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Via E-mail to:

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US Army Corps of Engineers Alaska District
Anchorage Regulatory Division (1145)
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**Re: Eyak Preservation Council's Comments on POA-1994-01014
Public Notice of Request for Permit Modification.**

Dear Mr. Bryan Herczeg,

The Eyak Preservation Council (EPC), the Prince William Sound Audubon Society, the Center for Biological Diversity, and the Community & Environmental Justice Clinic at Willamette University College of Law ("Commenters") hereby submit these comments in response to the U.S. Army Corps of Engineers' (Corps) Public Notice of Request for Permit Modification with respect to the Shepard Point Marine Oil Spill and Emergency Casualty Response Facility dated February 4, 2022. Please accept this letter as stating Commenters' express opposition to NVE's request to modify its § 404 permit. Commenters also maintain their opposition to the permit's issuance in the first instance.

The Eyak Preservation Council is a 501(c)(3) organization based in Cordova, Alaska. EPC's mission is to honor Eyak heritage and to conserve wild salmon habitat and culture through education, awareness and promotion of sustainable lifeways for all peoples. EPC represents the public interest with a regional and national constituency, including Indigenous and Eyak lineal descendants, for the preservation of wild salmon habitat and the sustainable communities and cultures that benefit from pristine ecosystems that support returning wild salmon. The Community and Environmental Justice Clinic at Willamette University College of Law works with individuals and organizations who seek to protect themselves from pollution, improve the health of their communities, and promote justice and equity in the Pacific Northwest and beyond.

The residents of Cordova are committed to supporting oil spill response mitigation. Their dedication is clearly demonstrated by the City of Cordova, the Coast Guard and Alyeska Pipeline: Ship Escort Response Vessel System (SERVS) exercises. Yearly, every spring and fall and "surprise" response exercises take place with on-call commercial fishing vessels in Cordova. The oil spill response drills and exercises last for 3 to 5 days and utilize Cordova's existing harbor facilities for the deployment and recovery of all oil spill recovery equipment. Oil spill response equipment and oil recovery barges are in easily

accessible locations within the harbor facility. Every year Cordova gets high marks and approvals from Alyeska, and the Coast Guard, as successful exercises.

The success of these drills further demonstrate that Cordova does not need to develop a deep-water port at Shepard Point to enhance oil spill response, and that enhanced existing facilities offer the best possible location(s), while respecting the precious environment. Alyeska Pipeline and the Prince William Sound Regional Citizen's Advisory Council have never endorsed the project.

A dedicated oil spill response facility would be a welcome addition to the City of Cordova. However, the proposed facility at Shepard Point and proposed permit modifications would be an unnecessary and immutable scar on Cordova. This permit does not meet the Corps' § 404 criteria because it is not the Least Environmentally Damaging Practicable Alternative. Additionally, the Shepard Point Project (hereafter also stated as Project) does not meet the Corps' "public interest" standard of review because any benefits the Project might provide are outweighed by the cumulative detriments brought on by the Project's construction. The Project will not help or augment Cordova's oil spill response capabilities. Simply stated, the Shepard Point Project does not make sense environmentally, economically, or strategically.

I. LEGAL STANDARD

The Clean Water Act (CWA) generally prohibits the discharge of pollutants, including dredged or fill material, into navigable waters.¹ However, CWA § 404 broadly describes a permitting system by which the Corps may approve the discharge of dredged or fill material at specified sites.² Under § 404(b)(1), the Corps must evaluate permit applications based on Environmental Protection Agency (EPA) guidelines, including four basic requirements—two of which are relevant here.³

First, EPA regulations condition permits on an applicant's appropriate and practical mitigation of potential adverse impacts to the aquatic environment.⁴ In some instances, the Corps may require compensatory mitigation with the fundamental objective of offsetting unavoidable impacts to waters of the United States (WOTUS).⁵ Importantly, the requirement that a permit approval results in a "no net loss" of wetlands is a national policy that was memorialized in a 1990 Memorandum of Understanding (MOU) between the Corps and EPA.⁶

Second, the Corps has a duty to minimize a project's impact on the environment including aquatic ecosystems, and it must individually evaluate the environmental impacts under a range of alternative actions that would still achieve a permittee's stated goals. Ultimately, "no discharge shall be permitted if there is a

¹ 33 U.S.C. §§ 1251-1389.

² 33 U.S.C. § 1344.

³ *Id.* § 1344(b)(1); 40 C.F.R. § 230.1.

⁴ 40 C.F.R. § 230.1(d).

⁵ *Id.* § 230.93(a).

⁶ EPA and Army Corps of Engineers, *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines 2* (1990) [hereinafter *1990 MOU*].

practicable alternative which would have less adverse impact on the aquatic ecosystem[.]”⁷ In other words, the Corps must permit the Least Environmentally Damaging Practicable Alternative (LEDPA) to a proposed project.

“Practicable” is defined as “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.”⁸ Therefore, in order to determine if an alternative is practicable, the Corps first defines a project’s overall purpose in light of the applicant’s stated purpose and objectives. Key here is that the applicant may not “preclude the existence of alternative sites and thus make what is practicable appear impracticable” by narrowly defining the project’s purpose.⁹ Next, practicable alternatives include (1) activities that do not involve discharging into WOTUS and (2) discharging at another location.¹⁰ Importantly, alternative locations that are not owned but could reasonably be obtained by an applicant are considered practicable.¹¹ Thus, the range of alternatives that EPA regulations allow the Corps to consider is broad, encouraging both applicants and the Corps to collaborate in order to minimize negative environmental impacts.

Furthermore, EPA regulations provide special protection for certain aquatic sites, including eelgrass, anadromous fish streams, and wetlands.¹² If an alternative “does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose[,] practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise,” and “all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.”¹³

Next, the CWA § 404 program and the National Environmental Policy Act (NEPA) often work in harmony. While the Corps’ review under EPA § 404 guidelines are stringent and focused, NEPA’s safety net “ensures that [an] agency will not act on incomplete information, only to regret its decision after it is too late to correct.”¹⁴ Therefore, when an agency makes “substantial changes” to a proposed project, or “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts” that develop *after* an Environmental Impact Statement (EIS) is finalized, a supplemental EIS is required in order to comply with NEPA.

Lastly, if a § 404 project does satisfy NEPA and EPA’s guidelines, the permit will be granted unless it fails the Corps’ “public interest” review.¹⁵ The “public interest” analysis balances a project’s reasonably

⁷ 40 C.F.R. § 230.1(a).

⁸ *Id.* § 230.4(q).

⁹ *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989); *Friends of the Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 912 (9th Cir. 2018); *La. Wildlife Federation, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985); U.S. Army Corps of Engineers, *HQUSACE Review and Findings, Old Cutler Bay Permit 404(q) Elevation 13* (1990); U.S. Army Corps of Engineers, *Permit Evaluation, Hartz Mountain Development Corporation 4* (1989).

¹⁰ 40 C.F.R. § 230.1(a)(1)(i)-(ii).

¹¹ *Id.* § 230.1(a)(2).

¹² *Id.* §§ 230.10(a)(3), 230.10(a), 230.41.

¹³ *Id.* § 230.10(a)(3).

¹⁴ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

¹⁵ 33 C.F.R. § 323.6(a); 33 C.F.R. § 320.4(a).

expected benefits against its reasonably foreseeable detriments.¹⁶ This includes a broad range of factors including environmental, economic, and social impacts.¹⁷ Essentially, the Corps examines all relevant information and will approve a permit if it finds that the project’s benefits to the public interest outweigh its detriments.

II. THE CORPS SHOULD REQUIRE COMPENSATORY MITIGATION FOR THE UNAVOIDABLE IMPACTS TO WOTUS.

The Corps should require compensatory mitigation because the Shepard Point Project will result in unavoidable impacts to 9.93 acres of WOTUS including 1.13 acres of wetlands.¹⁸

The spirit of the CWA is to protect the integrity of our nation’s waters. EPA guidelines therefore condition § 404 permits on appropriate and practical mitigation efforts, and the onus falls on the Corps to require compensation when proposed projects will result in unavoidable impacts. Although the Corps ultimately retains discretion here, it established a commitment to protecting our waters when it developed § 404(b)(1) guidelines in conjunction with EPA, subsequently stating that it will “strive to avoid impacts and offset unavoidable adverse impacts to existing aquatic resources.”¹⁹ The Corps also acknowledged the “no-net-loss” policy with respect to wetlands, stating that “at a minimum, one for one functional replacement” is necessary.²⁰

Here, the Corps failed to follow its own policy, and ignored sister agencies’ concerns and NVE’s own compensatory mitigation plan. First, the Shepard Point Project would unavoidably degrade WOTUS including wetlands, and compensation should be required. When the Corps refused, EPA commented that compensation is integral to demonstrating compliance with § 404(b)(1) guidelines.²¹ The U.S. Fish and Wildlife Service (USFWS) also raised concerns over inadequacy.²² The Corps evaded these concerns by referencing its mitigation section in the 2017 ROD where the issues were left unanswered. In fact, not only did the Corps ignore EPA and USFWS, but it also ignored NVE’s own compensatory mitigation plan that proposed to improve habitat throughout the Copper River basin. This position contravenes the spirit of the CWA and the Corps’ own commitments under § 404(b)(1) guidelines and “no-net-loss” policy. Therefore, the Corps should reevaluate its rationale and require compensatory mitigation if the Shepard Point Project proceeds.

