

**Tanana Chiefs Conference¹ • Yukon River Inter-Tribal Watershed Council²
• Alaska Community Action on Toxics • Alaskans for Wildlife • Alaska
Soles, Great Old Broads for Wilderness • Alaska Wilderness League • Alaska
Wildlife Alliance • All About Adventure • Audubon Alaska • Brooks Range
Council • Center for Biological Diversity • Defenders of Wildlife •
Earthworks • National Parks Conservation Association • Native Movement •
Northern Alaska Environmental Center • Protect the Kobuk • Sierra Club •
The Wilderness Society • Trustees for Alaska • Winter Wildlands Alliance**

Submitted via e-mail

October 4, 2023

Administrator Michael S. Regan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

**Re: Environmental Protection Agency Engagement in the Remand Process for the
Proposed Ambler Mining District Industrial Access Road**

Dear Administrator Regan:

On behalf of the above-listed organizations and our members, we are writing to request the U.S. Environmental Protection Agency (EPA) engage to the full extent of its legal authority in the remand process currently underway for the proposed 211-mile Ambler Mining District Industrial Access Road (Ambler Road) in Alaska. This complex and far-reaching infrastructure proposal will cause significant degradation to aquatic resources across a vast region. Many of those impacts, as well as appropriate mitigation to address and offset those impacts, were not adequately considered or adopted when the U.S. Army Corps of Engineers (Corps) and other federal agencies authorized the project in August 2020. These authorizations are currently undergoing additional analysis as part of a remand process requested by the Biden Administration. EPA's engagement and expertise is necessary to ensure the Corps and other agencies address the substantial gaps and problems with the prior analysis of this complex project, particularly with regard to aquatic resources and the Corps' compliance with the Clean Water Act (CWA).

This letter provides background information on how the prior decision failed to comply with the law. As discussed below, specific areas where EPA previously identified concerns and

¹ Tanana Chiefs Conference is a tribal consortium made up of 42 members, including 39 villages and 37 federally recognized tribes occupying the Brooks Range and the Yukon and Tanana River watersheds in Interior Alaska.

² The Yukon River Inter-Tribal Watershed Council is a treaty organization comprised of 74 tribes and First Nations extending from one end of the Yukon River to the other.

where EPA's engagement will be vital going forward include: the lack of baseline information; the lack of site-specific information about the project's location and design; the Corps' failure to ensure the project would not cause significant degradation of aquatic resources; and the Corps' failure to require any compensatory mitigation.

Background

The Ambler Road would be a 211-mile industrial access road that would cut across the Southern Brooks Range in Alaska and would open the region to large-scale hardrock mining. The road would permanently fill over 2,000 acres of wetlands and cross over 2,900 waterbodies. It would require approximately 2,903 culverts and 29 bridges, with 11 large bridges crossing major rivers, including the Kobuk Wild and Scenic River. The project would permanently discharge between 8.4–11 million cubic yards of fill into wetlands and would directly and permanently impact over 47 miles (250,000 feet) of stream channels, at a minimum. The corridor passes through areas with naturally occurring asbestos and places where there is a high likelihood that construction will generate acid rock drainage. It is also almost entirely underlain by continuous permafrost that is highly susceptible to thawing.

The Alaska Industrial Development and Export Authority (AIDEA), a State of Alaska–owned corporation, applied to the U.S. Bureau of Land Management (BLM) and U.S. National Park Service (NPS) for right-of-way permits and to the Corps for a CWA Section 404 permit to build the project. The agencies initially deemed AIDEA's application incomplete under their respective statutory requirements. AIDEA submitted a revised application, but it still lacked detailed, site-specific information about the design and location of the Ambler Road, and it lacked baseline information about hydrology and other resources. Despite that, the agencies moved forward with their environmental review processes and issued a final Environmental Impact Statement (EIS) and their decisions approving the project in 2020.

