, while we appreciate the fact the Federal Register notice for the PM 2.5 designation of the Fairbanks/North Pole area has not yet been published, and that the area has not been officially designated to date, publication is expected in the next few weeks. We are confident that the Fairbanks/North Pole area will be designated as nonattainment for PM 2.5. As such, if the designation occurs before the publication of the ROD, we encourage the STB to include a discussion of designation impacts on the project in that document, if any.

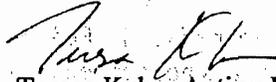
We also have concerns regarding the STB's approach to identifying multiple preferred alternatives for the Eielson and Donnelly segments. Although NEPA regulation, 40 CFR 1502.14(e), states that the lead agency shall "Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and **identify such alternative in the final statement** unless another law prohibits the expression of such a preference", it is typically the practice that the selection of multiple preferred alternatives applies to analyses that include multiple projects or segments. We encourage the STB to clearly identify one preferred alternative for each segment in the ROD.

We recognize that the STB has included a mitigation measure that states the requirement of the project to comply with the Final Mitigation Rule for compensation of losses of aquatic resources, which include all waters of the US. We appreciate that this information has been included per our request. We do not believe that this rule, nor other federal permit and authorization requirements (such as compliance with Clean Water Act Sections 402 and 404, and Spill, Prevention, Control and Countermeasure plans) listed in the mitigation section, should have been termed "voluntary" as has been done in the heading. We believe this is misleading to the reviewer. While the 49 U.S.C. §10501 appears to preclude STB actions from "conflicting" state and local regulations, federal requirements are still valid and compliance with these requirements is not optional.

Finally, we are disappointed with the format of the final EIS. It is extremely difficult to navigate, and likely created undue hardship for agency reviewers and members of the public. It is also unclear why certain comments on the draft EIS, such as those from the US Army Corps of Engineers, have been omitted. We request that in the future the STB use a more traditional format of reproducing the entire revised document in hard copy and electronic formats, and not rely on the reviewer having access to the draft EIS. We also request that, in compliance with 40 CFR §1503.4(b) that all substantive comments received on the draft EIS, including those of cooperating agencies, be included in the Response to Comments section of the final EIS, particularly if these comments were received during the public comment period. We believe this issue should be discussed in the ROD.

Thank you for the opportunity to comment on the final EIS. Please feel free to contact Jennifer Curtis at (907) 271-6324 or by electronic email at curtis.jennifer@epa.gov with any questions that you may have.

Sincerely,



**Teresa Kubo, Acting Manager
Environmental Review and
Sediments Management Unit**

3

MEMORANDUM OF UNDERSTANDING

BETWEEN

SURFACE TRANSPORTATION BOARD

AND

U.S. ARMY CORPS OF ENGINEERS, ALASKA DISTRICT

CONCERNING GRANTING COOPERATIVE AGENCY STATUS

AND THE PREPARATION OF THE

NORTHERN RAIL EXTENSION PROJECT

ENVIRONMENTAL IMPACT STATEMENT

1. BACKGROUND. The Alaska Railroad Corporation (ARRC) plans to file a petition with the Surface Transportation Board (STB) pursuant to 49 U.S.C. 10502 for authority to construct and operate a new rail line from the vicinity of North Pole to Delta Junction, Alaska. When filed, the case will be docketed as STB Finance Docket No. 34658. The proposed project, referred to as the Northern Rail Extension Project, would involve the construction and operation of approximately 80 miles of new main line track and could include an approximately 15-mile rail spur to the U.S. Air Force's Blair Lakes training area. In anticipation of ARRC's filing, the STB issued a Notice of Intent to prepare an Environmental Impact Statement (EIS) in the *Federal Register* on November 1, 2005.

The purpose of the proposed Northern Rail Extension Project is to expand ARRC's freight and passenger rail service in the region. According to ARRC, the project would support the following:

- Commercial freight service for businesses and communities on and near the proposed rail corridor.
- Passenger rail service with scheduled station stops between North Pole and Delta Junction.
- Additional opportunities for tourists to access this region of Alaska.
- Land access for the Department of Defense to the Tanana Flats and Donnelly training areas.

2. PURPOSE. The purpose of this Memorandum of Understanding is to identify the U.S. Army Corps of Engineers, Alaska District (USACE), as a cooperating agency on the EIS, pursuant to 40 CFR 1501.6, "Cooperating Agencies." By signing this Memorandum of Understanding, USACE shall be granted cooperating agency status.

3. LEAD AGENCY. The STB shall be the lead agency, pursuant to 40 CFR 1501.5(c), "Lead Agency," and shall supervise the preparation of the EIS. The environmental review process shall be consistent with the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), the NEPA implementing regulations of the Council on Environmental Quality at 40 CFR Parts 1500-1508, and the environmental rules of the

STB at 49 CFR Part 1105. As provided for in 40 CFR 1501.6(a) (2), the STB shall “use environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.”

4. AGENCY DECISIONS

4.1 Surface Transportation Board. The STB shall decide whether or not to grant authority, pursuant to 49 U.S.C. 10901 and 10502, to ARRC to construct and operate the Northern Rail Extension Project.

4.2 U.S. Army Corps of Engineers. The proposed project could affect waters of the United States, and thus could require Department of the Army authorization pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1251-1376, as amended) and/or Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). The EIS to be prepared by the STB shall be used by USACE to fulfill its NEPA requirements in its consideration of ARRC’s Section 404 and/or Section 10 permit application, if it is determined by USACE to be adequate for this purpose.

5. RESPONSIBILITIES. As the lead agency, the STB shall supervise the preparation of the EIS, which shall be prepared with the assistance of a third-party contractor pursuant to 49 CFR Part 1105, under the direction, supervision and control of the STB. While the contractor shall be paid by proponent ARRC, the proponent shall have no supervision over the contractor regarding preparation of the EIS. The contractor selected to assist in the preparation of the EIS is ICF Consulting, Fairfax, Virginia.

The EIS shall disclose and analyze the potential environmental impacts related to land use, biological resources, water resources including wetlands and other waters of the US, navigation, geology and soils, air quality, noise and vibration, socioeconomics, safety, transportation systems, cultural and historic resources, subsistence, recreation, aesthetics, environmental justice and cumulative impacts. Attachment A – Draft Scope of Analysis – specifies in greater detail the analyses to be addressed.

The STB agrees to coordinate and communicate with USACE during preparation of the EIS. The EIS shall contain sufficient information for the USACE to make a permit decision, particularly the information required to determine compliance with the Section 404(b)(1) guidelines (40 CFR 230) and the USACE’s public interest review (33 CFR 320). In order to ensure this, USACE shall be consulted in the selection of the range of alternatives to be analyzed, in the methods used to analyze impacts of those alternatives, and the justification for the elimination of any alternatives. The goal is that, when completed, the EIS shall provide the information needed for decision-making purposes by USACE.

USACE shall provide information to the STB, as needed. Each agency may develop Interdisciplinary Teams or designate specialists to review the analysis and provide

direction or comment where necessary to meet applicable laws, regulations and policies without undue delay. At a minimum, USACE shall be provided the opportunity to review the following documents during this NEPA review process:

- Final Scope of Analysis for the EIS,
- Annotated Outline for the EIS,
- Analytical methodologies to be used,
- Preliminary Draft EIS, and
- Preliminary Final EIS.

If the analyses indicate that mitigation would be appropriate, USACE shall assist in the development of mitigation measures applicable to USACE. USACE shall also assist in the formulation of responses to public comments on the Draft EIS that pertain to USACE, USACE permitting authority, and other related issues, as appropriate.

Each agency shall work toward completing appropriate NEPA compliance and reviews in a timely manner. However, in order to ensure meaningful review and input, a minimum of 30 days each for USACE review of the Final Scope of Study for the EIS, Preliminary Draft EIS, and the Preliminary Final EIS should be incorporated into the schedule.

6. PROJECT CONTACTS

Surface Transportation Board

David Navecky
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001
Phone: 202-565-1593
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Email: naveckyd@stb.dot.gov

U.S. Army Corps of Engineers

Christy Everett
Regulatory Branch, Fairbanks Field Office
3437 Airport Way, Suite 206
Fairbanks, Alaska 99709-4777
Phone: 907-272-2166
FAX: 907-474-2164
Email: Christy.a.everett@poa02.usace.army.mil

7. NON-FUND OBLIGATING DOCUMENT. This document is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement, contribution of funds, or transfer of value between the parties of this instrument will be handled in

accordance with applicable laws, regulations and procedures including those for government procurement and printing. Such endeavors shall be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This instrument does not provide such authority. Specifically, this instrument does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Any contract or agreement for training or other services must fully comply with all applicable requirements for competition.

8. EXPIRATION. The Memorandum of Understanding shall be in effect for a period of two years from the executed date, and shall terminate at the end of that time unless otherwise modified, formally cancelled, or renewed by the parties.

9. MODIFICATION AND AMENDMENT. This Memorandum of Understanding may be modified or amended in writing by mutual agreement of the parties.

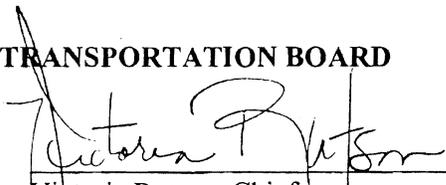
10. TERMINATION. Either party to this agreement may terminate the instrument in whole or part, in writing, at any time before the date of expiration, with 30 days written notice.