III. ALTERNATIVE 4 NEVER SATISFIED THE LEDPA STANDARD BECAUSE ORCA CANNERY IS A PRACTICABLE ALTERNATIVE THAT WOULD CAUSE LESS ENVIRONMENTAL DAMAGE.

¹⁶ 33. C.F.R. § 320.4(a).

¹⁷ *Id.*

¹⁸ Native Village of Eyak, *Shepard Point Marine Oil Spill & Emergency Casualty Response Facility: A Marine Tribal Transportation Facility* 18, 22 (2021) [hereinafter *Final 2021 Environmental Report*]

¹⁹ *1990 MOU, supra* note 6, at 5.

²⁰ *Id.*

²¹ Department of the Army, *Record of Decision* 17 (2017).

²² *Id.* at 21.

The Corps must permit the Least Environmentally Damaging Practicable Alternative to a proposed project. First, siting the Oil Spill Response Facility (OSRF) at Orca Cannery would cause less environmental damage than siting it at Shepard Point. Second, Orca Cannery is practicable because (1) Former Governor Walker’s letter stating that Alaska was unwilling to lease or relinquish title to submerged lands referenced a location south of the Cannery, and (2) Steve Ranney, owner of title to the surface lands, structures, and intertidal lands has expressed his willingness to sell the facility. Therefore, the Corps erred in selecting the Shepard Point alternative because Orca Cannery is both practicable and less environmentally damaging. Furthermore, a supplemental EIS is required because the Cannery alternative was never fully evaluated under NEPA.

a. The Orca Cannery alternative is less environmentally damaging than Shepard Point.

Siting the OSRF at Orca Cannery would cause less environmental harm than siting it at Shepard point. Even if the Corps disagrees in principle based on the inadequate record, EPA regulations require the Corps to clearly demonstrate otherwise because the Orca Cannery alternative would not involve discharge into special aquatic sites.

First, siting the OSRF at Orca Cannery would cause less harm to the environment because, unlike Shepard Point, it would not require (1) dumping fill into special aquatic sites, (2) building a new 4.32-mile road through previously undisturbed, rugged land, including wetlands, mountainsides, and old-growth forest, or (3) constructing new facilities and a 5.5-acre staging pad.²³ Instead, the existing road accesses the Cannery, and facilities and infrastructure are already on-site. It offers a covered staging area for response equipment and space for offices, a communications center, a covered training area, and a maintenance shop.²⁴ Also, it may be feasible to avoid discharge of dredged or fill material via construction entirely if the staging area is carefully planned and a pile-supported dock is extended to a depth of 35 feet.²⁵ Next, although navigating the Eastern Channel with deep-draft vessels would likely require dredging, the estimated volume is the lowest total figure of all the dredging alternatives.²⁶ Furthermore, the EIS states that the environmental impacts of dredging the Eastern Channel would be “insignificant.”²⁷ Finally, the potential for maintenance dredging is low because ocean currents align with the channel.²⁸ The Orca Cannery alternative would therefore cause less environmental harm than Shepard Point.

Second, developing the OSRF at Orca Cannery must be presumed to be less environmentally damaging under EPA regulations unless clearly shown to be otherwise.²⁹ Building an access road to Shepard Point would discharge fill material into wetlands and potentially eelgrass and anadromous fish bearing

²³ Army Corps of Engineers Alaska District, *Public Notice of Request for Permit Modification 3* (2022); *Final 2021 Environmental Report*, *supra* note 18, at 18, 22 [hereinafter *Request for Permit Modification*].

²⁴ Steve Ranney Comment Letter to Mary Lee Plumb-Mentjes (Jan. 4, 2010).

²⁵ *Id.*

²⁶ Bureau of Indian Affairs, *Cordova Oil Spill Response Facility Environmental Impact Statement: Appendix R, Navigation Channel Dredging Study 2-3* (2006) [hereinafter *Dredging Study*]; Department of the Army, *Record of Decision 9* (2017).

²⁷ Bureau of Indian Affairs, *Cordova Oil Spill Response Facility Environmental Impact Statement 4-32* (2006) [hereinafter *FEIS*].

²⁸ *Dredging Study*, *supra* note 19, at 2-3.

²⁹ *Id.* § 230.10(a)(3).

streams—three types of special aquatic sites.³⁰ On the other hand, Orca Cannery would not. Although the facilities are flanked by eelgrass, constructing a staging pad and pile-supported dock would likely avoid the vegetation.³¹ Therefore, the Corps must presume that the Orca Cannery alternative is less environmentally damaging unless it can clearly show otherwise, thus fulfilling LEDPA’s first element.

b. The Corps erred in relying on former Governor Walker’s letter expressing Alaska’s unwillingness to lease or relinquish title to submerged lands.

Next, the Corps’ singular reason for determining that Orca Cannery was not a practicable alternative was that marine access to the facility would require use of submerged lands titled to Alaska, and the state was supposedly unwilling to lease or relinquish title to those lands for the Project.³² This conclusion is inaccurate, and the Corps’ language reveals the perplexing possibility that Alaska can veto any practicable alternative other than Shepard Point.

The 2017 ROD summarized the Corps’ rationale for not advancing the Orca Cannery alternative in a single, short paragraph:

In a letter dated April 15, 2016, Alaska Governor Bill Walker informed the Corps that the “State-owned submerged land near the Orca Cannery is not available for the project.” Though the Orca Cannery Facility is privately owned and directly bound by tidelands conveyed to the Mr. Ranney, marine access to the COSRF at this location would require use of State-owned submerged land. Therefore, the Orca Cannery Facility Alternative remains an unavailable location for the COSRF.³³

However, the lands that Former Governor Walker referenced are not at Orca Cannery. They are located to the south where another alternative was being considered in the 2006 EIS.³⁴ Why Alaska’s unwillingness to relinquish lands at an unrelated location prevents marine access and the use of the Cannery as an OSRF is left unexplained.³⁵ The 2017 ROD indicates that the Corps simply confused the two locations.³⁶ Considering the gravity of this mistake, the Corps should re-evaluate its rationale and determine that Alaska’s title to submerged lands at EIS Alternative 5 has no bearing on Orca Cannery.

³⁰ *Final 2021 Environmental Report*, *supra* note 18, at 22. The math suggests that the impact to wetlands is greater than the acreage listed in the report. The report also claims that the Shepard Point alternative will not impact eelgrass, but a close analysis and comparison to eelgrass studies shows that as unlikely.

³¹ Midnight Sun Environmental, LLC, *Shepard Point Oil Spill Response Facility 2020 Eelgrass Field Survey*, Appendix A. Figures: Map Extent 1 of 7 (2020).

³² Department of the Army, *Record of Decision* 11-12 (2017).

³³ Department of the Army, *Record of Decision* 11-12 (2017).

³⁴ Letter from Governor Bill Walker to Jack Hewitt, *Information relating to the permit application for Shepard Point oil spill response facility and access road (POA-1994-1014)* (April 15, 2016); Bureau of Indian Affairs, *Cordova Oil Spill Response Facility Environmental Impact Statement* 2-24 (2006) (referencing Alternative 5: Orca Site).

³⁵ Department of the Army, *Record of Decision* 11-12 (2017).

³⁶ *Id.* (conflating the “Orca Site” with Orca Cannery in its analysis of Alternative 5 in section 3.1.5 and then reference the wrong submerged lands in its discussion of Orca Cannery in section 3.2).

Next, this discrepancy reveals the perplexing possibility that Alaska can eliminate virtually any practicable alternative other than Shepard Point if it chooses. According to the 2017 ROD, Orca Cannery is the only alternative where marine access would be burdened by Alaska's title to submerged lands.³⁷ This is curious for two reasons. First, intuitively, all deep-water ports require marine access via docks that are anchored into submerged lands. Second, Alaska in fact owns *all* submerged lands within three nautical miles of the coastline.³⁸ Thus, according to the Corps' logic, constructing a deep-water port practically anywhere along Alaska's coastline would require the state's approval. This includes, for example, erection of dock pilings at Shepard Point, the applicant's preferred alternative. Yet the record lacks any title transfers or submerged land leases there, and the Corps has failed to explain why Alaska's title precludes dock construction and marine access at Orca Cannery but not at Shepard Point. Former Governor Walker's letter, however, sheds light on this issue by stating that Alaska was unwilling to lease state-owned submerged lands at Orca Point because facilitating Project construction at an alternative site to Shepard Point would "contravene Alaska's commitments and policy positions, as reflected in the consent decree."³⁹ Thus, perhaps Alaska was willing to lease submerged lands at Shepard Point, but likely was unwilling to do so elsewhere because that would have been against state policy. Therefore, this policy effectively functions as a trump card that the state can wield to eliminate any practicable alternative other than Shepard Point, so long as marine access over Alaska's submerged lands is required to achieve the Project's purpose.

c. Steve Ranney's willingness to sell Orca Cannery makes it a practicable alternative.