During the prior permitting process, EPA began elevating its concerns over the project under CWA Section 404(q). EPA indicated the supporting documents for the project did not contain sufficient information to address the necessary factual determinations or to make reasonable and defensible determinations that the proposed discharges would comply with the 404(b)(1) Guidelines.³ EPA determined the project “may result in substantial and unacceptable impacts” to aquatic resources of national importance — specifically, the Kobuk and Koyukuk Rivers and their tributaries and wetlands, and the Nutuvukti fen.⁴ EPA based this determination on the “outstanding natural resource value” of the region's wetlands and waterways, habitat for fisheries and other wildlife, subsistence use, and unique ecosystems like the Nutuvukti fen — an “intricate” and “unique” wetland ecosystem.⁵ EPA noted that adverse impacts “would result from water extraction activities associated with dust abatement, the development of [gravel mines] adjacent to waterways, and the release of hazardous materials and pollutants during operation and management of the road.”⁶ EPA did not ultimately elevate its concerns over the

³ Letter from Daniel Opalski, U.S. Env'tl. Prot. Agency, to Colonel Phillip Borders, U.S. Army Corps of Eng'rs enclosure at 1 (Oct. 29, 2019) (Attachment 1) [hereinafter 2019 EPA Letter].

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.*

Ambler Road under the 404(q) process further by submitting a “3(b)” letter. However, no apparent changes were made to the project to address those substantial and unacceptable impacts.

Because of the serious legal problems with the federal agencies’ decision making for the Ambler Road, there are two pending lawsuits challenging those authorizations.⁷ Those lawsuits underscore the wide range of legal violations that occurred in the federal permitting process for the project, including the Corps’ violations of the National Environmental Policy Act (NEPA), the CWA, the Alaska National Interest Lands Conservation Act (ANILCA), and the National Historic Preservation Act (NHPA). On February 22, 2022, the federal government filed motions with the court acknowledging some of the legal errors with the process to date and requesting that the court remand BLM’s and NPS’s decisions to those agencies to correct deficiencies with the agencies’ NHPA compliance and the ANILCA Section 810 subsistence analysis, and to provide the opportunity for the agency to do a supplemental NEPA analysis to address the deficiencies in the prior environmental review.⁸ Those acknowledged deficiencies included problems with the adequacy of the agencies’ analysis of impacts to subsistence and other resources, including aquatic and fisheries resources — which directly relate to the Corps’ obligations under the CWA as well.

There are broad, fundamental problems with the authorizations to date for this project, particularly with regard to the Corps’ violations of CWA Section 404. To date, the Corps has been silent regarding the legal problems with the 404 permit. The Corps has also not committed to revisiting any aspects of its analysis or permitting decision, despite the serious underlying legal problems highlighted below.

Lack of Adequate Project and Baseline Information

Under NEPA, agencies must “describe the environment of the area(s) to be affected ... by the alternatives under consideration.”⁹ “Without establishing the baseline conditions ... there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA.”¹⁰ The lack of an adequate baseline assessment is fatal under NEPA: “[O]nce a project begins, the pre-project environment becomes a thing of the

⁷ *N. Alaska Envtl. Ctr. v. Haaland*, Case No. 3:20-cv-00187-SLG (Alaska D. Ct. Feb. 22, 2022); *Alatna Vill. Council v. Heinlein*, Case No. 3:20-cv-00253-SLG (Alaska D. Ct. Feb. 22, 2022). The two lawsuits are stayed during the course of the remand process. A number of CWA claims against the Corps are at issue in the *Northern Center* case and were incorporated by reference into the *Alatna Village Council* case. Ptf.’s Opening Br. for Summ. J., *N. Alaska Envtl. Ctr.*, Case No. 3:20-cv-00187-SLG (Alaska D. Ct. Feb. 22, 2022) (Attachment 2).

⁸ Defs.’ Mot. for Voluntary Remand, *N. Alaska Envtl. Ctr.*, Case No. 3:20-cv-00187-SLG (Alaska D. Ct. Feb. 22, 2022) (ECF No. 113) [hereinafter NAEC Remand Mot.]; Defs.’ Mot. for Voluntary Remand, *Alatna Vill. Council*, Case No. 3:20-cv-00253-SLG (Alaska D. Ct. Feb. 22, 2022) (ECF No. 111) [hereinafter AVC Remand Mot.].

⁹ 40 C.F.R. § 1502.15. Citations are to the 1978 NEPA regulations in effect at the time of the decision.