11. PARTICIPATION IN SIMILAR ACTIVITIES. This instrument in no way restricts the cooperating agency from participating in similar activities with other public or private agencies, organizations, or individuals.

12. EFFECTIVE DATE. This Memorandum of Understanding shall be effective as of the last signature date.

SURFACE TRANSPORTATION BOARD

Signature:

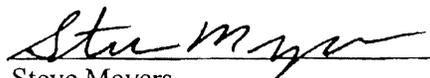

Victoria Rutson, Chief
Section of Environmental Analysis

Date:

11/23/2006

**U.S. ARMY CORPS OF ENGINEERS
ALASKA DISTRICT**

Signature:


Steve Meyers
Chief, North Section, Regulatory Branch

Date:

2 Nov 06

**ATTACHMENT A
DRAFT SCOPE OF ANALYSIS
NORTHERN RAIL EXTENSION PROJECT
ENVIRONMENTAL IMPACT STATEMENT**

Draft Scope of Analysis for the EIS

Proposed Action and Alternatives

The proposed Northern Rail Extension Project includes construction of approximately 80 miles of new rail line connecting the existing rail line near Eielson AFB near North Pole, Alaska to a point near Fort Greely and the Donnelly Training Area near Delta Junction, Alaska. The proposed project could also include the construction of a 15-mile spur line from Flag Hill to the Blair Lakes Military Training Area. The proposed line would provide freight and passenger rail services for defense facilities, commercial interests, and communities in or near the project corridor. The proposed rail line would also provide the U.S. Army with year round access to the Tanana Flats and Donnelly training areas and all the major military installations in Alaska would be accessible by rail.

The reasonable and feasible alternatives that will be evaluated in the EIS are (1) construction and operation of the proposed project along the proposed alignments, (2) other alternatives that might be identified during the scoping process, and (3) the no-action alternative.

Environmental Impact Analysis

Proposed New Construction

Analysis in the EIS will address the proposed activities, including material sources, associated with the construction and operation of new rail facilities and their potential environmental impacts for the range of alternatives suggested as reasonable and feasible, as appropriate.

Impact Categories

The EIS will analyze potential direct and indirect impacts for each alternative of the proposed construction and operation of new rail facilities on the human and natural environment, or in the case of the no-action, of the lack of these activities. Impact areas addressed will include the categories of land use, biological resources, water resources including wetlands and other waters of the US, navigation, geology and soils, air quality, noise, energy resources, socioeconomics as they relate to physical changes in the environment, safety, transportation systems, cultural and historic resources, subsistence, recreation, aesthetics, and environmental justice. Other categories of impacts may also be included as a result of comments received during the scoping process or the draft EIS. The EIS will include a discussion of each of these categories as they currently exist in the project area and will address the potential direct and indirect impacts of each alternative on each category as described below:

1. Safety

The EIS will:

- a. Describe existing road/rail grade crossing safety and analyze the potential for an increase in accidents related to the new rail operations, as appropriate.
- b. Describe existing rail operations and analyze the potential for increased probability of train accidents, as appropriate.
- c. Describe hazardous materials safety factors for the transportation of hazardous materials and analyze the potential for a release of those materials, as appropriate.
- d. Evaluate the potential for disruption and delays to the movement of emergency vehicles due to new rail line construction and operation for each alternative.
- e. Propose mitigative measures to minimize or eliminate potential project impacts to safety, as appropriate.

2. Land Use

The EIS will:

- a. Evaluate potential impacts of each alternative on existing land use patterns within the project area and identify those land uses that would be potentially impacted by new rail line construction.
- b. Analyze the potential impacts associated with each alternative to land uses identified within the project area. Such potential impacts may include incompatibility with existing land uses and conversion of land to railroad uses.
- c. Propose mitigative measures to minimize or eliminate potential impacts to land use, as appropriate.

3. Biological Resources

The EIS will:

- a. Evaluate the existing biological resources within the project area, including vegetative communities, wildlife and fisheries, wetlands, and Federal and state threatened or endangered species and the potential impacts to these resources resulting from each alternative.
- b. Describe any wildlife sanctuaries, refuges, national or state parks, forests, or grasslands and evaluate the potential impacts to these resources resulting from each alternative.
- c. Propose mitigative measures to avoid, minimize, or compensate for potential impacts to biological resources, as appropriate.

4. Water Resources

The EIS will:

- a. Describe the existing surface water and groundwater resources within the project area, including lakes, rivers, streams, stock ponds, wetlands, and floodplains and analyze the potential impacts on these resources resulting from each alternative.
- b. Describe the permitting requirements for the various alternatives with regard to wetlands, stream and river crossings, water quality, and erosion control.
- c. Propose mitigative measures to avoid, minimize or compensate for potential project impacts to water resources, as appropriate.

5. Navigation

The EIS will:

- a. Identify existing navigable waterways within the project area and analyze the potential impacts on navigability resulting from each alternative.
- b. Describe the permitting requirements for the various alternatives with regards to navigation.
- c. Propose mitigative measures to minimize or eliminate potential impacts to navigation, as appropriate.

6. Geology and Soils

The EIS will:

- a. Describe the geology, soils, and permafrost found within the project area, including unique or problematic geologic formations or soils, prime farmland, and hydric soils and analyze the potential impacts on these resources resulting from the various alternatives for construction and operation of a new rail line.
- b. Evaluate potential measures employed to avoid or construct through unique or problematic geologic formations, soils, or permafrost.
- c. Propose mitigative measures to minimize or eliminate potential project impacts to geology and soils, as appropriate.

7. Air Quality

The EIS will:

- a. Evaluate rail-related air emissions, if the alternative affects a Class I or non-attainment area as designated under the Clean Air Act.
- b. Discuss and evaluate the potential air emissions increases from vehicle delays at new at-grade road/rail crossings for each alternative. Emissions from vehicle delays will be factored into the emissions estimates for the affected area, as appropriate.

- c. Describe the potential air quality impact resulting from new rail line construction activities.
- d. Propose mitigative measures to minimize or eliminate potential project impacts to air quality, as appropriate.

8. Noise

The EIS will:

- a. Describe the potential noise impacts during new rail line construction.
- b. Describe the potential noise impacts of new rail line operation.
- c. Propose mitigative measures to minimize or eliminate potential project impacts to sensitive noise receptors, as appropriate.

9. Energy Resources

The EIS will:

- a. Describe and evaluate the potential impact of the new rail line on the distribution of energy resources in the project area for each alternative, including petroleum and gas pipelines and overhead electric transmission lines.
- b. Propose mitigative measures to minimize or eliminate potential project impacts to energy resources, as appropriate.

10. Socioeconomics

The EIS will:

- a. Analyze the effects of a potential influx of construction workers and the potential increase in demand for local services interrelated with natural or physical environmental effects.
- b. Propose mitigative measures to minimize or eliminate potential project adverse impacts to social and economic resources, as appropriate.

11. Transportation Systems

The EIS will:

- a. Evaluate the potential impacts of each alternative, including new rail line construction and operation, on the existing transportation network in the project area, including vehicular delays at grade crossings.
- b. Propose mitigative measures to minimize or eliminate potential project impacts to transportation systems, as appropriate.

12. Cultural and Historic Resources

The EIS will:

- a. Analyze the potential impacts to historic structures or districts previously recorded and determined potentially eligible, eligible, or listed on the National Register of Historic Places within or immediately adjacent to the right-of-way for the proposed rail alignments.
- b. Evaluate the potential impacts of each alternative to archaeological sites previously recorded and either listed as unevaluated or determined potentially eligible, eligible, or listed on the National Register of Historic Places within the right-of-way for the alternative rail alignments and the no-action alternative.
- c. Analyze the potential impacts to historic structures or districts identified by ground survey and determined potentially eligible, eligible, or listed on the National Register of Historic Places within or immediately adjacent to the right-of-way for the alternative rail alignments.
- d. Analyze the potential impacts to archaeological sites identified by ground survey and determined potentially eligible, eligible, or listed on the National Register of Historic Places within the right-of-way for the alternative rail alignments.
- e. Evaluate the potential general impacts to paleontological resources in the project area due to project construction, if necessary and required.
- f. Propose mitigative measures to minimize or eliminate potential project impacts to cultural and historic resources, as appropriate.

13. Subsistence

The EIS will:

- a. Analyze the potential impacts of the alternatives, including the alternate alignments for new rail line construction and operation, on subsistence activities in the project area.
- b. Propose mitigative measures to minimize or eliminate potential project impacts on subsistence activities, as appropriate.

14. Recreation

The EIS will:

- a. Evaluate the potential impacts of the alternatives, including the various new rail line construction alignments and their operation, on recreational opportunities provided in the project area.
- b. Propose mitigative measures to minimize or eliminate potential project impacts on recreational opportunities, as appropriate.

15. Aesthetics

The EIS will:

- a. Evaluate the potential impacts of each alternative, including construction and operation of the rail lines, on visual resources and other aesthetic values within the project area.
- b. Propose mitigative measures to minimize or eliminate potential project impacts on aesthetics, as appropriate.