The record shows that Steve Ranney, owner of the surface rights, facilities, and intertidal lands at Orca Cannery, is willing to transfer title for the OSRF Project.⁴⁰ Under EPA regulations, an alternative location is practicable if it is not owned but could reasonably be obtained by an applicant.⁴¹ Therefore, Orca Cannery is practicable because Mr. Ranney is willing to transfer title, and the Corps must thoroughly consider it as an alternative.⁴²

The Orca Cannery alternative satisfies both elements under the LEDPA analysis because it is (1) practicable and (2) less environmentally damaging than the Shepard Point alternative. The Corps violated the Clean Water Act and EPA regulations when it issued NVE's permit for Shepard Point. Furthermore, a supplemental EIS is necessary to prevent an agency from acting on incomplete information and whenever "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."⁴³ Not to mention, the Bureau of Indian Affairs' willful ignorance as to Orca Cannery's practicability means it was never fully evaluated in 2006, and the Corps issued the permit for Shepard Point with one eye closed. It cannot do this under NEPA. Furthermore, the Corps' "new"

³⁷ *Id.*

³⁸ 43 U.S.C. §§ 1301, 1311; 43 U.S.C. § 2102; Alaska Const. art. XII, § 1 (defining state boundaries as "all the territories, together with the territorial waters appurtenant thereto, included in the Territory of Alaska upon the date of ratification of this constitution by the people of Alaska," which included lands granted by the Submerged Land Act).

³⁹ Letter from Governor Bill Walker to Jack Hewitt, *Information relating to the permit application for Shepard Point oil spill response facility and access road (POA-1994-1014)* (April 15, 2016).

⁴⁰ Steve Ranney Comment Letter to Mary Lee Plumb-Mentjes (Jan. 4, 2010); Department of the Army, *Record of Decision 12* (2017).

⁴¹ *Id.* § 230.1(a)(2).

⁴² 40 C.F.R. § 230.1(a)(2).

⁴³ 40 C.F.R. § 1502.9(c).

awareness as to the Cannery's practicability constitutes "new circumstances and information." Therefore, federal law requires a supplemental EIS where Orca Cannery is fully considered under EPA's guidelines.

IV. ORCA CANNERY'S ELIGIBILITY ON THE NATIONAL REGISTER OF HISTORIC PLACES DOES NOT MAKE IT IMPRACTICABLE.

The Cannery's eligibility on the National Register of Historic Places (NRHP) and the Project's anticipated adverse effect on the historic property do not automatically preclude its consideration as a practicable alternative. Additionally, although the Corps did not officially cite the Cannery's eligibility as the reason for eliminating it as an alternative, the danger remains that the Corps will erroneously rely on these false claims if the Cannery is reconsidered. Thus, this issue is discussed in the following section.

a. Factual background: Orca Cannery's eligibility on the National Register of Historic Places

Two laws generally prohibit federal agencies from facilitating projects that "use" or "adversely affect" historic properties. The first law only applies to the U.S. Department of Transportation (USDOT), prohibiting "use" of properties unless there is no "feasible and prudent" alternative. The second law applies to all federal agencies, requiring assessment and resolution of adverse effects through consultation with State Historic Preservation Offices (SHPO) before projects can be approved.

In 1995, Orca Cannery was listed as eligible for the National Register for Historic Places (NRHP).⁴⁴ After the Corps published a public notice for the Shepard Point permit in 2013, Eyak Preservation Council asked the Alaska Department of Natural Resources' Office of History and Archaeology (the SHPO here) whether the Corps ever initiated consultation with their office. The SHPO subsequently notified the Corps via public comment that its office had never been consulted.⁴⁵ In response, a cultural survey of Orca Cannery was commissioned at NVE's request to determine whether the site should remain eligible on the NRHP and whether constructing an OSRF on site would adversely affect the historic property.⁴⁶ In May of 2014, the survey recommended that the Cannery remain eligible and that the Project would adversely affect it.⁴⁷

Next, on June 2, 2014, NVE published responses to public comments, apparently relying on the survey and stating that Orca Cannery was not practicable because the Federal Highway Administration (FHWA) could not fund the Project.⁴⁸ In the same document, NVE stated with no supporting authority that

⁴⁴ Alaska Department of Natural Resources Email to Steve Lindamood; *Oil Spill Response Facility at Shepard Point, POA-1994-1014* Footnote 1 (Dec. 13, 2013).

⁴⁵ *Id.*

⁴⁶ Grantham and Bundy, *Orca Cannery Cultural Resources Evaluation: Shepard Point Oil Spill Response Facility and Connecting Road Project* (2014) <https://shepardpointless.files.wordpress.com/2014/09/orca-cannery-evaluation-report-5-6-14-final.pdf>.

⁴⁷ *Id.* at 1.

⁴⁸ Native Village of Eyak, *Response to Comments on Section 404 Permit Application (POA-1994-1014) Public Notice for the Permit on November 15, 2013 for Shepard Point Oil Spill Response Facility and Connecting Road 1, 6, 7* (2014) [hereinafter *Response to Comments*].

“there is a feasible and prudent alternative” to Orca Cannery.⁴⁹ Importantly, NVE published its responses while the 2014 report was still under the Corps’ review and without FHWA having issued an opinion regarding feasible and prudent alternatives.⁵⁰ Also, NVE subsequently doubled down on this stance in its 2016 request to the Corps that it resume the Shepard Point permit consideration, simply citing its own response to public comments as authority in one place and citing nothing in another.⁵¹ This document also contained a CH2M Hill, Inc. report stating that Shepard Point is feasible and prudent based on the Bureau of Indian Affairs (BIA) Record of Decision (ROD).⁵²

Lurking beneath the surface is a series of communications between the Corps, NVE, and FHWA officials. After the 2014 survey’s publication, the Corps’ Heather Adams asked NVE whether FHWA would fund a project that impacts an historic site. Moe Zamarron, NVE’s Capital Projects Director, responded on October 3, 2014, outlining § 4(f)’s standard and simply stating that “the Shepard Point road is the avoidance alternative that satisfies the Purpose and Need of the project and balances the environmental impacts when all avoidance and minimization has been completed.”⁵³ Heather Adams subsequently left her position, and was replaced by Jack Hewitt, who raised concerns over whether FHWA funds could be used only for the road or the entire project. James Glaze then urgently reached out to Robert Sparrow at FHWA on February 18, 2015, initiating a heated exchange and asking the agency to explain to Mr. Hewitt that FHWA funds could not be used at Orca Cannery. Mr. Glaze even provided Moe Zamarron’s earlier email to Ms. Adams as a template, stating, “please feel free to take anything you want from it,” and, “this is an urgent matter so I hope you will be able to do it quickly.”⁵⁴ The following day, Mr. Glaze emailed Mr. Sparrow again, stating, “please don’t blow me off on this request. It is very important to the Tribe and all we are asking is for you to say what is actually true.”⁵⁵ That same day, a Mr. Allen with FHWA emailed Mr. Sparrow, confirming that § 4(f) had been “used to eliminate the cannery option . . . as an acceptable site for the project.”⁵⁶ Finally, at NVE’s request,⁵⁷ FHWA’s Senior Environmental Specialist Terry Schumann sent a June 1, 2015 letter to Jack Hewitt, notifying the Corps that the Administration was aware of Orca Cannery’s eligibility status and that FHWA funds may not be used to develop the site unless there were no “feasible and prudent” alternatives.⁵⁸ It further stated that the Shepard Point location, which at that point was chosen under the BIA ROD, was documented as being “feasible and prudent.”⁵⁹ Therefore, Terry Schumann’s letter concluded that selecting the Orca Cannery alternative would jeopardize FHWA funding.

⁴⁹ *Id.* at comment reply #9.

⁵⁰ *Id.* at 1.

⁵¹ Native Village of Eyak, *Request to Resume Active Consideration of Permit Application for Shepard Point Oil Spill Response Facility and Access Road (POA-1994-1014), Along with Supplemental Information for Permit Application Record 4* (2016) [hereinafter *Request to Resume Active Consideration*].

⁵² *Id.* at Tab 12 (CH2M Hill, *Shepard Point Oil Spill Response: Alternatives Assessment* at Tab 12 (pg. 6-1) (2015)).

⁵³ *Request to Resume Consideration, supra* note 51, at Tab 9 (Email from Moe Zamarron to Heather Adams (Oct. 3, 2014)).

⁵⁴ James Glaze Email to Robert Sparrow, *FW: Confirmation That FHWA/TTP Funds Will Be Used for the Entire Shepard Point Project* (Feb. 18, 2015 4:39 pm) [hereinafter *James Glaze Email 4:39*].