¹⁰ *Half Moon Bay Fisherman’s Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988); see also *Or. Nat. Desert Ass’n v. Jewell*, 840 F.3d 562, 568–71 (9th Cir. 2016).

past and evaluation of the project's effect becomes simply impossible.”¹¹ Under the CWA, to issue a 404 permit, the Corps must demonstrate the “discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.”¹² Without detailed information on a project's reasonably foreseeable impacts, a finding that no significant degradation will result lacks a rational basis.¹³

The process to date has not been sufficient to support the authorizations for such a massive, damaging proposal. As an initial matter, there is still insufficient and at times conflicting information about how the proposed road will be constructed and operated. Despite the fact that this would be a massive infrastructure project, the prior EIS provided scant information about the project design and almost zero site-specific information about the proposal and how it could impact a wide range of resources along the road corridor. AIDEA has yet to provide sufficient site-specific information about the way in which this project will be built, where exactly it will be located, what the site-specific impacts of their proposal will be, what mitigation measures will address those impacts, and more.

AIDEA has not — even still — designed the project or gathered information to a level where there is adequate information about the site-specific locations or impacts of various infrastructure elements. This is reflected throughout the decision documents for this project. When the agencies originally permitted the project, AIDEA acknowledged there was still only a “conceptual” level of design and development. Estimates at the time indicated AIDEA's construction plans for the project were only around 7–10% complete.

BLM and the Corps also failed to obtain and analyze necessary baseline information prior to authorizing the project. The agencies pointed to future, yet-to-be-conducted baseline studies for multiple resources instead of obtaining that information to inform their NEPA and CWA analyses.

For example, although the project would require over 40 gravel mines and infrastructure to support those mines, the baseline assessment of those sites' design and the project's gravel needs was deferred.¹⁴ AIDEA claimed it identified potential gravel mine sites, but in fact had yet to conduct “[g]eotechnical investigations ... on the specific sizes, grades, and actual quantities” to verify those sites would be the locations of the actual gravel mines.¹⁵ The final EIS discussed the high likelihood of encountering naturally-occurring asbestos along the road corridor, which could be released by gravel mining, but noted that “the exact details of the amounts and locations of [naturally occurring asbestos] are not known.”¹⁶ The final EIS relied inappropriately on undetermined future mitigation measures to assert that there will be little risk from asbestos

¹¹ *N. Plains Resource Council, Inc. v. Surface Transp. Bd. (N. Plains)*, 668 F.3d 1067, 1083 (9th Cir. 2011) (internal quotations omitted).

¹² 40 C.F.R. § 230.1(c).

¹³ *Friends of the Earth v. Hall*, 693 F. Supp. 904, 946 (W.D. Wash. 1988).

¹⁴ 1 Bureau of Land Mgmt., Ambler Road Final Environmental Impact Statement 3-14 to -15 (2020) [hereinafter FEIS].

¹⁵ *Id.*

¹⁶ *Id.* at 3-9 to -10.

releases.¹⁷ The agencies also allowed AIDEA to defer identifying areas of potential acid rock drainage at these potential mine sites.¹⁸ These field studies and investigations are the exact type of critical information that should have been collected in a baseline assessment and then considered in the prior EIS.¹⁹

The agencies approved the Ambler Road despite further acknowledging that future baseline studies were needed to assess the project's impacts to numerous resources, including but not limited to: permafrost;²⁰ rare plants;²¹ archaeological, historical, and cultural resources;²² fish, birds, and key wildlife species; and streams and aquatic habitats used by fish.²³

The Corps also previously identified data gaps in AIDEA's application that were never remedied. Early in the permitting process, the Corps informed AIDEA that it would require a functional or aquatic site assessment, and that mapping of wetland types was required to compare alternatives and evaluate how impacts could be avoided and minimized.²⁴ The Corps raised concerns that AIDEA's application did not address "[h]ow roads cross and are parallel to major river crossings."²⁵ As EPA pointed out, AIDEA also never provided accurate mapping of wetlands and streams along the entirety of the actual road corridor.²⁶ EPA questioned the Corps' decision to defer its analysis of culvert impacts at specified locations, but again, those concerns were never addressed in the final decision.²⁷ EPA also noted an outstanding need for accurate mapping of wetlands and streams along the eastern 50 miles of the road corridor, and that the agencies were still missing the locations of all stream crossings.²⁸ EPA also identified in comments that, where AIDEA conducted field wetland mapping verification, there were

¹⁷ *Id.*

¹⁸ BUREAU OF LAND MGMT. & U.S. ARMY CORPS OF ENG'RS, JOINT RECORD OF DECISION App. F at F-13 to -14 (2020) [hereinafter JROD].

