



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000
APR 26 2011

Pacific Ocean Division
Regional Integration Team

Mr. Michael J. Frank
Senior Staff Attorney
Trustees for Alaska
1026 W. 4th Ave., Suite 201
Anchorage, AK 99501

Dear Mr. Frank:

This letter is in response to your March 31, 2008, Request for Correction (RFC), under the Information Quality Act (IQA) and the Department of Defense (DoD) implementing guidance, of information in the U.S. Army Corps of Engineers Alaska District Department of the Army (DA) Permit Evaluation and Decision Document (Decision Document), DA permit application Number POA-2003-502-N, concerning the Port of Anchorage Expansion Project. The RFC challenges the correctness of some of the information contained within the Decision Document. Specifically, your letter requests that the Corps of Engineers reevaluate the circumstances and conditions of the Alaska District's Public Notice, and Permit Evaluation and Decision Documents, that the Decision Document be corrected, and that the above-referenced Permit be revoked in the interim.

We have reviewed your RFC and have determined that additional explanation in the Decision Document is warranted. The Alaska District will review the above referenced Decision Document and provide additional explanation and support in the form of an Addendum for some of the areas as discussed below which reflect the subject headings in your RFC.

“SYSTEMIC LACK OF UTILITY” AND “OBJECTIVITY” OF THE INFORMATION PRESENTED

You state that the Decision Document failed to identify the portions of the U.S. Department of Transportation, Maritime Administration (MARAD) Environmental Assessments (EAs), which the Alaska District relied upon for its Finding of No Significant Impact (FONSI) and decision to grant the Permit. We acknowledge that the National Environmental Policy Act (NEPA) requires the public be given the opportunity to analyze and comment on all material used in the preparation of NEPA documents. The Alaska District provided that opportunity by indicating that the MARAD EAs would be used as the environmental document for the permit application and by providing a means for interested parties to obtain copies. The MARAD EAs went through the full public review process where public comments were solicited and considered. We agree that the Alaska District should have cited the specific reference material

from the MARAD EAs and more completely incorporated the referenced material. The Alaska District will provide additional details and material specifically referenced from the MARAD documents and will reevaluate the Decision Document to ensure it meets quality standards.

INFORMATION ABOUT GEOTECHNICAL ATTRIBUTES OF THE OCSP DESIGN

You state that, “the Decision Document does not present an accurate, clear, complete, and unbiased analysis of information available and relevant to the Alaska District’s decision” in relation to the Port’s Open Cell Sheet Pile (OCSP) design. The Corps’ responsibility when evaluating permit applications does not involve an independent technical review and/or approval of the engineering aspects of a proposed project. However, since the Port is located adjacent to a federally maintained navigation channel managed by the Alaska District, we required the Port to provide design information on the OCSP to ensure the expansion of the docking facility would not adversely impact the Federal dredging project. In addition, as the Port is located in an area of high seismic activity, we required the Port to provide seismic information, again to ensure the Federal dredging project would not be adversely impacted. In 2006, the Corps’ Engineer Research and Development Center (ERDC) in conjunction with Alaska District staff conducted a review of the Port’s seismic information to determine if the structure could suffer structural damage or failure during a seismic event as a result of Corps dredging operations. This review was performed solely in the context of potential impacts to the Federal dredging project. The findings by the ERDC resulted in a special condition to the DA permit requiring the Port to provide a final analysis of the global and internal structural stability of the OCSP structure under static and seismic conditions prior to installation of the sheet piles. In doing so, the Alaska District met objectivity and transparency requirements. The Alaska District recognizes the critical nature of the Port infrastructure to the public interest and in order to ensure no adverse impacts to the Federal dredging project, conducted additional review and coordination beyond normal regulatory procedures.

We disagree with your assertion that the DA Decision Document disseminates biased and inaccurate information concerning the geotechnical attributes of the OCSP alternative. It was never the intent of the DA permit process for the Corps to conduct independent technical reviews of applicant’s proposals; as such, the DA Decision Document only describes the comments received and the scientific controversy over the seismic stability of the proposed OCSP design. The Corps review of the Ports design plans were; and will remain, limited to identifying potential impacts to the Federal dredging project. The results of the Corps’ evaluation of any potential impacts to the Federal dredging project will be included in an Addendum to the Decision Document.