16. Environmental Justice

The EIS will:

- a. Evaluate the potential impacts of each alternative, including construction and operation of the rail lines, on local and regional minority populations and low-income populations.
- b. Propose mitigative measures to minimize or eliminate potential project impacts on environmental justice issues, as appropriate.

Cumulative Impacts

The EIS will analyze cumulative impacts for each alternative of the proposed construction and operation of new rail facilities on the human and natural environment, or in the case of the no-action, of the lack of these activities. Impact areas addressed will include the categories of land use, biological resources, water resources including wetlands and other waters of the US, navigation, geology and soils, air quality, noise, energy resources, socioeconomics as they relate to physical changes in the environment, safety, transportation systems, cultural and historic resources, subsistence, recreation, aesthetics, and environmental justice. The EIS will incorporate all past, concurrent, and reasonably foreseeable future actions that could result in collectively significant impacts to each of the categories of impacts listed above, and to any other categories of impacts that may be included as a result of comments received during the scoping process or the draft EIS.

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

November 15, 2010

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

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

Dear Colonel Koenig:

This letter responds to the U.S. Army Corps of Engineers (USACE) Alaska District's September 15, 2010, Public Notice (PN) for a proposal by the Alaska Railroad Corporation (ARRC) to construct Phase I of an approximately 80-mile-long railway extension from Fairbanks to Delta Junction, Alaska. The project would include the following eight (8) components, as identified in the PN:

- Tom Bear Trail access road and bridge over Piledriver Slough,
- Northeast rail embankment and construction staging area,
- A 100-acre material source site within the active channel of the Tanana River,
- A 3,300-foot long bridge across the Tanana River,
- An 11,065-foot long levee along the east bank of the Tanana River,
- A southwest access road and rail embankment with two separate bridges each,
- Southwest spur dike embankment protection, and
- Ancillary support facilities including a guard shack, gate, and utilities.

The project site is located within Sections 13, 14, 23, 24, and 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 precise acreage of waters of the U.S., including wetlands, to be impacted by the footprint of the proposed project is unclear, due to a discrepancy in the figures provided. The PN (see Proposed Work) indicates there would be 145.5 acres of permanent and 21.5 acres of temporary impacts, whereas the applicant's Table of Wetland Impacts states there would be 58 acres of permanent and 109.1 acres of temporary impacts.

On October 7, 2010, EPA requested a 30-day extension of time, in order to allow EPA additional time to review additional information on the proposed project. On October 14, 2010, your office granted this extension. We appreciate your consideration in this matter.

Based on our assessment of this project, it is EPA's conclusion that the proposed project does not comply with the Clean Water Act (CWA) Section 404 (b)(1) Guidelines (Guidelines), and that the USACE should deny issuance of the permit for the proposed project by the applicant. We believe the Tanana River to be an Aquatic Resource of National Importance (ARNI) according to the criteria identified in the August 11, 1992 Memorandum of Agreement (MOA) between our agencies regarding Section 404(q) of the CWA, 33 U.S.C. 1344(q) (404(q) MOA). In our opinion, the proposed project may have substantial and unacceptable impacts to the Tanana River, and we are therefore providing, by this letter, notice pursuant to Part IV, Paragraph 3(a) of the 404(q) MOA.

Aquatic Resource of National Importance (ARNI)

The Tanana River is the second largest tributary basin to the Yukon River and drains approximately 45,000 square miles (ADF&G, 2010). From its headwaters in the Alaska Range, the Tanana River flows 590 river miles to the Yukon River, where it accounts for a 37% increase in the streamflow of the Yukon (Brabets and Schuster, 2008). The Tanana River produces approximately 25% of the Yukon River Chinook salmon, a stock of international importance for commercial, subsistence and sport fisheries in Alaska and Canada (Eiler et al., 2006). With numbers declining since 1998, no commercial Chinook salmon fishery was allowed on the Yukon River in 2009, and in January of 2010, a commercial fishery failure was declared for Chinook salmon due to low returns (Howard et al., 2009; U.S. Dept. of Commerce, 2010).

The Tanana River supports eighteen (18) species of fish, three (3) anadromous, and fifteen (15) resident species (ADF&G, 2010; Johnson and Blanche, 2010). A recent study by the University of Alaska Fairbanks found that the Tanana River is a major spawning area for whitefish (Rozell, 2010). The U.S. Fish & Wildlife Service has indicated whitefish may travel over 1,000 miles from the mouth of the Yukon to spawn in the Tanana River. Whitefish are an important subsistence food for rural Alaskans. Subsistence continues in the present day to be the most valued source of both nutrition and cultural identity for residents of Dot Lake, Tanacross, Tok, Tetlin and Northway (Marcotte, 1991; Martin, 1983). Subsistence harvest comprises a substantial portion of village residents' diets, with most of the harvest consisting of moose, four different species of whitefish, and waterfowl (Marcotte, 1991; Martin, 1983; Andersen and Jennings, 2001).

The Tanana River and its adjacent lands provide residents and tourists with a variety of recreational opportunities such as hunting, fishing, trapping, camping, hiking, dog mushing, cross-country skiing, wildlife viewing, flightseeing, snow machining, gold panning, boating, and berry picking (ADNR, 2010; ADF&G, 2006). The Tanana River flows for 200 miles through the 1.81 million acre Tanana Valley State Forest. At the headwaters of the Tanana River, the 682,602 acre Tetlin National Wildlife Refuge is host to 160 migratory and 30 resident bird species, 42 species of mammals, 15 fish species, one amphibian, and an unknown number of invertebrate species. The refuge is located in a major migration corridor through which up to 200,000 sandhill cranes, representing about one half of the world population, annually migrate. The refuge was established primarily for its unique waterfowl values, and produces an estimated 35,000 to 65,000 ducklings annually (USFWS, 2010).

Substantial and Unacceptable Adverse Impacts to an ARNI

Our environmental concerns regarding this project involve the likely substantial effects on the natural ecology and hydrology of the Tanana River, both upstream and downstream of the project site. Ecological productivity of the Tanana River is a result of and dependent on hydrologic processes over the extent of the entire braidplain. The braidplain at the proposed project site has a flood zone width of 4.57 miles (Metz, 2005). The proposed 3,300-foot long bridge, 11,065-foot long levee, and solid-fill rail embankment on the left bank associated with both Phase 1 and Phase 3, would constrict this flood zone by approximately 86%.

This constriction of the flood zone would impound water behind the solid fill and increase water velocity beneath the bridge. During an October 12, 2010 meeting with ARRC, project hydrologist Robin Beebee stated that the existing velocity at the proposed crossing location is approximately eight (8) feet per second and would increase to ten (10) feet per second as a result of the project, a 25% increase in velocity. The contraction and pier scour at the bridge would likely result in deepening of the main channels and head-cuts that propagate upstream. The main channels would be destabilized, and naturally-occurring lateral channel migration would be substantially altered. Outside of the main channels, the impoundment of water would cause sediment to drop out. Side channels and sloughs now providing shallow, low velocity refugia for fish spawning, rearing, and overwintering would disappear at the site, and possibly for some distance upstream and downstream because of the combined effect of impoundment and scour.

The full range of successional stages now extant within the braidplain—ranging from gravel and sand bars, to sparse willows and grasses, to willow thickets, to broadleaf and conifer forests—would be permanently altered, both upstream and downstream. The consequent reduction in biodiversity and extent of early successional habitats, as well as losses of spawning habitats, would adversely impact the sustainability of various fisheries, and would negatively affect both human use and wildlife habitat. The wide braidplain and channel morphology at this location increase the risk that the bridge will capture woody debris and increase ice jamming.

In addition to increasing flow velocity, the channel constriction is also predicted to increase the river's stage elevation. The proposed levee is intended to mitigate the effect of this stage increase on the community of Salcha. Salcha currently experiences nearly annual flooding from groundwater upwelling during high river stages, and overbank flow when ice jams form. The levee may reduce overbank flooding and stabilize the right bank of the Tanana River but will not reduce flooding from groundwater upwelling. The stage increase caused by the project may actually lead to increased groundwater upwelling.

The proposed filling of approximately 50 acres of channel for levee construction would eliminate fish habitat, cut off a substantial amount of flow north of the island where the proposed access road and bridge would join, and alter the interaction between surface and groundwater.

Alternatives Analysis

In our February 2, 2009 letter on the *Draft Environmental Impact Statement for the Alaska Railroad Corporation Construction and Operation of a Rail Line between North Pole and Delta Junction, Alaska* (DEIS), EPA rated the DEIS as EC-2 (Environmental Concerns, Insufficient Information), and expressed environmental concerns regarding potential impacts to water quality, open water habitats, wetlands, stream channels, and riparian areas. We encouraged the consideration of full span bridges for stream, river and wetland crossings. We also found that there was insufficient information regarding the purpose and need for the project, and requested data be provided to support the project utility and need identified, to include discussion of the interest of the US Army and US Air Force, or private industry (tourism, agriculture, mining and petrochemical) to utilize the proposed service. After reviewing the Final EIS, we stated in our letter of October 22, 2009, that our concerns remain unaddressed.

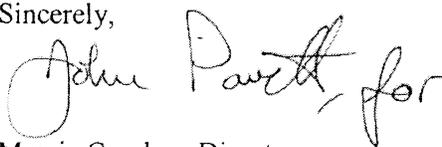
The importance of having sufficient data to support all identified project purposes and needs cannot be overemphasized. Without compelling evidence of current demand, and/or a demonstration that existing capacity is inadequate to meet future demands, the no-build alternative must be presumed to be a practicable alternative to meeting the transportation needs of the area, and the discharge of fill into waters of the U.S. cannot be authorized.