¹⁹ *See N. Plains Res. Council, Inc. v. Surface Transp. Bd. (N. Plains)*, 668 F.3d 1067, 1083 (9th Cir. 2011).

²⁰ JROD App. C at C-3; 3 FEIS App. Q at Q-11; 1 FEIS at 2-10; 1 FEIS at 3-5; 1 FEIS at 3-16 ("Locations of [gravel mines] and access roads should be chosen and designed based on site-specific geotechnical explorations..."); Agency Comment/Response Matrix for the Preliminary DEIS Review 4 (Aug. 16, 2019) ("Site-specific information on current and future thaw subsidence risk does not exist.").

²¹ 3 FEIS App N at N-25.

²² 1 *id.* at 3-160.

²³ *Id.* at 3-67 (needing additional data collection to document all streams); *id.* at 3-80 (requiring additional surveys documenting fish presence); *id.* at 3-87 (stating AIDEA would collect additional information for the fen).

²⁴ Letter from the Corps to BLM Re: Request for Specific Analysis in DEIS in Response to Scoping NOI 4 (Feb. 7, 2018).

²⁵ Army Corps of Eng'rs, Scoping Comments/Review of Functional Assessment (2017).

²⁶ Env'tl. Prot. Agency, FEIS Comments 1 (2020) [hereinafter 2020 EPA Comments].

²⁷ 2019 EPA Letter at 8, 15 (explaining need to identify culvert locations to assess impacts); JROD App F at F-7 (stating AIDEA would identify culvert locations later); *see also* Report of C. Frissell on DEIS 9-10 (2019) [hereinafter Frissell DEIS Report] (fisheries expert Dr. Chris Frissell explaining lack of information on waterway crossings) (Attachment 3).

²⁸ 2019 EPA Letter enclosure at 6 (EPA noting FEIS acknowledgment that drainages less than 12 feet wide in vegetated areas were not mapped).

significant errors in the data that was provided.²⁹ EPA indicated these problems with the data “call[ed] into question the validity, accuracy, and precision of the wetland mapping” for the project.³⁰ Despite all these issues, there is no indication these problems were ever fixed before the Corps issued the 404 permit. In fact, in its joint decision with BLM, the Corps allowed AIDEA to defer obtaining data and identifying water crossings for the eastern 50 miles of the corridor until an unspecified “final design phase,” at which time it would “identify additional drainages and ... avoid and minimize the impacts to wetlands and aquatic resources to the extent practicable.”³¹

In addition, neither AIDEA nor the Corps performed an adequate functional assessment as part of the prior EIS process. Groups are not aware that any further functional assessments have been completed to date. As discussed in the attached expert report by Dr. Siobhan Fennessy, some assessments of the functions and values of the wetlands were completed over the past five years, but that “different methods were employed in the different studies, giving differing results.”³² As a result, even to the limited extent any functional assessments were done, they cannot serve their purpose “to determine impacts and compensatory mitigation requirements.”³³ Conducting a functional assessment is critical to determining what functions particular wetlands perform, and their capacity to perform those functions. This missing information was critical to understanding the functions of wetlands the Ambler Road would destroy and determining whether the project would directly or cumulatively cause significant degradation.

The Corps did not engage — and could not have engaged — in an adequate analysis of the project and the potential for significant degradation since it was missing key site-specific and baseline information about the aquatic resources in the project area and specific plans for the project. Knowing the locations of wetlands and other aquatic resources is necessary to determine the nature and degree of impacts from the project and ensure impacts are avoided and minimized before 404 permit issuance.³⁴ The Corps could not rely on mitigation measures as a substitute for identifying those areas and evaluating the impacts of the proposal in the first instance, as it did in its decision.³⁵ The prior failure to obtain baseline and project information that was necessary to analyze the impacts of this project and inform potential project designs and mitigation measures was directly contrary to NEPA and the CWA.