⁵⁵ James Glaze Email to Robert Sparrow, *FW: Confirmation That FHWA/TTP Funds Will Be Used for the Entire Shepard Point Project* (Feb. 19, 2015 11:22 am) [hereinafter *James Glaze Email 11:22*].

⁵⁶ Brian G Allen Email to Robert Sparrow, *FW: Confirmation That FHWA/TTP Funds Will Be Used for the Entire Shepard Point Project* (Feb. 19, 2015 12:05 pm) (emphasis added) [hereinafter *Brian Allen Email 12:05*].

⁵⁷ Terry Schumann Email to Jack Hewitt, *Letter Regarding the Shepard Point Project* (June 1, 2015 4:12 pm) [hereinafter *Terry Schumann Email 4:12*].

⁵⁸ Terry Schumann Letter to Jack Hewitt (June 1, 2015).

⁵⁹ *Id.*

b. U.S. Department of Transportation Act § 4(f) does not categorically preclude use of FHWA funds on the Orca Cannery alternative.

The Native Village of Eyak and FHWA stated in 2014 and 2015, respectively, that FHWA funds would be unavailable for developing Orca Cannery as an OSRF pursuant to federal law. However, § 4(f) mandates specific procedures from FHWA that cannot be circumvented by collusion or sheer bureaucratic will. The record shows that FHWA, the only agency with authority to make the determination, failed to follow the law. Furthermore, FHWA does not have authority to eliminate project alternatives that satisfy the LEDPA standard. Lastly, even if the Administration had followed the procedures correctly, it nevertheless would have concluded that using FHWA funds on Orca Cannery’s historic property does not violate § 4(f) because the Shepard Point alternative is not prudent.

i. *Department of Transportation Act § 4(f)*

The U.S. Department of Transportation Act of 1966 (commonly referred to as § 4(f)) guides USDOT and FHWA projects involving historic properties.⁶⁰ Under USDTA § 4(f), the Secretary of Transportation may approve a project that “use[s]” an historic site only if (1) there is no feasible and prudent alternative and (2) the project includes all possible planning to minimize harm to the site.⁶¹ The substantive requirement here is that a different site must be selected unless there is no feasible and prudent alternative. Broadly stated, an alternative is feasible and prudent if it “does not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the § 4(f) property.”⁶² More narrowly, an alternative is not “feasible” if “it cannot be built as a matter of sound engineering judgment.”⁶³ On the other hand, prudence speaks to economic, social, and environmental impacts. An alternative is not “prudent” if:

- it results in unacceptable safety or operational problems;
- after reasonable mitigation, it still causes severe social, economic, or environmental impacts or severe impacts to environmental resources protected under other Federal statutes;
- it results in additional construction, maintenance, or operational costs of an extraordinary magnitude; or
- it involves multiple of the above factors that, while individually minor, cumulatively cause unique problems or impacts of extraordinary magnitude.⁶⁴

FHWA is solely responsible for making the “feasible and prudent” finding, including during a National Environmental Policy Act (NEPA) process when the federal lead agency is not part of USDOT.⁶⁵

⁶⁰ 49 U.S.C. § 303.

⁶¹ *Id.* § 303(c).

⁶² 23 C.F.R. 774.17.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 23 C.F.R. § 774.11(a), (b).

The standard here weighs different factors than the Corps' LEDPA standard, thus FHWA cannot determine that an alternative is feasible and prudent just because it is practicable.

§ 4(f) sometimes conflicts with CWA § 404 permitting when the LEDPA requires use of an historic site and § 4(f) requires an alternative that harms aquatic resources. According to an FHWA policy paper and a Practitioner's Handbook that was drafted with FHWA assistance, neither act has supremacy over the other, which is why the Administration and Corps are meant to strike a balance on a case-by-case basis if there is conflict.⁶⁶ Therefore, whereas the existence of a feasible and prudent alternative would typically forbid using historic properties, conflict exists between § 404 and § 4(f) that urges the Corps and FHWA to coordinate.⁶⁷ Only then, under the condition that the agencies jointly find in favor of preserving the property, may a location officially be eliminated as a practicable alternative.⁶⁸

- ii. *The Corps should not presume that Orca Cannery is impracticable because NVE, FHWA, and the Corps failed to complete § 4(f).*

This process was not sufficiently completed here because (1) NVE prematurely relied on an incomplete § 4(f) analysis to foreclose the Cannery from being considered a practicable alternative, (2) NVE and CH2M Hill, Inc. falsely stated that Shepard Point is "feasible and prudent", and (3) FHWA never independently performed the feasible and prudent analysis with respect to Shepard Point as required by § 4(f).

First, in its response to public comments, NVE prematurely relied on an incomplete § 4(f) analysis to foreclose the Cannery from being considered as a practicable alternative. Although the 2014 report concluded that the Cannery was eligible for the NRHP and that the Project would adversely affect (and therefore "use") the historic property, no official subsequent efforts were taken by FHWA to determine if any feasible and prudent alternatives existed. Instead, NVE unilaterally concluded in its response to comments that the Cannery was not practicable based on the 2014 report.⁶⁹ It also stated in its 2016 request to the Corps that "FHWA funds may not be used if the Historic District is impacted."⁷⁰ However, FHWA and the Corps, not NVE, have authority over whether Orca Cannery's eligibility on the NRHP ultimately eliminates it as a practicable alternative.

Second, in a response to a National Oceanic and Atmospheric Administration (NOAA) comment, NVE stated, "the Orca Cannery alternative cannot be advanced as there is a feasible and prudent alternative."⁷¹ Also, CH2M Hill, Inc. and Moe Zamarron of NVE both stated that Shepard Point is feasible

⁶⁶ FHWA Section 4(f) Policy Paper 63 (2011) file:///Users/benjamindeford/Downloads/FHWA-2011-0125-0001_attachment_1.pdf; AASHTO, *Practitioner's Handbook: Complying With § 4(f) of the U.S. DOT Act 17* (2009) [hereinafter *Practitioner's Handbook: Complying with § 4(f)*] <https://environment.transportation.org/wp-content/uploads/2021/05/pg11-1-lowres.pdf>.

⁶⁷ *Practitioner's Handbook: Complying With § 4(f)*, *supra* note 62, at 17.

⁶⁸ *See id.*

⁶⁹ *Response to Comments*, *supra* note 29, at 1.

⁷⁰ *Request to Resume Consideration of Permit Application*, *supra* note 32, at 22.

⁷¹ *Response to Comments*, *supra* note 29, at 1 (2014).

and prudent.⁷² However, CH2M Hill likely based its conclusion on the BIA ROD that makes no reference to § 4(f). NVE did not analyze Shepard Point under § 4(f)'s prudence factors test. These documents not only are missing crucial language, necessary explanations, and reliable sources, but they are also misleading. This is because FHWA has exclusive authority over the "feasible and prudent" finding,⁷³ and nothing suggests that the Administration had exercised that authority. Furthermore, Moe Zamarron's inaccurate statements were in response to the Corps' unambiguous question about whether FHWA would fund a project that impacts a historic site.⁷⁴ Therefore, NVE and CH2M Hill, Inc. undermined the § 4(f) process and should have withheld judgment until the Corps and FHWA fully reviewed the 2014 report and analyzed Shepard Point as a feasible and prudent alternative.⁷⁵

Third, Terry Schumann's 2015 letter to Jack Hewitt stated that the Shepard Point alternative had been documented as feasible and prudent and that the Administration therefore could not fund the Project at Orca Cannery. However, the only document referenced in the letter referenced was BIA's 2007 ROD that never discussed § 4(f).⁷⁶ Regardless, FHWA has singular authority over whether Shepard Point is feasible and prudent, and it may not rely on another agency's judgement during the NEPA process.⁷⁷ However, the record indicates that the agency did just that.

Lastly, the email correspondence between NVE, FHWA, Heather Adams, and Jack Hewitt of the Corps suggests the existence of a coordinated effort to wield the weight and authority of federal law with the intent of eliminating Orca Cannery as a practicable alternative. Moe Zamarron's original email to Ms. Adams verbosely articulated § 4(f)'s lengthy legal standard and simply stated that Shepard Point satisfied it without any analysis or citations.⁷⁸ Mr. Glaze's urgent and heated emails also reveal the Tribe's intense concern over the possibility that the Corps would delay the Shepard Point permit and pursue Orca Cannery.⁷⁹ He even provided a template email and told FHWA to use Moe Zamarron's language at will even though Mr. Zamarron is not an FHWA employee and has no authority to determine whether Shepard Point is a feasible and prudent alternative.⁸⁰ FHWA subsequently stated that § 4(f) had been "used" to eliminate Orca Cannery before even though federal law is not a tool to deploy at an agency's will.⁸¹ Finally, Ms. Schumann's 2015 letter was sent at NVE's request, and consistent with NVE's opaque tone, vaguely mentions that Shepard Point is feasible and prudent after thoroughly describing § 4(f)'s legal standard.⁸² These communications suggest that NVE and FHWA exploited the Corps' personnel changes and possible

⁷² *Request to Resume Consideration of Permit Application*, supra note 32, at Tab 9 (Email from Moe Zamarron to Heather Adams (Oct. 3, 2014)) and Tab 12 (CH2M Hill, *Shepard Point Oil Spill Response: Alternatives Assessment* at Tab 12 (pg. 6-1) (2015)).