Conclusion

Section 230.10(a) of the CWA's Section 404(b)(1) Guidelines prohibits the discharge of dredged and/or fill material into waters of the U.S. when there is a practicable alternative that would have less adverse impact on the aquatic ecosystem, so long as that alternative does not have other significant impacts. Section 230.10(c) of the Guidelines prohibits the discharge of dredged or fill material which will cause or contribute to significant degradation of the waters of the U.S. We are concerned that the applicant has not fully demonstrated that the proposed project is both the least environmentally damaging practicable alternative and would not result in significant degradation to the Tanana River, as required by the Guidelines. Our review of the information available to us to date leads us to conclude that the applicant has not provided sufficient information to support a determination that alternative bridge designs and/or crossing locations are not practicable. EPA believes there may be practicable alternatives—such as crossing at Flag Hill or the Little Delta River—that would not substantially constrict the flood zone, would not require construction of a levee, and would have less adverse effect on the aquatic environment.

Thank you for the opportunity to review this project. We greatly appreciate the coordination of information on this complex project which has been provided by the District and the applicant thus far. We will provide further information on our concerns within 25 days of this letter in accordance with Part IV, Paragraph 3(b) of the 404(q) MOA. In the interim, should you have any questions or require any additional information, please do not hesitate to contact me at (907) 271-6555 or have your staff contact Tracy DeGering at (907) 271-3419.

Sincerely,



Marcia Combes, Director
Alaska Operations Office

cc (via e-mail):

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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DEC 10 2010

OFFICE OF THE
REGIONAL ADMINISTRATOR

Colonel Reinhard W. Koenig
District Engineer, Alaska District
U.S. Army Corps of Engineers
P.O. Box 6898
Elmendorf AFB, Alaska 99506-0898

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

Dear Colonel Koenig:

This is in further reference to the application by the Alaska Railroad Corporation (ARRC) for a Standard Permit, which was placed on Public Notice (PN) POA-2008-53 by the U.S. Army Corps of Engineers, Alaska District (Corps) on September 15, 2010. EPA's review concludes that the project as proposed does not comply with the Clean Water Act Section 404(b)(1) Guidelines (Guidelines) and will have substantial and unacceptable adverse effects on an Aquatic Resource of National Importance (ARNI), the Tanana River.

PN POA-2008-53 identifies the proposed activities associated with Phase I of the approximately 80-mile long railway extension from Fairbanks to Delta Junction. This entire project was the subject of an Environmental Impact Statement (EIS) on which EPA provided detailed comments (see enclosed). The principle components of Phase I of the Northern Rail Extension (NRE) project are a 3,300-foot long bridge across the Tanana River and an 11,065-foot long levee along the river's east bank. The PN indicates that Phase I of the NRE would place fill material into 145.5 acres of the Tanana River.

The stated purpose of the NRE project is to: (1) provide freight and passenger rail service to the region as a safe, reliable and efficient transportation alternative to the Richardson Highway; (2) allow reliable, year-round access to training areas used by the U.S. military; and (3) foster the development of Alaska's economy by expanding the state-owned railroad's passenger and freight network to an area not currently served by rail.

On November 15, 2010, the United States Environmental Protection Agency, Region 10 (EPA) provided comments on the proposed permit pursuant to Part IV, Paragraph 3(a) of the August 11, 1992 Memorandum of Agreement (MOA) between our agencies regarding Section 404(q) of the Clean Water Act (CWA), 33 U.S.C. 1344(q), (404(q) MOA). We stated in our letter that we do not believe the project as proposed complies with the Guidelines. EPA also expressed concerns that the project as proposed may result in substantial and unacceptable adverse effects to the Tanana River, an ARNI.

As expressed in our earlier letter, we are concerned that the applicant 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.

Both of these factors must be satisfied to comply with the Guidelines. The burden of proof to demonstrate compliance with the Guidelines rests with the applicant. If an application contains insufficient information to establish compliance with the Guidelines, then a Section 404 permit cannot be issued.

The project purpose identified in the EIS is used to define the scope of alternatives analysis. As EPA stated in our comments on the EIS, we believe that there is insufficient information provided to justify the applicant's need and purpose. In such a case, the Corps may consider that an alternative which uses other measures, such as additional shuttle service to meet the basic project purpose of providing transportation to meet future demand may be practicable. We ask that the applicant be required to provide more detailed information to support its basic project purpose, so that the scope of alternatives may be appropriately defined.

The applicant has not provided sufficient information to support a determination that alternative bridge designs and/or crossing locations are not practicable. The U.S. Army Alaska conducted an independent evaluation of potential crossing locations and bridge designs. This analysis indicated that crossing the Tanana River at other locations—such as at Flag Hill or the Little Delta River— would be practicable and actually preferable from the standpoint of providing access to Army training areas (Metz, 2005). Likewise, a State of Alaska Joint Commission identified Flag Hill as the preferred location for a rail extension corridor across the Tanana (Metz, 2005).

The width of the flood zone at the proposed crossing location is wider than other potential crossing locations. Crossing the river at another location, like Flag Hill or Little Delta River, would (a) not constrict the flood zone as much as the proposed crossing, (b) not require construction of a levee, and (c) have less impact on the aquatic environment. Alternatively, crossing the river at the proposed location, but with a design that provides additional flow capacity (e.g., adding bridge spans or spanning the entire breadth of the braidplain without using any solid fill embankment) would also have less adverse effect on the aquatic environment than the proposed project.

In sum, the applicant's alternatives analysis was too narrow to demonstrate that the proposed action is the LEDPA. The presumption that there are alternatives to non-water dependent activities which would not involve a discharge of fill has therefore not been rebutted.

Since our letter of November 15, 2010, EPA has seen no new information which would change our opinion that the project as proposed could cause substantial and unacceptable adverse effects on the Tanana River. The proposed components of Phase I of the NRE would permanently alter the ecological and hydrological processes of the Tanana River at the crossing location, and will have substantial and unacceptable adverse effects on numerous fish species and fisheries.

The solid fill embankment and levee are intended and designed to permanently restrict lateral channel migration and confine the majority of the river's flow to a single channel under the proposed bridge. The proposed crossing will intentionally alter processes that generate and maintain the complex matrix of aquatic habitats within the river's braidplain. This habitat complexity is key to the ecological productivity of the Tanana River and critical for the eighteen (18) species of fish it supports.

complexity is key to the ecological productivity of the Tanana River and critical for the eighteen (18) species of fish it supports.

The ARRC predicts that the loss of flow capacity due to the proposed solid fill embankment will impound the river and lead to a stage height increase equivalent to the difference between a 100-year and 500-year flood event. The proposed levee is specifically designed to address the predicted magnitude of this impoundment effect. The proposed levee would not address Salcha's existing flood risk; rather it would protect Salcha from the risk of increased flooding caused by the crossing structure.

The ARRC's consultants made this same distinction regarding the levee's purpose relative to the proposed Salcha crossing in their 404(b)(1) evaluation. That document states:

Since it is reasonably foreseeable that any Tanana River bridge configuration would cause a rise, with debris loading, in excess of that permitted under 44 CFR 60.3(c)(10), ARRC would construct a levee to protect structures within the potentially impacted community. ARRC could thus certify that no structures would be affected by an increase in flood elevations created by Phase I of the NRE Project.

In 2003, the Corps evaluated the annual flooding of the community of Salcha. The Corps concluded that a seven mile long levee would be needed to prevent flooding from the river topping its bank; but that the levee would not reduce flooding due to groundwater upwelling. The groundwater flooding is due to the very high transmissivity of the river bank material, and the stage (and hydraulic head) increase caused by the crossing structure may lead to increased groundwater upwelling.

The levee is also designed to prevent Tanana River surface flows from entering Piledriver Slough. This would impact the habitat within Piledriver Slough, which is an historic secondary channel of the river. Surface flows from the Tanana River during high water events are the channel-forming flows for the Slough. Without these flows, successional processes will reduce and eventually eliminate the habitat value of the Slough for fish and other wildlife.

Confining the river's flow to a single, larger channel will result in the elimination of secondary channels within the disturbance footprint up- and downstream of the crossing. These channels typically account for a high percentage of the total aquatic habitat within braided river systems. This is true for total channel length, but also for habitat diversity in terms of substrate, water depth, flow velocity, total suspended solids (TSS) and turbidity, and the occurrence of up- and downwelling flow.

The lateral movement of channels across the river's braidplain generates a great diversity of aquatic and riparian habitats. The Alaska Department of Fish and Game (ADF&G) has identified five distinct water types in the Tanana River based on source water, TSS, and turbidity. The predominant water types are: glacial, groundwater, and tannic-stained runoff water. Many areas present a combination of these types, and the ADF&G has identified two mixed-source classes. These are: mixed glacial-tannic and mixed glacial/groundwater. Fish species utilize different water types preferentially, and fish habitat use patterns shift seasonally in response to changes in water type at the same location over time.