INFORMATION ABOUT “COSTS” OF THE DESIGN ALTERNATIVES

You state that “the information the Alaska District used and presented in the Decision Document concerning costs and the selection of the Least Environmentally Damaging Practicable Alternative (LEDPA) failed to satisfy the objectivity standard.” It is important to note that cost is only one of several factors evaluated. The Clean Water Act’s Section 404(b)(1) Guidelines (40 C.F.R. Part 230) (Guidelines) state that, “no discharge of dredged or fill material

shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” The Guidelines go on to indicate that an alternative is considered 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.”

Since the Guidelines place the burden of proof on the applicant to demonstrate that there are no less environmentally damaging practicable alternatives, the Corps relies primarily on information provided by an applicant when completing its evaluation and making determinations of compliance with the Guidelines. The Alaska District, as required by the Guidelines, appropriately directed inquiries regarding the practicability of design alternatives to the permit applicant.

While the Alaska District’s determination of the practicability of less damaging alternatives focused on the assessment of impacts of the project upon the aquatic environment, it also considered cost differentials between alternatives in light of the overall project purpose. The Alaska District considered the cost information provided by the applicant regarding funding limitations. In light of the anticipated impacts associated with the Port expansion, the Alaska District went above and beyond normal permit application evaluation procedures by having a Corps Cost Engineer review the cost-related information provided by the applicant. The Corps Cost Engineer determined that the applicant’s relative cost estimates provided for the various design alternatives were reasonable. Based on the information submitted by the applicant, the Alaska District determined that the less damaging alternatives were not practicable. This determination was made with no focus on the applicant's financial standing or the State’s financial reserves. No additional information concerning the costs of this project or the evaluation of those costs will be addressed in the addendum.

You note that the National Marine Fisheries Service (NMFS) requested that the Alaska District require the applicant to prepare cost estimates for the preferred and pipe pile alternatives based on 35% design specifications, as opposed to the conceptual design level used. The Alaska District explored this idea in their review of the Port expansion permit application, and based upon the conceptual level designs provided by the applicant, the Alaska District determined that an adequate level of information was provided to make an informed decision. No additional information concerning the level of design for this project will be included in the addendum.

INFORMATION ABOUT ESSENTIAL FISH HABITAT

You state that the information concerning Essential Fish Habitat (EFH) impacts and mitigation measures in the Decision Document is unreliable as a matter of substance and does not satisfy the best available science standard. We agree that the Decision Document did not fully reference the material and input that was relied upon in reaching decisions regarding EFH impacts, however, including more information on the materials referenced in the Decision Document would not change the decision made. No additional information concerning the EFH evaluation will be included in the addendum.

We agree that the NMFS has the sole responsibility of EFH designations. However, the Corps is solely responsible for the determination of compliance with the Guidelines in its permit decisions, including any anticipated impacts proposed projects may have on fish and other aquatic organisms.

Due to the nature of the proposed project and pursuant to applicable laws, regulations, and guidance, the Corps consulted with the NMFS regarding potential impacts on EFH. The Alaska District fully considered Appendix G of the Alaska EFH Environmental Impact Statement (EIS), the NMFS's project-specific comments and recommended conservation measures, and site specific scientific studies (i.e., Port of Anchorage/Knik Arm Bridge and Toll Authority fish studies). Additionally, the mitigation required by the DA permit provides measures to offset the impacts of the authorized activity on salmonids, which are the primary species of concern with respect to EFH. Based on the analysis of available information, the Alaska District determined that impacts to EFH would not be significant.