⁷³ 23 C.F.R. § 774.11(a), (b).

⁷⁴ *Request to Resume Consideration of Permit Application*, supra note 32 at Tab 9.

⁷⁵ *Response to Comments*, supra note 29, at 1 (stating that the Corps was currently reviewing the report, confirming that NVE eliminated Orca Cannery before FHWA, SHPO, and the Corps could coordinate over § 4(f)).

⁷⁶ Bureau of Indian Affairs and Department of Interior, *Record of Decision* (2007).

⁷⁷ 23 C.F.R. 774.11 (a), (b).

⁷⁸ *Request to Resume Consideration*, supra note 29, at Tab 9 (Email from Moe Zamarron to Heather Adams (Oct. 3, 2014)).

⁷⁹ *James Glaze Email 4:39*, supra note 54; *James Glaze Email 11:22*, supra note 55.

⁸⁰ *James Glaze Email 4:39*, supra note 54.

⁸¹ *Brian Allen Email 12:05*, supra note 56.

⁸² *Terry Schumann Email 4:12*, supra note 57; Terry Schumann Letter to Jack Hewitt (June 1, 2015).

unfamiliarity with § 4(f) to pressure Mr. Hewitt into eliminating Orca Cannery after he replaced Ms. Adams and raised concerns over FHWA funding.

Even if Shepard Point is feasible and prudent, FHWA does not have the authority to unilaterally eliminate Orca Cannery as a practicable alternative because of the conflict between CWA § 404 and NHPA § 4(f). Interagency disputes happen all the time, yet statutory obligations do not take primacy over one another out of court without agencies undergoing dispute resolution. Statutes like the CWA contain conflict resolution provisions targeted at specific agencies.⁸³ Otherwise, memoranda of understanding often delineate resolution procedures with respect to certain laws.⁸⁴

Commenters have been unable to locate clear statutory or regulatory language outlining the Corps' and FHWA's process with respect to § 4(f) and § 404 conflicts. However, an FHWA endorsed guidebook specifically mentions that interagency resolution is necessary when § 4(f) and § 404 conflict, as do state DOT § 4(f) guides and FHWA's Environmental Review Toolkit.⁸⁵ Nevertheless, FHWA and NVE effectively eliminated Orca Cannery from consideration based on the property's NRHP eligibility status with no regard for the Corps' LEDPA requirement. Instead, FHWA and the Corps should have communicated directly following the 2014 cultural survey's publication. The agencies should have subsequently resolved the dispute through consultation and a memorandum of understanding as is common practice among federal agencies in similar circumstances.

iii. *Shepard Point is not a "feasible and prudent" alternative.*

Although the Shepard Point alternative is "feasible" because it likely can be built "as a matter of sound engineering judgment," it fails the "prudent" factors test because it will "cumulatively cause unique problems or impacts of extraordinary magnitude."⁸⁶ Alternatively, it also fails the birds-eye feasible and prudent inquiry because it likely "cause[s] other severe problems of a magnitude that substantially outweigh the importance of protecting" the Cannery's historic property.⁸⁷ Even if FHWA disagrees in principle, it never conducted a thorough analysis, and it was thus improper to notify the Corps that the Cannery alternative was not eligible for Administration funds. Therefore, use of FHWA funds on the Orca Cannery alternative would not contravene § 4(f), and the Corps has a duty to fully consider the Cannery for development. Finally, under the unlikely scenario an FHWA "prudence" analysis is buried in the record, the Project's price tag has ballooned extraordinarily, and a new analysis should be done.

⁸³ 33 U.S.C. § 1344(q); Environmental Protection Agency and Department of the Army, *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army* (1992).

⁸⁴ US Fish and Wildlife Service/Federal Highway Administration, *Memorandum of Understanding on Coordination of Highway Projects in Alaska* (1985).

⁸⁵ *Practitioner's Handbook: Complying With § 4(f)*, supra note 62, at 17; Arizona Department of Transportation, *Section 4(f) Manual: Section 4(f) Evaluation Guidance and Requirements* 10-6 (2019); Federal Highway Administration, *Environmental Review Toolkit: Disputes That Arise During NEPA Reviews of Transportation Projects* https://www.environment.fhwa.dot.gov/pubs_resources_tools/resources/adrguide/adr4.aspx.

⁸⁶ 23 C.F.R. 774.17.

⁸⁷ *Id.*

First, the “prudent” factors in aggregate indicate that Shepard Point fails the test. Under the first factor, the road will traverse dangerous avalanche paths that reach Orca Inlet.⁸⁸ This is especially concerning because avalanches pose a considerable safety risk to road maintenance workers and the general public.⁸⁹ Furthermore, the avalanche study that was completed for the Draft 2005 EIS took a very cautionary position, recommending that “every effort be made to design and construct [an] alternative site . . . so that the identified avalanche exposure is avoided.”⁹⁰ As to the second factor, even under NVE’s mitigation plan, the Shepard Point alternative will damage a variety of upland, wetland, and aquatic habitats, including anadromous fish streams and possibly eelgrass—an “essential fish habitat” under the Magnusson-Stevens Act.⁹¹ Therefore, not only will this alternative cause environmental impacts, but it will affect resources that are protected under two federal statutes: the Clean Water Act and the Magnusson-Stevens Act. Under the third factor, constructing and maintaining the Shepard Point alternative will involve costs of an extraordinary magnitude. The most recent estimate for construction is \$100 million,⁹² and NVE has stated that it does not have a plan for funding the facility and road maintenance,⁹³ which is concerning in part because of the rugged landscape and harsh climate. Therefore, costs alone should eliminate Shepard Point as a prudent alternative. However, even if each factor individually is insufficient to determine that Shepard Point is not a “prudent” alternative, the combination of factors should be because they “cumulatively cause unique problems” and “impacts of extraordinary magnitude.”⁹⁴

Second, an alternative can be “feasible and prudent” if it “does not cause other severe problems of a magnitude that substantially outweigh the importance of protecting the § 4(f) property.” Based on the above “prudence” factors, Shepard Point likely causes “severe problems.” The importance of protecting the Orca Cannery historic properties, on the other hand, is not addressed anywhere. To be certain, the 2014 cultural report found that constructing a pad at Orca Cannery would adversely affect the historic site, but the report stopped short of stating the importance of protecting the property. Regardless, however, the survey was endorsed by SHPO with respect to § 106 of the NHPA and not by FHWA.⁹⁵ Therefore, the Corps and FHWA should have completed this birds-eye § 4(f) analysis in addition to weighing the “prudent” factors individually before eliminating the Cannery as a practicable alternative.

Finally, even if a prudence analysis is buried somewhere in the record, the Shepard Point price tag has ballooned to \$100 million, and the staging pad has increased in size by 2 acres since FHWA notified

⁸⁸ David Hamre, Chugach Mountain Guides, LLC and CH2M Hill, *Avalanche Hazard Mitigation Analysis Cordova Deep Water Port*.

⁸⁹ *Id.*

⁹⁰ Alaska Mountain Safety Center, Inc., *Avalanche Hazard Evaluation and Mitigation Recommendations for the Proposed Cordova Oil Spill Response Facility* 18 (2005).

⁹¹ 16 U.S.C. § 1801; 50 C.F.R. § 600; Native Village of Eyak, *Final 2021 Environmental Report*, *supra* note 70, at 22 (delineating individual impacts and stating that total upland and aquatic impacts equal 33.1 and 9.93 acres respectively).

⁹² *Final 2021 Environmental Report*, *supra* note 70, at 18, 22.

⁹³ Prince William Sound Regional Citizens’ Advisory Council’s Oil Spill Prevention and Response Committee, *OSPR Meeting on Native Village of Eyak’s Shepard Project Update*, at 50:07 (Dec. 8, 2021) (available at https://drive.google.com/file/d/1Cuvdi9WLOi2iP_zJAwapopY_Db1-QdAT/view?usp=sharing).

⁹⁴ *Id.*

⁹⁵ Grantham and Bundy, *Orca Cannery Cultural Resources Evaluation: Shepard Point Oil Spill Response Facility and Connecting Road Project*, at cover sheet (2014). <https://shepardpointless.files.wordpress.com/2014/09/orca-cannery-evaluation-report-5-6-14-final.pdf>.

the Corps that Administration funds would be unavailable for developing Orca Cannery.⁹⁶ Therefore, a new analysis is necessary to determine why Shepard Point remains feasible and prudent.

c. The Corps is obligated to complete National Historic Preservation Act § 106 consultation in considering Orca Cannery as a practicable alternative.