In addition to restricting channel migration, the proposed project will also disrupt river processes associated with bedload movement, sediment and woody debris transport, high flow and ice jam events. The disruption of these processes will alter the distribution of specific aquatic habitats within the braidplain and watershed.

The habitat needs of the various resident and anadromous fish species for spawning, rearing, feeding, overwintering and migration are specific and discrete. Indeed, habitat needs may vary for different ecotypes within a single species, as is the case for humpback whitefish (*Coregonus pidschian*). Humpback whitefish display wide plasticity in life history behavior; lake resident, river resident, allacustrine (moving between lakes and rivers), and anadromous (moving between salt-and freshwater) ecotypes may occur within the same watershed.

The occurrence of necessary aquatic habitats may be limited even within a large watershed. For example, research conducted by the U.S. Fish and Wildlife Service on humpback whitefish in the upper Tanana River watershed has indicated that two spawning areas account for a majority of production (Brown, 2006). Similarly, recent research by the ADF&G indicates that as much of twenty percent (20%) of chum salmon production within the extensive Susitna River drainage is attributable to a single tributary (Merizon, 2010). In much the same way, research by the National Marine Fisheries Service indicates that as much as twenty-five percent (25%) of Chinook salmon production in the entire Yukon River drainage is from the Tanana River and its tributaries (Eiler, 2006).

As referenced in our November 15, 2010 letter, a recent study identified what appears to be a whitefish spawning area of regional significance located downstream of the proposed crossing (Rozell, 2010). The multiple secondary channels in the braidplain at this location are utilized by several species of spawning whitefish, suckers, arctic grayling, northern pike, burbot, and lake chubs. Humpback whitefish, in particular, are a species of great subsistence value within the watershed. The project as currently proposed will likely impact this important habitat by reducing flow in these secondary channels, thereby increasing sediment deposition and substrate embeddedness. Source water composition could also potentially be altered. All of these changes would reduce habitat value.

The project as proposed will have substantial and unacceptable adverse effects on an ARNI, the Tanana River. It does not comply with the Guidelines and therefore should not be authorized. I therefore request, pursuant to Part IV(3)(c) of the Clean Water Act Section 404(q) Memorandum of Agreement (404(q) MOA) between our agencies, signed August 11, 1992, that you provide me with a copy of the draft permit and decision documents if the Corps proposes to issue the permit. Our detailed comments, addressing the applicant's 404(b)(1) Evaluation, overall project purpose, alternatives analysis, project phasing, practicability, substantial and unacceptable impacts to an ARNI, project footprint and jurisdiction, and compensatory mitigation, can be found in the enclosed Attachment 1.

Thank you for the opportunity to review this project. We greatly appreciate the coordination of information on this complex project which has been provided by the District and the applicant thus far. I have asked Michael Szerlog, Aquatic Resources Unit Manager, to provide your staff with our additional technical comments on this project. Should you have any questions or require any additional information, please do not hesitate to contact me at (206) 553-1234 or have your staff contact Tracy DeGering in our Alaska Operations Office at (907) 271-3419.

Sincerely,



Dennis J. McLerran *DJM*
Regional Administrator

cc (via e-mail):

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U.S. EPA's Supplemental Comments on Public Notice POA-2008-53, Tanana River, Alaska Railroad Corporation (ARRC)

The following comments are provided to assist the U.S. Army Corps of Engineers (Corps) in their public interest review, evaluation of compliance with the CWA 404(b)(1) Guidelines, and identify additional measures to avoid, minimize, and mitigate for impacts to aquatic resources. The U.S. Environmental Protection Agency (EPA) requests the Corps' permit decision consider the following concerns.

404(b)(1) Evaluation by HDR, Alaska, Inc.

Earlier this year, HDR Alaska, Inc. (HDR), agent for ARRC, invited us to review and comment on their February 2010 Section 404(b)(1) Evaluation (Evaluation) for Phase 1 of the Northern Rail Extension project. In a letter dated March 16, 2010 (enclosed) we shared our preliminary comments on the proposal, concluding that, at the time, the Evaluation did not adequately demonstrate how the applicant's proposed project complies with the Clean Water Act (CWA) Section 404(b)(1) Guidelines (Guidelines). Specifically, we noted:

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 alternatives not requiring fill into waters of the U.S. may be viable alternatives, 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.

As supplemental information to the public notice, HDR again provided us the opportunity to review their final Evaluation, dated May 2010. Since many of the points and concerns we raised in response to the February 2010 Evaluation were not addressed in the May 2010 version, we have reiterated them in the sections to follow.

Overall Project Purpose

The evaluation of practicable alternatives occurs in light of the overall project purpose (40 CFR §230.10(a)(2)). Identifying the overall project purpose is a critical first step in determining the practicability of alternatives, as it defines the scope of the alternatives analysis. In the current project record, EPA believes that the information provided is not adequate to support the project purpose as the applicant has defined it. We ask that the Corps direct the applicant to provide the data to support the project purpose, in order to be able to build a supportable alternatives analysis.

The stated project purpose, as defined in section 2.3 of the May 2010 Evaluation is to:

“...provide 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 line would provide a safe, reliable, and efficient transportation alternative to the Richardson Highway for freight and passenger service in the region; allow reliable, year-round access to training areas used by the U.S. military; and foster the development of Alaska’s economy by expanding the state-owned railroad’s passenger and freight network to an area not currently served by rail. ” (HDR, 2010, p. 9).

As noted in both Evaluations, it is the responsibility of the Corps to identify the overall project purpose, both under NEPA and for the purpose of compliance with the Guidelines. The overall project purpose for the CWA Section 404 permit review, as identified by the Corps, is independent of the project purpose and need identified in NEPA documents.

We believe it is inappropriate to require that all three project purposes must be met via a single alternative, prior to evaluating other possibilities. 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 should be conducted on that basis.

Listed below are the three identified Project Purposes, followed by EPA’s responses to the information provided in the Evaluation, demonstrating the need for each:

Project Purposes 1 & 3: To provide common carrier rail service as an alternative to existing transportation modes; and to provide passenger train service as an alternative to other transportation modes.

The data provided to demonstrate needs for freight and passenger rail service continues to be inadequate. This conclusion was also given by the Surface Transportation Board’s (STB) Vice Chairman, 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 Guidelines direct that other alternatives, namely, alternatives which do not require

fill into waters, must be presumed to be practicable alternatives to meeting the transportation needs of the area. Consequently, without these data and/or such a demonstration, we believe the discharge of fill into waters of the U.S. for the proposed project cannot be authorized. Passenger service, 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 building a new rail line that has not been evaluated. The current or projected future demand for commuting via train as well 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 (HDR, 2010, p. 13), continues to be unsupported in the May 2010 Evaluation by any data. In addition, the current proposal that there would be enough freight to warrant a single freight train, with 32 loaded cars each way (HDR, p. 15), has not been substantiated with data. The applicant must provide this information in order for the Corps to be able to make a finding of compliance with the Guidelines.

Purpose 2: To support military needs related to surface transportation and access

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). It is our understanding that this would largely be achieved through the construction of Phase 1 alone; however, in an October 13, 2009 letter, U.S. Army General and Vice Chief of Staff Peter W. Chiarelli, writes, "...the Army has not identified construction of a bridge as a formal training requirement shortfall..." Based on this information, it becomes problematic to identify practicable alternatives for project components which are linked solely to military need for the extension. Again, we request that the Corps have the applicant provide information which clearly identifies both the military need and military support for that need, if the Corps is to consider this as part of the overall project purpose.

Part of the identified need for rail access to and from a permanent bridge would be to transport military vehicles; however, "the U.S. Army anticipates the use of commercial semi-tractor rigs"—not rail—"to transport the" (vehicles) "from Ft. Wainwright to a staging area adjacent to the site of the [Tanana Flats Training Area] crossing" (Metz, 2005, p. 232). In a 2005 analysis conducted for the U.S. Army Alaska, it was recommended that a permanent bridge be constructed at Flag Hill and that a road be constructed from the bridge to the relevant area within the Tanana Flats Training Area (Metz, p. 255), allowing the vehicles to be driven under their own power (as opposed to being transported via commercial line-haul). While it is reported that "rail is the Army's preferred mode for overland transport of Stryker vehicles" (Metz, 2005, p. 273), both a bridge-only or bridge and improved access road combination, separate from a rail extension, appear to be viable alternatives to meeting the military's needs that have not been evaluated.

The Evaluation is unclear in allowing the reader to discern the precise current and future needs for both a bridge and rail extension to and through the Tanana Flats and Donnelly TAs. Aside from Stryker vehicles, it is not clear what other types or amounts of equipment, vehicles, personnel, or resources, may require access to the TAs during the various exercises. The possibility of constructing onsite storage within the TAs, in order to avoid extensive, repetitious,

and costly mobilization of items, appears to be yet another viable alternative that has not been evaluated.

If a project purpose of the Northern Rail Extension project is to support military needs related to surface transportation and access, we believe the U.S. Department of Defense 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 the military should not hesitate to identify this need and request authorization for its construction.

It is important to note that independent authorization to construct a bridge does not prevent a rail extension from being constructed in the future, once the demand for passenger and freight service has been demonstrated. Again, the applicant needs to provide these data in order for the Corps to be able to make this finding in its analysis of compliance with the Guidelines.