The Alaska District carefully considered the NMFS's support of a hybrid dock design based on the NMFS's suggestion that the tidal mudflats provide important habitat for salmon because the shallow water of the mudflats allows them to escape predation from Beluga whales. Ultimately, the Alaska District determined that the severity of the anticipated threat to salmonid populations in Knik Arm was not significant. The near-shore shallow waters along the perimeter of Knik Arm are primarily undisturbed. The potential for increased predation by Cook Inlet Belugas, a species now listed under the Endangered Species Act, was not determined to be a significant impact, and is arguably beneficial to the endangered Beluga population.

With regard to the authorized construction-related dredging and disposal, the Alaska District fully considered less-damaging alternatives including upland disposal sites, beneficial uses of dredged materials, and minimization or avoidance of disposal sites within EFH in accordance to Appendix G of the Alaska EFH Environmental Impact Statement. The Corps has been dredging the Port of Anchorage for over 40 years and the authorized construction-related dredging evaluated in this DA permit is minimal in comparison to the annual maintenance dredging volumes. Additionally, the NMFS provided no comments related to impacts to EFH from the proposed construction-related dredging. Ultimately, the Corps determined that upland disposal, beneficial uses (e.g., beach nourishment), and minimization/avoidance of EFH disposal options were not practicable in light of both the physical characteristics of the sediment (i.e., fine silt) and the ongoing maintenance dredging, which has previously been determined to not have significant impacts. In addition, the dredging disposal site lies within an extremely turbid and dispersive area. Bottom surveys have shown little changes in elevation due to previous dredge disposal. EFH regulations do not expressly require a consulting agency to cite or use Appendix G in evaluating impacts to EFH and determining appropriate mitigation. Rather, the Alaska District relied on the project-specific comments provided by the NMFS when it considered impacts and avoidance, minimization, and compensation measures to EFH. No additional information concerning EFH will be included in the addendum.

INFORMATION ABOUT AIR QUALITY

You state that the Decision Document presents incomplete information concerning the project's air pollution impacts. The Alaska District agrees that the explanations in the Decision Document need to be revised for clarity. The District will, therefore, provide additional details on how air quality determinations were made in an Addendum. For example, the Decision Document did not provide a clear statement that the District adopted the MARAD emission calculations, even though such reliance was appropriate, in accordance with 40 C.F.R. § 93.154, "[w]here multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination."

You criticized the Alaska District for not evaluating emission pollutants aside from CO and PM10 and for emissions associated with Port operations. General conformity determinations, however, are only required for pollutants or precursors of pollutants for which an area is in nonattainment or maintenance status. The Municipality of Anchorage (MOA) is currently in maintenance status for CO only.

You also indicated that "the Decision Document does not quantify the emissions of the criteria pollutants that will be emitted during the project's construction." Construction activities in attainment areas (i.e., geographic areas where air quality conforms to national standards), however, are not normally subject to a general conformity determination, unless the area is under a Maintenance Plan due to a previous nonattainment status. This will be explained in more detail in the Addendum.

INFORMATION ABOUT COMPENSATORY MITIGATION REQUIREMENTS

You asserted that the Public Notice, DA Permit and Decision Document did not contain a mitigation plan. The Alaska District, however, followed proper procedures and regulations in place at the time of this application and those regulations did not require the submittal of a mitigation plan nor did they require a mitigation plan to be available for public comment. Had the applicant provided a mitigation plan with the project application, the District would have published relevant details of that proposal in the public notice for the project.

The Corps follows a standard process when reviewing applications for permits, which is codified in its implementing regulations at 33 C.F.R. Part 320-332 (Part 332 was added in 2008, after the date of this application; therefore, its requirements do not apply to this matter). 33 C.F.R. Part 325 details the information required from an applicant for a complete application; that part goes on to explain what information is necessary to include in a public notice to generate meaningful public comment.