The Corps did not complete National Historic Preservation Act § 106 consultation with Alaska’s SHPO to resolve potential adverse effects to the Cannery, thus it should not have been eliminated as a practicable alternative.

i. *The National Historic Preservation Act § 106*

Unlike § 4(f), the National Historic Preservation Act § 106 is procedural, and it requires all federal agencies to consider their projects’ effects on historic properties.⁹⁷ If a project could cause effects on historic properties, the agency must proceed through the § 106 process, including consultation with SHPOs, or, when appropriate, Tribal Historic Preservation Offices (THPO) or Indian Tribes.⁹⁸ Part of the consultation process involves determining whether the project will adversely affect properties that are eligible for the NRHP.⁹⁹ If the answer is yes, then the agency must assess and resolve the adverse effect.¹⁰⁰ Importantly, resolution is not a fixed standard, and an adverse effect finding does *not* categorically prevent the project from proceeding.¹⁰¹ Rather, it involves continued consultation “to develop and evaluate alternatives or modifications to the undertaking that could avoid, *minimize or mitigate* adverse effects on historic properties.”¹⁰² Furthermore, the public has the opportunity to participate in the resolution process.¹⁰³ Ultimately, if resolution is successful, the parties execute a memorandum of agreement that delineates the agency’s obligations, allowing use of the site under specific conditions.¹⁰⁴

ii. *The Corps did not complete § 106 consultation with respect to Orca Cannery.*

NVE and the Corps did not fulfill their duties here, and when the Alaska’s SHPO (a necessary party to consultation) inquired about § 106 consultation with respect to Orca Cannery in 2013, NVE’s and the Corps’ responses were evasive and misleading. While NVE took the necessary first step in the § 106 process when it commissioned the 2014 cultural report, consultation proceeded no further. Instead, NVE suggested that the property’s eligibility mandates preservation.¹⁰⁵ It also stated that coordination with the Alaska SHPO concluded in 2012, and that “all project alternatives were surveyed for the purpose of meeting

⁹⁶ *Final 2021 Environmental Report*, *supra* note 70, at 17; Army Corps of Engineers Alaska District, *Public Notice of Request for Permit Modification 3* (2022).

⁹⁷ 54 U.S.C. § 306108.

⁹⁸ *Id.* § 306108; 36 C.F.R. § 800.

⁹⁹ 36 C.F.R. §§ 800.3; 800.5.

¹⁰⁰ *Id.* § 800.6.

¹⁰¹ *Id.*

¹⁰² *Id.* (Emphasis added).

¹⁰³ *Id.* § 800.6(a)(4).

¹⁰⁴ *Id.* § 800.6(b)(4).

¹⁰⁵ *See Response to Comments*, *supra* note 29, at response to comments ## 148, 149, 157 (2014).

Section 106[.]”¹⁰⁶ This is unlikely considering Alaska’s SHPO commented in 2013 that its record showed that Orca Cannery never underwent full § 106 review.¹⁰⁷ Next, the Corps replicated the same mistake as NVE in its ROD, restating the Cannery’s eligibility status as sufficient reason for eliminating it as an alternative without explaining why.¹⁰⁸ NVE’s and the Corps’ comments inadequately addressed the substantive issue raised by the SHPO—that eligibility does *not* mandate preservation. Eligibility instead leads to the next step in the process: continued consultation.¹⁰⁹ Here, there was no subsequent consultation, no efforts to develop a mitigation plan and resolve the adverse effect, and no opportunity for the public to express its opinions on the resolution process. Therefore, the Corps did not complete § 106 consultation, and did not satisfy its obligation under NEPA to fully explore Orca Cannery as a practicable alternative.

Alarming, the § 106 process *is* familiar to the Corps because it acknowledged the consultation between Alaska’s SHPO, NVE, and FHWA regarding two historic buildings at Shepard Point.¹¹⁰ In fact, the Corps applied a double standard here because it sidestepped comments raising concerns over the incomplete § 106 process with respect to Orca Cannery, yet it acknowledged—in the same document—that compliance with § 106 was required for the historic properties at Shepard Point.¹¹¹ This shows that § 106 consultation at Orca Cannery was not fulfilled, and also reveals the Corps’ bias toward the Shepard Point alternative.

V. SHEPARD POINT IS THE MOST ENVIRONMENTALLY DAMAGING ALTERNATIVE.

The Shepard Point alternative was never the LEDPA and the proposed modifications do not cure this fact because the modifications will likely exacerbate the Project’s impacts on several distinct habitat types.¹¹² This includes effects on wetland habitats—riverine, palustrine, intertidal, and subtidal—and upland habitats, including old-growth forests, tall shrub alder, and beach rye meadow.¹¹³ The OSRF at Shepard Point was the most environmentally damaging and least practicable alternative of the original alternatives proposed in the 2006 FEIS; these proposed modifications do nothing to change that fact, and may actually make the Project *more* environmentally damaging and even less practicable.

a. The proposed permit modifications do not make Shepard Point the LEDPA.

The reduction in impacts to wetland and upland habitats that NVE claims do not add up. In its 2021 report, NVE claims a reduction of 4.8 acres of reduced impacts to upland habitat.¹¹⁴ NVE also claims a reduction of 5.49 acres of impacts to wetlands and other WOTUS.¹¹⁵ These amount to a total Project impact reduction of 10.29 acres; NVE likely can rely on only three reductions to account for this total. First,

¹⁰⁶ *Id.*

¹⁰⁷ Alaska Department of Natural Resources Email to Steve Lindamood; *Oil Spill Response Facility at Shepard Point, POA-1994-1014* Footnote 1 (Dec. 13, 2013).

¹⁰⁸ Department of the Army, *Record of Decision 21* (2017).

¹⁰⁹ 36 C.F.R. 800.6.

¹¹⁰ Department of the Army, *Record of Decision 55* (2017).

¹¹¹ *Id.*

¹¹² *Final 2021 Environmental Report*, *supra* note 18, at 22 Table 3.

¹¹³ *See 2021 Environmental Report*, *supra* note 18, at 18 Table 2.

¹¹⁴ *Id.*

¹¹⁵ *Final 2021 Environmental Report*, *supra* note 18, at 22 Table 3.

realignment of the road from the East to the West side of Humpback Mountain reduces the width of a that portion of the road from 32-foot-wide to 16-foot-wide, but with 23 total turnouts for 4.32 miles of road, this hardly seems likely to be a significant reduction.¹¹⁶ Second, NVE proposes reducing the length of a 32-foot-wide section of the road by 0.18 miles.¹¹⁷ Third, NVE tabulates a 0.6-acre reduction of fill below the High Tide Line (HTL) from removing the RipRap at the staging area.¹¹⁸ However, these three reductions only account for 5.18 acres of reduced impacts, which are partially offset by the request to enlarge the pad and staging area by 2 acres.¹¹⁹ As a result, it's likely that the modifications may only entail Project reduction of 3.18 acres, leaving an unexplained claim of 7.11 acres of reductions. A discussion of the modifications and why the Corps should revoke the § 404 permit in light of the modification requests follows below.

b. The road realignment to the east of Humpback Mountain will likely increase impacts to Intertidal and Subtidal Habitats.

Shifting the road alignment from the east side of Humpback Mountain to the west side to avoid potential impacts on the Cordova Electric Cooperative (CEC) penstock tunnel will likely increase the impacts to intertidal and subtidal habitat areas, which is contrary to the CWA. Road option 3 of the 2006 FEIS (passing around Humpback Mountain on the East side) was selected as the preferred option for a couple of reasons. First, and most importantly to the § 404 permit requirements, road option 3 required the least amount of fill placed below the HTL reducing the impacts on high value intertidal habitat.¹²⁰ Second, road option 3 was the preferred route for safety concerns from avalanches occurring on the steeper west side of Humpback Mountain.¹²¹ Third, it was the least expensive option.¹²²

The proposed modification of realigning the road to traverse around the west side of Humpback Mountain undoes the effort to avoid impacts and mitigate risks. In fact, the modification significantly increases the likelihood of negative impacts on high value habitats, increases the avalanche risk to human life (see section below for details), and adds additional costs to an already unreasonable expense of the Project.¹²³ NVE states that the new proposed route will be similar to a combination of previously considered road options 1 and 2 from the 2006 FEIS.¹²⁴ By doing a simple comparison of the road options discussed in the 2006 FEIS, it becomes apparent choosing a combination of road options 1 and 2 has the potential to double the amount of fill below the HTL when compared to road option 3. Road options 1 and 2 are estimated to result in 20.5 and 27.5 acres of fill, respectively, while road option 3 was estimated to result in only 11 acres of fill below the HTL.¹²⁵ Even though NVE indicates the road has been shifted to a higher elevation, the road realignment modification will still likely require fill to be placed in both intertidal and

¹¹⁶ Army Corps of Engineers Alaska District, *Public Notice of Request for Permit Modification* at 2 (Feb. 2022).