Other Related Issues: Flooding

In 2004, the Fairbanks North Star Borough (FNSB) and U.S. Department of Agriculture Natural Resource Conservation Service (NRCS) entered into an agreement, resulting in Ordinance No. 2004-20-21, to “implement the Tanana River Flood Plain Acquisition Project at Salcha, Alaska, to restore and enhance the flood plain’s function while helping participating landowners by offering to voluntarily purchase easements at fair market value” (Fairbanks North Star Borough, 2005). Constructing a levee, therefore, seems contrary to the ongoing efforts and intentions of the FNSB and NRCS, and interests of FEMA, of allowing the Tanana River to continue charting its own course, and to protect local residents from future flooding through property acquisition.¹

EPA is concerned that the reason given for the need to construct a levee is somewhat inconsistent with other findings. We are also concerned that the public’s perception may be that this levee will prevent future flooding of Salcha. A levee, in this case, is being proposed by ARRC for the sole purpose of preventing more than a 1-foot increase in water surface elevation that would occur as a result of the proposed bridge design and location. If the bridge were designed in a manner that would avoid an increase in water surface elevation, or if a bridge were located away from the community, a levee would not be necessary. A levee is, therefore, an avoidable impact.

¹ An unpublished 2003 report on flooding in Salcha was prepared by the U.S. Army Corps of Engineers. According to the report, numerous measures would need to be taken to achieve the identified level of flood protection, including constructing an armored levee approximately seven (7) miles long with drainage improvements to address groundwater flooding (e.g., flood proofing all structures inside the leveed area. A project of this scale was estimated to exceed approximately \$83 million. By comparison, the 150 residences and 2 businesses in the study area were assessed at a value of \$14 million. The benefits of a structural flood damage reduction project were determined not to exceed the costs of its construction and maintenance (*in Metz*, p. 117).

Under the current proposal, the levee would not prevent flooding from ice jams, and may in fact increase groundwater upwelling because of an increase in channel depth upstream of the bridge. We are very sensitive to the fact that flooding is a recurring and highly disruptive problem for residents of Salcha, and we are not opposed to the pursuing of solutions to further protect the community. Constructing a flood control project for Salcha, however, is *not* identified as a project purpose of the Northern Rail Extension project, and the development of flood mitigation for Salcha should be pursued as an independent project on its own merits.

Alternatives Analysis

Pursuant to 40 CFR §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. Except as permitted under CWA §404(b)(2), the Guidelines prohibit the authorization of any alternative that is not the least environmentally damaging practicable alternative (LEDPA).

The Evaluation continues to state, on page 3, that practicable alternatives for a project are a subset of the project's reasonable alternatives under NEPA. We note, rather, that 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.

By limiting the alternatives, ARRC has limited the value of its 404(b)(1) Evaluation. In our May 2010 Evaluation, we identified issues in ARRC's alternatives analysis that we believe are inconsistent with the requirements of the Guidelines. These issues have not been addressed at the current time, and we provide a summary of these issues below:

Alignment of the NRE Project

- **“Topography on the east side of the river, south of the Flag Hill crossing location...presents a significant engineering challenge to rail construction within the grade and curvature objectives of the project, such that construction is not practicable. Several hills and ridges would require crossing before reaching the confluence of the Tanana and Delta Rivers. Such extensive earthwork would prove to be prohibitively expensive, in addition to creating a much larger footprint. In addition, the project purpose of providing access to military lands requires crossing the Tanana River” (HDR, 2010, p. 7).**

EPA Response: Both the Richardson Highway and Trans-Alaska Pipeline were constructed through this same region. Given this, EPA questions ARRC's conclusion

that construction of a rail line on the east side of the river, south of Flag Hill, is not practicable.

It is true that the Tanana River must ultimately be crossed to reach both the Tanana Flats and Donnelly Training Areas; however, this crossing need not be confined to a particular location between Fairbanks and Delta Junction. For example, if the entire rail line were constructed on the east side of the Tanana River, the river could be crossed at Big Delta, and a separate, military-controlled bridge and spur line (similar to the proposed Phase 3 and 4 alignments) could be constructed across the Delta River to the training areas from Delta Junction. A Tanana River crossing south of Flag Hill was not evaluated by ARRC; however, it has not been demonstrated that the aforementioned alternative is not practicable. We believe that it could result in fewer impacts to the aquatic environment than the proposed route, and recommend that the Corps direct the applicant to consider it.

“The Flag Hill rock outcrop forms a dominant hard-point that contains the river on the right bank and prevents further rightward lateral erosion upstream of this potential bridge crossing site” (Metz, 2005, p. 69 “Earlier studies of potential Tanana River crossings concluded that a Flag Hill crossing would be the best choice for a bridge location...” (HDR, 2010, p. 32).

EPA Response: We believe that the Flag Hill alternative represents a potentially sound, practicable, and less damaging alternative than the proposed project. If the applicant has data that indicate otherwise, we request that they provide it.

- **“The Flag Hill crossing and its associated Salcha Alternative Segment 2 ... would impact 150 homes or businesses in the Salcha area and would require relocation of portions of the Richardson Highway, as well as the Salcha Elementary School, to allow adequate space for the rail line and the highway to pass between the Tanana River and the adjacent bluff. Of note, the Salcha School grounds and associated ski trails are considered 4(f) properties. Any impact to these 4(f) resources would be considered “use” under 4(f). Neither the Federal Railroad Administration nor Federal Transit Administration could provide funding for a project that includes Salcha Alternative Segment 2 and its associated crossing at Flag Hill if a feasible and prudent alternative is available” (HDR, 2010, p. 34).**

EPA Response: Impacts to 4(f) property do not preclude an alternative from being practicable and authorized under CWA Section 404 if it is determined to be the LEDPA. Under 23 CFR 774, The Federal Highway Administration can approve the use of 4(f) property if: a) there is no feasible and prudent avoidance alternative to the use of land from the property; and the action includes all possible planning to minimize harm to the property resulting from such use; or b) the Administration determines that the use of the property, including any measure(s) to minimize harm (such as avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact on the property. Because this alternative was ultimately not selected as ARRC’s preferred alternative, the Evaluation does not address either the need to use 4(f) property or the ways in which Salcha Alternative Segment 2 could further avoid,

minimize, or mitigate for impacts to 4(f) properties. This alternative is practicable and must be evaluated alongside all other practicable alternatives.

Proposed Bridge at Salcha

- **Regarding a 4,000-foot bridge crossing at Flag Hill: “Channel modification would be accomplished using rock revetments, multiple channel plugs, and fill in the river bed on the south side. Rock revetments would be used to stabilize the right bank in place and to create a new left bank shoreline, in order to modify flow as necessary for the 4,000-foot bridge. This construction scenario could result in unacceptable impacts to the aquatic environment. It would be expected to substantially alter natural hydrology, as described above, and substantially impact anadromous fish habitat.” (HDR, 2010, p. 32)**

EPA Response: It is not our desire to exchange one set of unacceptable adverse impacts for another. However, we have not seen the information on which this conclusion was based. Given that we have seen no specific construction plans for the Flag Hill alternative, EPA questions how the impacts expected under this scenario differ from those which would result from the proposed crossing at Salcha. We ask that the Corps direct the applicant to provide the information which led to its conclusion that the Flag Hill alternative would result in unacceptable impacts to the aquatic environment, but similar channel modification at Salcha would not.

- **“The proposed Salcha bridge location was evaluated closely, with a hydrology and hydraulics model developed for the Salcha site, using various bridge lengths and configurations.” (HDR, 2010, p. 40).**

EPA Response: We are concerned that a close evaluation of potential impacts resulting from various bridge lengths and configurations occurred only after the preferred crossing location was selected. Without undergoing similar studies for all alternative crossing locations, it cannot be demonstrated that the crossing at Salcha is the LEDPA.

- **“The modeling showed that (if) bridge lengths (are) longer than the braidplain is wide, no project benefits would be gained.” (HDR, 2010, p. 42)**

EPA Response: Our concern is that the proposed bridge does not presently span the entire—not just the active—braidplain. The Evaluation notes: “Both the 3,000- and 3,300-foot bridge lengths would constrict the active braidplain of the Tanana River, while the 4,050-foot bridge would span the active braidplain” (HDR, 2010, p. 53). Constricting the braidplain would result in substantial and unacceptable adverse effects to the river’s hydrology, which we believe are avoidable.

Proposed Levee

- **“Since it is reasonably foreseeable that any Tanana River bridge configuration would cause a rise, with debris loading, in excess of that permitted under [FEMA**

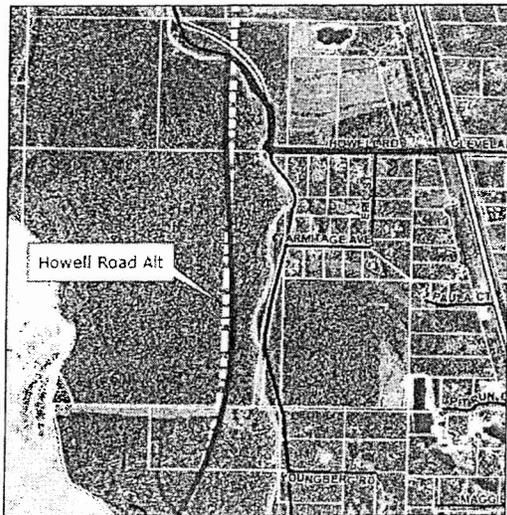
regulations] 44 CFR 60.3(c)(10), ARRC would construct a levee to protect structures within the potentially impacted community. ARRC could thus certify that no structures would be affected by an increase in flood elevations created by Phase 1 of the NRE Project” (HDR, 2010, p. 45).