²⁹ 2019 EPA Letter at 2.

³⁰ 2019 EPA Letter enclosure at 5.

³¹ JROD App. F at F-7.

³² Siobhan Fennessy, Ph.D., PWS, Comments on the Ambler Road Draft Environmental Impact Statement 19 (Oct. 7, 2019) [hereinafter Fennessy DEIS Report] (Attachment 4).

³³ U.S. Army Corps of Eng’rs, Regulatory Guidance Letter No. 02-02, Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, Dec. 24, 2002.

³⁴ 40 C.F.R. §§ 230.10(d), 230.11(b), (e).

³⁵ JROD, App. F at F-42 to -44, F-51 (acknowledging general issues of permafrost thaw, fugitive dust, and thousands of stream crossings are problematic, but assuming without support that mitigation measures and construction to Phase II would reduce impacts to extent practicable).

Failure to Comply with the 404(b)(1) Guidelines and Prevent Significant Degradation

It is fundamental under the 404(b)(1) Guidelines that “dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.”³⁶ The Ambler Road’s direct, indirect, and cumulative impacts to jurisdictional wetlands and other waters of the United States will be inevitable and significant. The water crossings alone have the potential to significantly degrade waters in the area, particularly since there is not even site-specific information on which to base an analysis of impacts and mitigation measures.

The final EIS previously concluded that “[c]umulatively, the project has the potential to cause very substantial, long-term impacts to fish and aquatic life that could lead to very substantial impacts on subsistence use practices in the region, even with mitigation measures in place.”³⁷ The Corps also acknowledged during the prior permitting process that the road would create issues of permafrost thaw and degradation,³⁸ introduce fugitive dust into wetlands and waterbodies with resulting turbidity and changes to water quality,³⁹ present risks of contamination from asbestos and acid-rock drainage,⁴⁰ and require thousands of stream crossings and culverts.⁴¹ The Corps’ own wetlands specialist found that, even if mitigation practices were followed, embankment erosion and culvert blowouts would be “inevitable.”⁴² As noted above, EPA also determined the project could result in substantial and unacceptable impacts to aquatic resources of national importance.

As discussed in the attached expert report from Dr. Chris Frissell, “massive alteration of wetland features and landscape hydrology — both directly underneath the foot print of the road — and indirectly through up-gradient and down-gradient alteration of surface and subsurface water flows — will inexorably result” from the road.⁴³ Dr. Frissell confirmed that “there is no opportunity for avoidance of significant adverse hydrologic and aquatic habitat effects in and near the road corridor from this project; the only question is which streams and rivers will be more directly impacted.”⁴⁴ Dr. Fennesy similarly concluded that there will be substantial, negative impacts along the road corridor:

The proposed Ambler road alignment will have severe, negative impacts on aquatic ecosystems along its route, including rivers, streams, lakes, and wetlands. Roads have well documented ecological effects on hydrology, soils, and

³⁶ *Id.* § 230.1(c) (emphasis added).

³⁷ 2 FEIS App. H at H-57.

³⁸ JROD App. F at F-42.

³⁹ *Id.* at F-49.

⁴⁰ *Id.* at F-46 to -47.

⁴¹ *Id.* at F-44.

⁴² U.S. Army Corps of Eng’rs, Ambler EIS – Preliminary Final Environmental Impact Statement Review Feb. 26 to Mar. 6, 2020: Comments on the Preliminary Final EIS 2 (2020) [hereinafter Corps Comments].

⁴³ Frissell DEIS Report at 10.