¹¹⁷ *Id.*; See NVE Report at 5; (NVE states the typical road width will be 16-foot-wide, but with 23 turnouts for 4.32 miles of road, amounting to 5.3 turnouts per mile, it's likely the "typical" road width will be greater than 16-foot-wide).

¹¹⁸ NVE 2021 Report Table 3 footnote 4 at 22.

¹¹⁹ *Request for Permit Modification, supra* note 23, at 3.

¹²⁰ *FEIS, supra* note 27, at 2-24.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Final 2021 Environmental Report, supra* note 18, at 17 (stating that "[t]he current estimated cost of the pile-supported dock is \$42 million and the access road at \$58 million, for a total estimated project cost of approximately \$100 million.").

¹²⁴ *Request for Permit Modification, supra* note 23, at 2.

¹²⁵ *FEIS, supra* note 27, at 2-15 Table 2-7.

subtidal habitats because of the steepness of the terrain, coupled with the heavy rock cuts and the proximity of the road to Orca Inlet.¹²⁶ This modification will likely increase the impacts on WOTUS to more than what was decided on in the 2017 Corps ROD, making this modification contrary to the CWA.¹²⁷ Additionally, the proposed modification increases the potential for sediment erosion into Orca Inlet from the road construction's "heavy rock cuts and the steep climb away from the coastline, followed by a steep downhill decline near Humpback Creek."¹²⁸ These new increases to the likely impacts on WOTUS and habitats are unacceptable.

The proposed road realignment makes the most environmentally damaging alternative even more environmentally damaging, and contrary to § 404(b)(1) guidelines. "[N]o discharge of dredge 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."¹²⁹ Also, "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."¹³⁰ Because this realignment of the road to a combination of road options 1 and 2 will likely increase impacts to WOTUS, increases risks from avalanches, and has higher costs associated from significantly more earthwork on steep terrain, this proposed modification should be rejected, precluding the building of the OSRF at Shepard Point. The Corps has an obligation to not issue permits when it has not independently verified that an alternative (in this case a modified alternative), which will have fewer adverse impacts, is impracticable.¹³¹

c. Reducing the road length from 4.5 miles to 4.32 miles does not reduce impacts to WOTUS and should not be relied on to satisfy LEDPA requirements.

Shortening the road will not reduce any of the impacts that building the OSRF at Shepard Point will cause to wetlands and WOTUS. Therefore, this proposed modification should not be weighted as a positive modification for the § 404 permit requirements to select the LEDPA.

Reducing the road length from 4.5 miles to 4.32 miles is only a reduction of 950 feet, not a reduction of "more than 1,000 feet of road."¹³² As the starting section of road is two lanes at 32-feet wide, this reduction in length likely only reduces upland habitat impacts by around 0.7 acres.¹³³ While there will likely be other impact reductions to upland habitat from the narrowing of the road section that is realigned around Humpback Mountain, the 2 acre increase in the size of the staging area would likely offset most of these reductions,¹³⁴ making it unlikely that there will be a total upland habitat impact reduction of 4.8 acres as

¹²⁶ *Final 2021 Environmental Report*, *supra* note 18, at 4; *Public Notice Request for Permit Modification* at 3 (Feb. 2022); see also 2006 FEIS Figure 3.3-3.

¹²⁷ 40 C.F.R. § 230.10 320; see 33 U.S.C. § 1344(b).

¹²⁸ 40 C.F.R. § 230.10 320; see 33 U.S.C. § 1344(b).

¹²⁹ 40 C.F.R. § 230.10(a).

¹³⁰ 40 C.F.R. § 230.10(2).

¹³¹ *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004) (citing *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152 at 1186–87 (10th Cir. 2002) (requiring denial of a permit "where insufficient information is provided to determine compliance"))).

¹³² *Request for Permit Modification*, *supra* note 23, at 3; *Final 2021 Environmental Report*, *supra* note 18, at 6.

¹³³ *Final 2021 Environmental Report*, *supra* note 18, at 6; *FEIS*, *supra* note 27, at 2-21.

¹³⁴ *Request for Permit Modification*, *supra* note 23, at 3.

indicated in Table 2 of the NVE Final 2021 Environmental report.¹³⁵ This modification should not be considered as factor in deciding to continue forward with building the OSEF at Shepard Point.

d. Realignment of the bridge crossings is unlikely to reduce impacts to Palustrine fish habitat.

There seems to be a double counting of the reductions of impacts to the wetlands from the use of bridges. The Final 2021 Environmental Report claims that the realignment reduces impacts to “high-functioning palustrine wetlands in the vicinity of Humpback Creek by 9%, for a total impacted area of 0.10-acres.”¹³⁶ In relying on this claim, the report indicates the realignment reduces impacts to palustrine habitat from 1.13 acres, in 2017, to 0.10 acre.¹³⁷ This cannot be accurate. First, a 9% reduction to 1.13 acres is only a reduction by 0.10, not a reduction *to* 0.10. Second, the Corps 2017 ROD states that the “impacts to Humpback Creek and [No-name] Creek (fish-bearing streams) were completely eliminated.”¹³⁸ There were three bridges proposed for use in the Corps’ 2017 ROD, and there remain three bridges proposed in the modification. As such, there are no reductions that can be claimed from using or relocating the bridges spanning Humpback and No-name Creeks.

In addition, having the bridges cross over Humpback and No-name creeks closer to the mouths at Orca Inlet increases the potential for negative impacts to palustrine habitat. The Corps’ 2017 ROD states “[r]oad alignment was shifted inland from tidelands to avoid placing fill in productive habitat near the mouth of [No-name] Creek and Humpback Creek.”¹³⁹ The FEIS indicated that road option 2 would result in an increase of rock excavation due to the Humpback Creek bridge approaches and that by choosing road option 3, the road would avoid No-name and Humpback Creek estuaries.¹⁴⁰ The realignment now causes the bridge crossings to be closer to the mouths of these fish-bearing streams, and there will be increased earthwork for the bridge abutments flanking the creeks. Having these bridge embankments be close to the estuaries is contrary to the decision in the Corps 2017 ROD and will lead to increased degradation of water quality and destruction or alteration of stream habitats from erosion entering the stream estuaries. Because these impacts were originally avoided in choosing road option 3, allowing the road to shift back closer to the mouth of these fish bearing streams creates unacceptable impacts that should remain avoided.

Further, replacing the bridge spanning Orca Creek with a culvert increases the impacts on WOTUS that were originally avoided when it was crossed by a bridge.¹⁴¹ Plus, the road realignment adds an additional bridge crossing over Little Humpback Creek that was not crossed by road option 3.¹⁴² Further,

¹³⁵ *Id.* at 18 Table 2. The total amount of fill reduction is difficult to calculate without the 3D modeling of the road.

¹³⁶ *FEIS*, *supra* note 27, at 2-21.

¹³⁷ *Id.* at 21 Table 3.

¹³⁸ Department of the Army, *Record of Decision 5* (2017).

¹³⁹ This means that road option 3 was chosen because it is the most inland route. Also, there is a discrepancy between the 2017 Corps ROD and the Request for Modification in the names used for the creeks being crossed by bridges. The 2017 Corps ROD indicates that Humpback and Unnamed (No-name) Creek were being crossed by bridges, while the Request for Modification states that Humpback and Little Humpback Creeks were being crossed with bridges and proposes now to also cross No-name Creek with a bridge. The new bridge will be over Little Humpback Creek, not No-name.

¹⁴⁰ *FEIS*, *supra* note 27, at 2-23.

¹⁴¹ Department of Army, *Record of Decision 5* (2017).

¹⁴² See CH2M Hill, *Joint Application for Permit Shepard Point Oil Spill Response Facility and Connecting Road Project*, Table 4 at 23 (Aug. 2013) [Hereafter *CH2MHill 2013*].

there will be additional impacts to wetlands from the pad and staging area increase that were not previously accounted for. Therefore, impacts to wetlands and WOTUS will likely increase. Accordingly, the claimed 1.03 acres reduction to palustrine habitat and the claimed 0.23-acre reduction to riverine habitat from the modifications are inaccurate or inadequately explained.¹⁴³

The Corps has a responsibility not to issue a § 404 permit unless the it has independently verified an applicant’s alternatives analysis.¹⁴⁴ This verification process certainly should require the Corps to corroborate claimed wetland and WOTUS impact reductions when modifications are proposed for a project, and the claimed reductions are not being accurately portrayed. Therefore, this modification should not be permitted.

e. The Shepard Point pad and staging area increase from 3.5 acres to 5.5 acres is a significant increase in the Project and impacts wetlands.