EPA Response: First, it is important to remember that the purpose of the levee is not to protect Salcha from all flooding *per se*, but to protect Salcha from the increase in stage elevation caused by the proposed bridge. We continue to believe a levee to be an avoidable impact; we believe a bridge design and/or location may exist for which a levee is not needed. As noted in the Evaluation, “Constriction of the active channel would cause slightly higher water levels upstream of the proposed Tanana River bridge during flood events” (HDR, 2010, p. 54). We encourage ARRC to consider spanning the entire braidplain of the Tanana River, not just the main, active channel. 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.

Proposed Access Road

- **It is...not possible to develop a Howell Road access alternative that avoids using the Old Richardson Hwy” (HDR, 2010, pp. 50, 51).**

EPA Response: The February 2010 Evaluation included a Howell Road access alternative that avoided using the Old Richardson Highway. It is our understanding that this, and the modified Howell Road access alternative included in the May 2010 Evaluation (see figures below), were eliminated because of concerns with being too close to Piledriver Slough. The identified problem with the alternative included in the February 2010 Evaluation was that there was not enough room for an access road between Piledriver Slough and the rail line associated with NRE Phase 2. The problem the applicant identified with the alternative included in the May 2010 Evaluation are the indirect impacts to Piledriver Slough resulting from improvements to the Old Richardson Highway; these road improvements would provide access to the western (roomier) side of the rail line associated with NRE Phase 2.



May 2010 Evaluation, Figure 3.5-5



February 2010 Evaluation, Figure 3.5.2-4

While ARRC “does not desire to create additional at-grade crossings” (HDR, 2010, p. 51), it appears that doing so—where Howell Road (extended) is parallel to the rail, as shown in the February 2010 alternative—would result in both the least amount of road improvements, and allow an access road to be constructed west of the tracks, where there is more space. This appears to be a practicable alternative that was not evaluated, and we recommend that the Corps consider it.

A Howell Road access alternative would be located in the same vicinity of proposed Phase 2 alignment, resulting in impacts being limited to a finite area—in contrast to the preferred Tom Bear Trail Extension alternative, which “extend[s] approximately 1,700 feet onto the braidplain” (HDR, 2010, p. 51)—and could serve as a direct corridor to and from the proposed staging area.

Proposed Infrastructure on the southwest side of the Tanana River

- **“Facilitating construction of the NRE project via railroad vehicles is not a practicable option. A permanent access road would be required the entire length of the NRE project on the SW side of the Tanana River” (HDR, 2010, p. 56).**

EPA Response: There are two parts to this statement: 1) a parallel road is required to facilitate construction of the NRE project, and 2) the road must remain upon completion.

- 1) EPA does not dispute that construction via railroad vehicles—in other words, working from the rail embankment—may not be practicable. We do, however, question the need for a road (i.e., placement of additional fill beyond the project footprint), when the cleared project area, alone, may provide adequate access for all necessary construction equipment and anticipated traffic. Heavy equipment working

in wetlands could be placed on mats, or other measures (e.g., ice roads, compacted snow, low psi ground bearing weight, etc.) could be used to prevent soil disturbance.

- 2) ARRC has not clearly demonstrated that a permanent and parallel road is necessary to maintain the entire rail alignment on the southwest side of the Tanana River. We are not aware that such a road exists elsewhere along the main rail line; all maintenance, as we understand it, is performed via hi-rail equipment.
- **“It is not practicable to have the roadway and railroad share the same bridge surface” (HDR, 2010, p. 57). “...The separated approach embankments that would be constructed under Phase I would require bridges where they (separately) cross two waterbodies: a side channel of the Tanana River, known as Boundary Slough, and its tributary, Beebee Slough” (HDR, p. 58).**

EPA Response: Unless and until demonstrated otherwise, it appears practicable to extend the bi-modal nature of the crossing to, at minimum, Beebee Slough. Combined rail and vehicle use is in fact practicable, as demonstrated both by the proposed bridge itself and the existing 2.5-mile long Anton Anderson Memorial tunnel near Whittier, site of the first computerized regulation of both rail and highway traffic and longest combined vehicle-railroad tunnel in North America. (Alaska Department of Transportation & Public Facilities, 2010). The applicant has not provided information which would compel another conclusion.

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 without demonstration that the entire NRE alignment has been determined to be the LEPDA. We believe this is essential, because, as noted in the Evaluation, the choice of the Tanana River crossing location will directly affect the design and placement, and therefore impacts of later phases of the NRE project (HDR, 2010, p. 33). These subsequent project portions are therefore inextricably linked to the bridge. Likewise, a potential military access road to the Blair Lakes facility, and its associated impacts, will vary depending upon the location of a permanent crossing of the Tanana River. Issuance of a permit for a crossing at Salcha essentially locks in the alignments for the remainder of the NRE project, none of which have undergone their own 404(b)(1) analysis to determine whether they are the LEDPA.

Phase 1, located 13 miles from the north end of the rail line, would result in the construction of a 3,300-foot long bridge and associated rail embankment, an 11,065-foot long levee, and Tom Bear Trail Extension access road, none of which provides a rail connection to either Fairbanks or Delta Junction. 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 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.

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 (40 CFR §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. A number of questions about the practicability of certain alternatives (e.g., bridge length), logistics, (e.g., delivery of bridge beams) and costs (e.g., we identified project life cycle costs as an inappropriate factor to be weighed in the alternatives) were identified by EPA in our comments. These issues remain unaddressed, and we would appreciate discussion with the Corps as to how it intends to consider them in its evaluation.

While not specified in the Evaluation, it is our understanding that the bridge alignment is based on an optimal speed of 79 mph at which passenger—not freight—trains would travel. Based on ARRC's March 2010 Track Chart, the fastest speed at which trains are currently authorized to travel (in limited and specified areas) is 65 mph for passenger trains, and 60 mph for freight trains (Alaska Railroad Corporation, 2010). It is unclear why the proposed rail extension has been designed to a different standard, and why it could not conform to existing, slower design speeds. EPA does not 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. Also unclear is how many trains, in total, would/could be operated at any one time, which greatly influences the design of all proposed phases (e.g., necessity and construction of sidings).

Substantial and Unacceptable Adverse Impacts to an ARNI

Our environmental concerns regarding this project involve the likely substantial effects on the natural ecology and hydrology of the Tanana River, both upstream and downstream of the project site. Ecological productivity of the Tanana River is a result of and dependent on hydrologic processes over the extent of the entire braidplain. The braidplain at the proposed project site has a flood zone width of 4.57 miles (Metz, 2005, p. 25). The proposed 3,300-foot long bridge, 11,065-foot long levee, and solid-fill rail embankment on the left bank associated with both Phase 1 and Phase 3, would constrict this flood zone by approximately 86%.

This constriction of the flood zone would impound water behind the solid fill and increase water velocity beneath the bridge. During an October 12, 2010 meeting with ARRC, project hydrologist Robin Beebee stated that the existing velocity at the proposed crossing location is approximately eight (8) feet per second and would increase to ten (10) feet per second as a result of the project, a 25% increase in velocity. The contraction and pier scour at the bridge

would likely result in deepening of the main channels and head-cuts that propagate upstream. The main channels would be destabilized, and naturally-occurring lateral channel migration would be substantially altered. Outside of the main channels, the impoundment of water would cause sediment to drop out. Side channels and sloughs now providing shallow, low velocity refugia for fish spawning, rearing, and overwintering would disappear at the site, and possibly for some distance upstream and downstream because of the combined effect of impoundment and scour.

The full range of successional stages now extant within the braidplain—ranging from gravel and sand bars, to sparse willows and grasses, to willow thickets, to broadleaf and conifer forests—would be permanently altered, both upstream and downstream. The consequent reduction in biodiversity and extent of early successional habitats, as well as losses of spawning habitats, would adversely impact the sustainability of various fisheries, and would negatively affect both human use and wildlife habitat. The wide braidplain and channel morphology at this location increase the risk that the bridge will capture woody debris and increase ice jamming.

In addition to increasing flow velocity, the channel constriction is also predicted to increase the river's stage elevation. The proposed levee is intended to mitigate the effect of this stage increase on the community of Salcha. Salcha currently experiences nearly annual flooding from groundwater upwelling during high river stages, and overbank flow when ice jams form. The levee may reduce overbank flooding and stabilize the right bank of the Tanana River but will not reduce flooding from groundwater upwelling. The stage increase caused by the project may actually lead to increased groundwater upwelling.

The proposed filling of approximately 50 acres of channel for levee construction would eliminate fish habitat, cut off a substantial amount of flow north of the island where the proposed access road and bridge would join, and alter the interaction between surface and groundwater.

Project Footprint & Jurisdiction

Four different renditions of the amount of fill into waters of the United States have been provided by the USACE or the applicant during the Public Notice review, as shown in the following table.

Table 1: Comparison of different fill impacts for the proposed NRE project based on various sources.