⁴⁴ *Id.* at 9.

biota, disrupting ecosystems and altering landscapes. The EIS fails to adequately assess or document the full extent of these impacts, nor are the details of the measures that might mitigate those impacts provided. Because the alignment of the Ambler road runs east to west, it is situated perpendicular to the natural flow of water from the Brooks Range, and is likely to cause major hydrologic disruption with impacts on the chemical, physical and biological integrity of the waters along the route, which are now in near pristine, undisturbed condition.⁴⁵

Dr. Fennessy also explained that, because the Ambler Road would run perpendicular to the Brooks Range's natural runoff flows, it "represents a major hydrologic alteration that will severely reduce stream connectivity, fragment habitats, and pose a barrier to fish passage," and will cause "extensive" wetland and water quality impacts.⁴⁶ According to Dr. Fennessy, a "clear evaluation of road impacts and mitigation efforts requires detailed information on the stream and wetland hydrology in the specific areas where those impacts will occur, and information on the design, sizing, installation and maintenance of the culverts," but the "EIS does not present this information."⁴⁷ In sum, the record demonstrated the Ambler Road would have significant, adverse impacts to the structure and function of aquatic ecosystems across a vast region, and that such impacts were not sufficiently avoided or minimized such that significant degradation would not occur.⁴⁸

There are also numerous secondary and cumulative effects from the Ambler Road that have not been adequately addressed and have the potential to further exacerbate the serious impacts of this project. These include the release of naturally occurring asbestos and the release of acid rock drainage into the region's waters. Dr. Fennessy explained, "the indirect and cumulative impacts of acid rock drainage are likely to be severe" and can persist for decades.⁴⁹ Dr. Frissell pointed out that "the release of even low levels" of contaminants can cause "large and potentially irreversible biological effects."⁵⁰ Moreover, the final EIS concluded that "[c]umulatively, the project has the potential to cause very substantial, long-term impacts to fish and aquatic life that could lead to very substantial impacts on subsistence use practices in the region, even with mitigation measures in place."⁵¹ There are also significant impacts and risks associated with the large-scale gravel mining that were left almost wholly unanalyzed in the prior process because AIDEA had yet to test areas for naturally occurring asbestos or to determine the mine locations.

The Corps was obligated to demonstrate why concerns about the project's widespread and permanent impacts were either unfounded or adequately addressed to ensure that the project would not cause or contribute to significant degradation.⁵² To date, the Corps has failed to do so. The Corps attempted to brush off these significant direct and secondary impacts by asserting that AIDEA's vague mitigation measures and post-permitting project design would reduce or

⁴⁵ Fennessy DEIS Report at 1.

⁴⁶ *Id.* at 1, 22.

⁴⁷ *Id.* at 9–10.

⁴⁸ 40 C.F.R. § 230.11(e).

⁴⁹ Fennessy DEIS Report at 13.

⁵⁰ Frissell DEIS Report at 14.

⁵¹ 2 FEIS App. H at H-57.

⁵² 40 C.F.R. § 230.10(c).

eliminate them.⁵³ However, the Corps' findings were not supported because it lacked critical information to make that determination, and its findings are contradicted by the final EIS, the Corps' experts, and expert comments that explained mitigation would not completely resolve these issues, as explained above.

Failure to Require Compensatory Mitigation

The 404(b)(1) Guidelines provide that “no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.”⁵⁴ The Guidelines further require compensatory mitigation to offset “unavoidable impacts” to aquatic ecosystems.⁵⁵

Despite the wide range of impacts that will not be addressed through avoidance and minimization measures, the Corps required absolutely no compensatory mitigation for the Ambler Road — an unprecedented and unfathomable decision for a project of this scale, and a violation of the CWA.

The Corps stated that it would not require compensatory mitigation because “mitigation in the form of avoidance and minimization is sufficient.”⁵⁶ That finding was arbitrary and wholly unsupported. There was no detailed mitigation plan on which to base that conclusion, and numerous aspects of the project plans were not finalized, including the actual locations and designs of the road, gravel mines, and other project components. The Corps did not explain its determination that impacts were sufficiently mitigated in light of this missing information. Additionally, the EIS and other documents demonstrated that significant and unavoidable adverse impacts would occur even if all mitigation measures were properly implemented. The Corps' conclusory statements about avoidance and minimization were not an analysis of whether “appropriate and practicable steps have been taken which will minimize” the Ambler Road's impacts.⁵⁷

The Corps also failed to require compensatory mitigation “sufficient to replace lost aquatic resource functions.”⁵⁸ The Corps “must determine the compensatory mitigation to be required ... based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity.”⁵⁹ The Corps' 2018 *Thought Process*, an agency guidance document, identifies six factors that may warrant compensatory mitigation.⁶⁰ The relevant factors include: (1) projects in rare or difficult to replace wetlands; (2)

⁵³ See JROD App. F at F42–50.