The permit application evaluation process involves a careful weighing of all the factors, which may become relevant in each particular case. The benefits, which may reasonably be expected to accrue from a proposal, must be balanced against its reasonably foreseeable detriments; with the decision to authorize any proposal and the conditions under which that is done, hinging on the outcome of that process. Factors that are considered, if relevant, include

conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and in general, the needs and welfare of the people. Furthermore, as described previously, an alternatives analysis is completed pursuant to the Guidelines to determine the least environmentally damaging practicable alternative. The evaluation process also includes a mitigation sequencing process, which requires that; all impacts to waters of the U.S. be avoided to the maximum extent practicable, all unavoidable impacts then be minimized to the maximum extent practicable, and finally, that remaining impacts be offset through compensatory mitigation when appropriate and practicable. In this case, as a result of the permit evaluation process, it was determined that mitigation to offset unavoidable impacts was appropriate and practicable, and those mitigation requirements were included as permit conditions.

To arrive at the compensatory mitigation conditions included in the permit, required extensive coordination among the Alaska District and the Federal resource agencies. The Federal resource agencies expressed a preference for the applicant to fund previously identified restoration/enhancement projects under the Pacific Salmon Recovery Plan. In accordance with this preference, and also recognizing that a single mitigation project, that would appropriately offset the unavoidable impacts of the project was neither available nor practicable to the applicant, the Alaska District sought to ensure that mitigation projects to be completed would appropriately offset aquatic resources losses. Therefore, the compensatory mitigation requirements of the permit involved a hybrid plan that combined use of an established in-lieu fee program (with contributions based on the unavoidable functional losses of the project), as well as additional requirements for studies, designs, construction, performance measures, and monitoring of projects reviewed by a multi-agency mitigation team.

To develop the list of projects appropriately funded through the in-lieu fee program and the development of a project list for additional studies, the permit included special conditions which require a "feasibility study to further investigate potential compensatory projects within the Ship Creek estuary." This requirement was considered necessary to develop appropriate and practicable mitigation projects in the Ship Creek estuary to address conflicting stakeholder interests that precluded the development of a project list prior to permit issuance. The Alaska District also included potential projects in Knik Arm tributaries in the list at the specific request of the United States Fish and Wildlife Service. This inclusion was determined by the Alaska District as appropriate considering that the near shore habitat losses associated with the Port Expansion affects salmonid populations from tributaries throughout Knik Arm, not just immediately adjacent to the impacts authorized at the project area. An Addendum will provide clear explanation of the requirements associated with the in-lieu fee.

Your letter criticized the lack of financial calculations for compensatory mitigation to offset unavoidable project effects on movements and migration of anadromous fish. Those specific secondary impacts of the project on salmonid movement in Knik Arm are speculative. It would be inappropriate and arbitrary for the Corps to require financial compensatory mitigation for speculative secondary impacts.

With regard to your assertion that the Decision Document inaccurately states that other mitigation conditions would be imposed to mitigate impacts to birds and wood frogs caused by the loss of wetlands, the Alaska District will provide additional documentation on mitigation, if warranted, in an Addendum.

The Alaska District determined that a Finding of No Significant Impacts under the National Environmental Policy Act was appropriate in this permit action. The Decision Document details and references the NEPA-level analysis for the permit decision, as well as Section 404(b)(1) Guidelines review and compliance determination, and the Public Interest Review required for all individual permit applications. Compensatory mitigation was determined to be required under Section 404 of the Clean Water Act and 33 C.F.R. 320.4(r) to offset unavoidable impacts to the aquatic environment, and those mitigation requirements have been included as special conditions to the DA permit.

CONCLUSION

I have reviewed your RFC and do not agree with your request to revoke the Alaska District's permit decision. I agree the sections of the Decision Document discussed above should be further documented to provide a more transparent, clear and complete explanation. The Alaska District will review the Decision Document and provide additional explanation and support in the form of an Addendum.

You have the right to appeal to the Department of the Army Chief Information Officer (CIO), if you disagree with this determination. Your appeal must be in writing and filed within 30 working days of notification of this determination. The appeal should be sent to Mr. Robert Kazimer, CIO, U.S. Army Corps of Engineers, 441 G Street, N.W. Washington, D.C., 20314-1000, for review and forwarding to the Department of the Army CIO. The Army CIO will advise you directly of his appeal decision.

Sincerely,



Steven L. Stockton, P.E.
Director of Civil Works