Source Document	Permanent fill amount (acres)	Temporary fill amount (acres)	Total fill amount (acres)
PN, fill totals added up from "Proposed Work" section	145.5	21.5	167
"Tables of Wetland Impacts" referenced in PN	58.0	109.1	167.1
"USACE 404 Permit Application Box 22. Surface Area in Acres of Wetlands or Other Waters Filled" (Alaska Railroad Corporation and HDR Alaska, Inc., 2010)	58.0	134.2	192.2
Application for Department of the Army Permit, Box 22 on page 5, "Surface Area in Acres of Wetlands or Other Waters Filled" (CD hand-delivered by HDR to EPA on September 22, 2010).	60.5	132.8	193.3

The extent of permanent fill varies by 87.5 acres (a 150% increase from the lowest- to highest-stated fill amounts). The temporary fill varies by 112.7 acres (greater than a 5-fold increase from the lowest- to highest-stated fill amounts). Total fill varies by 26.3 acres, an increase of 16% from the lowest- to highest-calculated total fill amounts. These disparate numbers confuse the analysis of extent of impacts of fill on wetlands and waters of the U.S. Without a clear identification of the proposed footprint of fill, we cannot adequately evaluate the full extent of impacts to the river and downstream waters.

Another significant difficulty in evaluating this proposed project is that it is unclear how the extent of wetlands or waters of the U.S. were determined. The "Project Overview, NRE Phase I Project Features and Wetlands Map" (Alaska Railroad Corporation and HDR Alaska, Inc., 2010) and Box 22 of the Application for Department of the Army Permit depict the extent of wetlands that the applicant asserts will be filled; these are predominantly riverine waters of the U.S. An ocular estimate of the riverine wetlands depicted on the map shows an approximate extent of 425 acres, which is 2.5 times larger than the total 167 acres of fill reported in the PN. It is unclear why a swath of approximately 1,000 feet of riverine wetlands on each side of the proposed Tanana River bridge was selected to be depicted on the map, and why other affected wetlands were not similarly depicted. Additionally, the Mitigation Statement provided by ARRC has a different figure for the extent of wetlands impacted by the proposed project, making reference to 1,601.5 acres of wetland and waters within the NRE Phase 1 Project Area as identified in a Preliminary Jurisdictional Determination (PJD) dated in January 2008 and March 2010. EPA has not seen the PJD prepared by ARRC, nor to our knowledge has any PJD yet been approved by the U.S. Army Corps of Engineers for this project site. Without these data, we

cannot adequately evaluate the full extent of impacts to the river and downstream waters, and so we ask that the Corps provide accurate data on the extent of wetlands proposed to be impacted by this project.

Federal regulatory jurisdiction for waters of the U.S. under Section 10 of the Rivers and Harbors Act of 1899 extends laterally over the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water (OHW) mark. Jurisdiction extends to the edges of all such waterbodies, even though portions may be extremely shallow, or obstructed by shoals, vegetation or other barriers (Geographic and Jurisdictional Limits of Rivers and Lakes, 1986). In the case of a braidplain system such as at the proposed NRE Phase I project site, federal regulatory jurisdiction would then extend from OHW on the northeastern bank of the Tanana River to OHW on the southwestern bank of Beebee Slough, and include the vegetated islands in between. Consequently, most of the NRE Phase I project features fall into jurisdictional waters of the U.S. It is not clear to EPA, based upon the documents presented in association with the PN, whether mapping and characterization of all waters of the U.S., including wetlands, has been conducted over the entire jurisdictional area.

Compensatory Mitigation

ARRC's proposal for mitigation lacks detail, applicability and surety. The Evaluation devotes a mere half page to the subject of mitigation. Based on the questions we have identified concerning alternatives, we question whether mitigation by avoidance and minimization has been met for the project as proposed. For example, the applicant states, "The levee has been designed and will be constructed to minimize impacts to the Tanana River to the extent practicable." EPA, however, finds the levee itself to cause an unacceptable adverse impact to the Tanana River. In another example, the applicant states, "...on its northeast (right) bank in the vicinity of the upstream portion of the proposed levee the Tanana River has eroded approximately 160 acres of uplands in the past 72 years, which has caused significant impacts to the homeowners living in the nearby floodplain. The NRE Phase I Project would stabilize this area and mitigate flood impacts." EPA does not find that "mitigation" of flood impacts to residences in a floodplain provides mitigation for unavoidable losses of waters of the U.S., and therefore, this proposal does not qualify as a mitigation measure.

In its Mitigation Statement, ARRC states that 1,601.5 acres of wetlands and waters are within the project area per the PJD, but that 60.5 acres will be permanently impacted, and 133 acres will be temporarily impacted. We have not seen the PJD, nor has the PJD been endorsed by the Corps. ARRC also refers to a Wetlands Functional Assessment (HDR, 2010, p. 70), but we have not seen any wetlands functional assessment. We are therefore not able to evaluate the extent of permanently impacted wetlands asserted by the applicant, nor the functions that the applicant asserts those wetlands provide. We ask that the Corps provide this information in order to facilitate our review.

It appears that the 60.5 acres of permanently impacted wetlands for which the applicant proposes compensatory mitigation corresponds only to the direct footprint of fill into waters and wetlands. EPA finds this proposal to be insufficient, as it does not include secondary unavoidable impacts to waters of the U.S. that will result from the project. The extent of aquatic

resources that will be substantially altered or destroyed far exceeds 60.5 acres. Ecological and hydrological alterations to waters of the U.S. will result from: inundation due to increased water elevation; increased flooding due to debris jams and ice jams; erosion from head-cutting and scouring due to channel constriction, bank hardening and increased water velocity; increased upwelling of ground water; and degradation or elimination of fish and wildlife habitats. These effects will occur both upstream and downstream, throughout the width of the floodplain, and even behind the proposed levee. These affected waters and wetlands have not been delineated or mapped, nor has compensatory mitigation been proposed for the impacts to them. EPA contends that compensation for the waters and wetlands that will be lost as a result of secondary effects from the project should be provided. Failure to provide compensation would not comply with the Final Rule for Compensatory Mitigation for Losses of Aquatic Resources (2008), and consequently would not comply with the Guidelines.

ARRC's Mitigation Statement proposes compensatory mitigation ratios as follows: 1.5:1 for unavoidable impacts to 2.7 acres for the Beebee and Boundary Slough side channels on the southwest side of the project; 1:1 for 57.1 acres for the main channel of the Tanana River and northeast side of the project; and 1:1 for 0.7 acres of Piledriver Slough. EPA finds that these ratios are not in compliance with the Alaska District Regulatory Guidance Letter 09-01 (Alaska RGL), and suggests that further work should be done to develop acceptable compensation ratios for the losses of these resources. ARRC proposes meeting compensatory mitigation, in part, by paying in-lieu fee payments to The Conservation Fund. The Conservation Fund achieves mitigation objectives by purchasing preservation lands; sample ratios for preservation in the Alaska RGL for preservation lands range from 1.5:1 to 3:1. This would not provide adequate mitigation which is required by existing policy. The Alaska RGL, for example, specifies that impacts to ponds, lakes, rivers and streams should be mitigated for in the high category, dictating, at a minimum, a ratio of 3:1. In addition, the Final Rule requires that mitigation ratios for preservation be greater than 1:1 (73 FR 19675). We recommend that the Corps direct the applicant to develop appropriate compensation, consistent with existing policy, once adequate avoidance and minimization has been demonstrated.

ARRC also proposes to meet compensatory mitigation through a "hybrid of permittee-responsible and third-party responsible mitigation". Its plan, however, is vague, lacks detail and provides no surety that it will actually be carried out. The plan specifies that "qualified government and non-government resource agencies and entities" will receive "mitigation funds". We believe that the plan needs to identify where, when, and by whom aquatic resource restoration, enhancement, creation, and/or preservation projects will be carried out. EPA requests that we be provided with those details for review, and objects to the issuance of any Department of the Army permit without the applicant's commitment to carry out clearly stated mitigation requirements.

Conclusion

The Guidelines are explicit (40 CFR Sec. 230.10(a)) in that no discharge of dredged or fill material shall be permitted if there is a practicable alternative, and directs that no permit can 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)). As noted in our

November 15, 2010 letter, and in our March 16, 2010 letter, we are concerned that the applicant has not fully demonstrated that the proposed project is both the least environmentally damaging practicable alternative and would not result in significant degradation to the Tanana River, as required by the Guidelines. Our review of the information available to us to date leads us to conclude that the applicant has not provided sufficient information to support a determination that other alternatives, including alternative bridge designs and/or crossing locations are not practicable. EPA believes there may be practicable alternatives—such as crossing at Flag Hill or the Little Delta River—that would not substantially constrict the flood zone, would not require construction of a levee, and would have less adverse effect on the aquatic environment. We therefore conclude that the proposed permit as described does not comply with the Guidelines, and if issued, will cause substantial and unacceptable adverse effects to the Tanana River, which is an ARNI. We have identified additional information necessary for review and also identified what we believe needs to be provided in order to rebut the presumption that less-impacting alternatives exist, and we request that the Corps provide us with this information in order to facilitate our review. Based on these conclusions, we maintain our objections under §404(q) of the Clean Water Act, and request, in our letter to the Corps, Notice under Part IV 3(c) of the existing 404(q) Memorandum of Agreement between our agencies should the Corps propose to issue the permit.

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