⁵⁴ 40 C.F.R. § 230.10(d).

⁵⁵ *Id.* § 230.93.

⁵⁶ JROD App. F at F-15.

⁵⁷ 40 C.F.R. § 230.10(d).

⁵⁸ *Id.* § 230.93(f)(1). Replacing lost functions from unavoidable losses is “[t]he fundamental objective of compensatory mitigation.” 33 C.F.R. § 332.3(a)(1).

⁵⁹ 40 C.F.R. § 230.93(a)(1).

⁶⁰ U.S. Army Corps of Engineers, *Alaska District Compensatory Mitigation Thought Process* 5 (Sept. 18, 2018), <https://www.poa.usace.army.mil/Portals/34/docs/regulatory/2018MitigationThoughtProcess.pdf> (listing factors and explaining they are consistent with the Corps' regulations).

projects that permanently impact more than one-tenth an acre of wetlands or WOUS, or 300-feet of streams where the watershed condition warrants mitigation; (3) placement of fill within 300 feet of fish-bearing waters and jurisdictional wetlands with “more than minimal” impacts; and (4) large-scale projects with adverse aquatic resource impacts, such as mining development and highway projects.⁶¹ All four of these factors are relevant to the Ambler Road: the Ambler Road will traverse and impact aquatic resources of national importance; permanently impact over 1,400 acres of wetlands and over 47 miles of streams in a watershed that warrants mitigation; place fill in fish-bearing waters causing significant impacts; and is a large-scale highway project for a mining development with adverse aquatic impacts. Despite that, the Corps ignored all but the third factor regarding watershed conditions and did not explain its determination that no compensatory mitigation would be required in light of the record evidence demonstrating the relevance of the other factors.

Even regarding the watershed factor that was considered, the Corps’ analysis was arbitrary. The Corps stated that compensatory mitigation would not be required because the project — in tandem with existing disturbance — would impact less than 5% of the watershed.⁶² But nothing in the CWA or the Corps’ regulations limit its consideration of mitigation to only those impacts that impact a certain threshold of a watershed.⁶³ In determining it would not require compensatory mitigation based on its watershed percentage approach, the Corps relied on an Alaska-specific 2018 Memorandum of Agreement between EPA and the Corps.⁶⁴ But nothing in that Memorandum sets a threshold percentage for impacts that must be reached before the Corps requires compensatory mitigation. In addition, allowing the Corps to arbitrarily define an almost boundless scale for arbitrarily determining what percentage of a watershed will be impacted by a project would allow the Corps to write off highly impactful, serious projects in violation of the CWA, as it did with the Ambler Road. Indeed, EPA has critiqued the threshold percentage approach used here as potentially violating the CWA.⁶⁵ Moreover, the Corps admitted that the magnitude of the project’s impacts could be “high,” even at a large watershed scale, given the amount of information still missing on the project.⁶⁶ The Corps’ ultimate conclusion that the project’s impacts were not significant enough to warrant compensatory mitigation ignores this prior acknowledgment.⁶⁷ The Corps’ refusal to require compensatory mitigation based on its finding that only a small portion of the watershed would be impacted was arbitrary.

⁶¹ *Id.*

⁶² JROD App. F at F-30 to -31.

⁶³ See 33 C.F.R. § 332.3(f)(1); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (affirming agency action is arbitrary where it “relied on factors which Congress has not intended it to consider” or “offered an explanation for its decision that runs counter to the evidence before the agency”).

⁶⁴ Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Mitigation Sequence for Wetlands in Alaska Under Section 404 of the Clean Water Act (2018) (Attachment 5).

⁶⁵ U.S. Env’tl. Prot. Agency, Technical Review of a Threshold-Based Approach for Determining Significant Degradation in Alaska (July 5, 2018) (Attachment 6).

⁶⁶ Corps Comments at 3 (Corps staff indicating “the magnitude of impacts should be changed from small to medium to medium to high (more accurate) or just ‘high’ (accurate if you are being conservative due to the amount of information missing)").

⁶⁷ JROD App. F at F-38.

Because the Ambler Road and its secondary and cumulative effects would have extensive and unavoidable adverse impacts, compensatory mitigation was needed to replace lost wetland and aquatic resource functions. The Corps' failure to require mitigation to replace lost aquatic resource functions violated the CWA, and Groups urge EPA to participate robustly in the supplemental EIS process to ensure this violation is corrected. Given the Corps' misguided reliance on the 2018 Memorandum of Agreement to avoid requiring any compensatory mitigation for the Ambler Road, Groups also strongly encourage EPA to revisit the language in that Memorandum and other documents related to the Corps' implementation of compensatory mitigation decisions in Alaska. EPA should ensure that the Corps does not apply an illegal threshold approach to circumvent compensatory mitigation requirements for significant projects, including the Ambler Road.

In sum, the Ambler Road project involves significant, unresolved conflicts as to resource use and will result in major adverse impacts to subsistence uses, aquatic resources, public health, and other values. The project has not been adequately analyzed or considered to date. The agencies have yet to receive site-specific information about the vast majority of this project and the proposed infrastructure, and they have not adopted appropriate mitigation measures to prevent significant degradation.

Because of the serious legal deficiencies with the prior permitting process, the 404 permit should be rescinded. Authorization of this project is not in the public interest and cannot be authorized consistent with the 404(b)(1) Guidelines. Our organizations ask that EPA engage to the full extent of its authority in the supplemental EIS process to ensure any new permitting decisions comply with the CWA, NEPA, and other provisions of law.

Thank you for your prompt attention to this matter, which is of great importance to the public. Please direct any questions regarding this letter to Suzanne Bostrom, Senior Staff Attorney at Trustees for Alaska, at sbostrom@trustees.org or (907) 433-2015.

Sincerely,

Brian Ridley, Chief/Chairman
Tanana Chiefs Conference

Theresa Clark, Alaska Executive Director
Yukon River Inter-Tribal Watershed Council

Pamela Miller, Executive Director
Alaska Community Action on Toxics

Frank Maxwell
Alaskans for Wildlife

Kathleen O'Reilly-Doyle and Loren J. Karro, Co-Leaders
Alaska Soles, Great Old Broads for Wilderness

Maddie Halloran, Alaska State Director
Alaska Wilderness League

Nicole Schmitt, Executive Director
Alaska Wildlife Alliance

Ronald Yarnell
All About Adventure

David Krause, Interim Executive Director
Audubon Alaska

John Gaedeke, Chairman
Brooks Range Council

Cooper Freeman, Senior Advocate / Alaska Representative
Center for Biological Diversity

Nicole Whittington-Evans, Alaska Program Director
Defenders of Wildlife

Bonnie Gestring, Northwest Program Director
Earthworks

Alex Johnson, Alaska Senior Program Manager
National Parks Conservation Association

Enei Begaye, Executive Director
Native Movement

Katie McClellan, Clean Water and Mining Coordinator
Northern Alaska Environmental Center

China Kantner
Protect the Kobuk

Dan Ritzman, Director, Lands Water Wildlife Campaign, Our Wild America
Sierra Club

Karlin Nageak Itchoak, Senior Regional Director (Alaska Region)
The Wilderness Society

Victoria Clark, Executive Director,
Trustees for Alaska

Hilary Eisen, Policy Director
Winter Wildlands Alliance

Enclosures/Attachments

cc:

Janet McCabe, EPA Deputy Administrator

Casey Sixkiller, EPA Regional Administrator, Region 10

Tami Fordham, EPA Alaska Operations Office Director

Tracy Stone-Manning, Director, Bureau of Land Management

Nada Culver, Principal Deputy Director, Bureau of Land Management

Charles Sams, Director, National Park Service

Martha Williams, Director, U.S. Fish & Wildlife Service