An increase in a project footprint by 60 percent is a significant modification, and as such, it should be justified by supporting evidence. Here, NVE fails to provide the necessary support. Under 33 C.F.R. § 325.1(d)(1), an application for a § 404 permit “must include a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice (although, detailed engineering plans and specifications are not required); the location, purpose and need for the proposed activity.”¹⁴⁵ In this case, Section 2.1.7, “Staging Area Criteria,” of the 2006 FEIS indicates that “relocating and consolidating the SERVS equipment alone would require approximately 1.5 acres of staging area. A need frequently mentioned by the response planners is an additional area to assemble and sort pre-positioned and incoming equipment. An estimate of the area needed [...] is a minimum of 2.0 additional acres making the minimum staging area size criteria 3.5 acres.”¹⁴⁶ As the 3.5-acre requirement for the staging area was the established criteria set in the 2006 FEIS and relied on for the Corps 2017 ROD, NVE should not be permitted to increase the size of the staging area based on its own “master planning studies” completed after the issuance of the permit.¹⁴⁷

Also, NVE’s comments reveal the true purpose for prioritizing Shepard Point over other locations: potential future development. NVE claims that “Shepard Point was further discussed as having an advantage over other options due to it having adequate room for future expansion,” and “[a]ccess would be made to developable land,” but future development is not part of the purpose and need of this Project.¹⁴⁸ Therefore, these reasons should be excluded from criteria to be relied on in making a § 404 permit application decision, and in this case, a modification.¹⁴⁹

¹⁴³ See *Final 2021 Environmental Report*, *supra* note 18, at 4, 22.

¹⁴⁴ *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1269 (10th Cir. 2004) (citing *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152 at 1186–87 (10th Cir. 2002) (requiring denial of a permit “where insufficient information is provided to determine compliance”)).

¹⁴⁵ 33 C.F.R. § 325.1(d)(1).

¹⁴⁶ *FEIS*, *supra* note 27, at 2-11.

¹⁴⁷ *Final 2021 Environmental Report*, *supra* note 18, at 8.

¹⁴⁸ *Request for Permit Modification*, *supra* note 23, at 3; *Final 2021 Environmental Report*, *supra* note 18, at 12; *FEIS*, *supra* note 27, at 1-1, 1-2.

¹⁴⁹ 33 C.F.R. § 320.4.

The proposed enlargement of the staging area from 3.5 acres to 5.5 acres will impact two additional wetlands not considered in the 2006 FEIS or the Corps 2017 ROD. As the 3.5 acre pad and staging area had already been deemed sufficient as the LEDPA, the increase in size of the staging area is in direct conflict with the goal of the CWA. A § 404 permit should not be issued where there is a practicable alternative to the proposed discharge, or fill, that would have a less adverse impact on the aquatic ecosystem, provided that that alternative does not have other significant adverse environmental consequences.¹⁵⁰ In sum, because the 3.5 acre staging area was already determined to serve the Project's purpose, increasing the staging area to 5.5 acres would unnecessarily impact additional wetlands and constitutes an arbitrary and capricious decision.¹⁵¹ It makes no difference that the modification would better serve NVE's needs because the CWA requires selection of the LEDPA, not a project design that is the most convenient or efficient for the applicant.

- f. Installation of an interlocking steel sheet pile retaining wall should be required by a LEDPA analysis, not as a proposed modification.

Since the use of a sheet piling retaining wall, instead of a riprap retaining wall, provides an impact reduction of 0.6-acre and does not have any other adverse environmental impacts, the sheet pile retaining wall is the LEDPA and should have been the first selection.¹⁵² Regardless, this 0.6 acre reduction is not enough to explain how NVE accounts for its claim of total impact reductions. The realignment of road option 3 to a combination of road options 1 and 2 will likely lead to an increase in impacts to wetlands and WOTUS, further contradicting NVE's claim of a 5.49 acres reduction to wetlands and WOTUS.¹⁵³

- g. Increasing the boat ramp size is unjustified and unnecessary.

The proposed modification to the boat ramp is roughly a 60 percent increase in the ramp's impacts of Intertidal and Subtidal habitats. The 2006 FEIS states that the current ramp design requires 0.1 acre of fill.¹⁵⁴ Thus, the increased size would likely bring the total impact of the ramp up to 0.16 acres, which NVE does not justify under the Project's scope and need. NVE does not offer any justification for this larger size under request for modification or in its Final 2021 Environmental Report. As discussed above, an applicant for a § 404 permit is required to provide "complete description of the [. . .] purpose and need for the proposed activity."¹⁵⁵ Because NVE offers no description of the purpose and need for the proposed modification, allowing a 60 percent increase without any justification certainly undermines the requirements of the § 404 permit application process.

As previously stated, the Corps is required to choose the LEDPA when issuing § 404 permits. Here, because the smaller ramp was deemed sufficient in the Corps 2017 ROD and NVE offers no justification

¹⁵⁰ See 40 C.F.R. § 230.10(a).

¹⁵¹ *Cook Inletkeeper v. U.S. Army Corps of Eng'rs*, 541 Fed Appx. 787 (9th Cir. 2013) (constructing elevated rail over wetland was not a practicable alternative); *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073 (9th Cir. 2013).

¹⁵² *Final 2021 Environmental Report*, *supra* note 18, at 22 Table 3.

¹⁵³ *Id.*

¹⁵⁴ *FEIS*, *supra* note 27, at 2-21.

¹⁵⁵ 33 C.F.R. § 325.1(d)(1).

for increasing the size of the ramp; the Corps must deny this modification request under its requirement to choose the LEDPA.¹⁵⁶

Further, it isn't clear why a boat ramp is even required at Shepard Point. A boat ramp was not considered as part of the essential design criteria, and was not considered for any of the other alternatives.¹⁵⁷ While the 2006 FEIS states, "[t]he ramp is necessary due to the distance of this location from existing boat-launch ramps in Cordova, and would be used to launch smaller boats and skiffs," it also notes the ramp would be available for public use.¹⁵⁸ What rationale would a person have to haul their boat 4.5 miles down a road, up and over a hill with a 9 percent grade, when there are boat ramps for use in the Cordova area and Orca Cannery? It is more likely that the boat ramp is not for oil spill response services or current public use, but to support and promote future developments of the Shepard Point area.¹⁵⁹ For the Corps to consider these uses in its decision to issue a § 404 permit would be contrary to the CWA. Because the increased sized in the ramp would not be the LEDPA, and there is no stated need for the boat ramp as part of the OSRF essential design criteria, the § 404 permit should be revoked. At minimum, the proposed ramp modification should be denied.

h. Additional environmental impacts of concern

NVE stated that there has been a complete elimination to impacts on eelgrass, but little supporting evidence has been offered for how this elimination has occurred. The reports only state that the reduction is due from Project adjustments.¹⁶⁰ In response to previous comments about concerns of impacts to eelgrass, the Corps simply replies, "[s]ee the ROD Section 3.0: Alternatives."¹⁶¹ However, the alternatives in Section 3.0 do not address any steps to mitigate impacts to eelgrass.¹⁶² In addition to the lack of supporting evidence, there has been a dramatic increase in the estimated amount of eelgrass within the Project area. Based on a 1998 aerial survey, there was an estimated 11 acres of eelgrass within the Project area.¹⁶³ But the more recent surveys (which are considered to be more accurate) indicate that there are likely 75 acres of eelgrass within the Project area.¹⁶⁴ Further, another report stated that "eelgrass typically lives in water below -1 feet MLLW in Alaska."¹⁶⁵ Even with this seven-fold increase in the amount of eelgrass within the Project area, still there is no mention of specific mitigation actions taken to eliminate impacts to eel grass, nor which eelgrass study and estimate is being used for the claim that the road realignment has eliminated all impacts. Because of the dramatic increase in the estimated eelgrass present in the Project area, and because the request for modification road realignment is shifting approximately 2 miles of the road closer to Orca Inlet where impacts to intertidal and subtidal areas are likely to increase, increased impacts to eelgrass habit may

¹⁵⁶ 40 C.F.R. § 230.10(a).

¹⁵⁷ 2006 FEIS at 2-2; See 2006 FEIS Ch. 2.

¹⁵⁸ 2006 FEIS at 2-20.

¹⁵⁹ See *Request for Permit Modification*, *supra* note 23, at 3; see generally *Final 2021 Environmental Report*, *supra* note 18, at 12 (discussing project alternatives).

¹⁶⁰ *Final 2021 Environmental Report*, *supra* note 18, at 4, 14, 15, 20; Department of the Army, *Record of Decision 5* (2017).

¹⁶¹ Department of the Army, *Record of Decision 34* (2017).

¹⁶² *Id* at 8-12.

¹⁶³ *Final 2021 Environmental Report*, *supra* note 18, at 19.

¹⁶⁴ *Id*.

¹⁶⁵ *CH2MHill 2013*, *supra* note 142, at 21.

occur. As such, the Corps should revoke the § 404 permit and require a Supplemental EIS (SEIS) to be conducted pursuant 40 C.F.R. § 1502.9(c)(1).¹⁶⁶

Another valid concern not discussed (which may not have been considered in the § 404 permitting process) is the potential for inadvertent fill of WOTUS and impacts to special aquatic resources from sections of the road being washed into Orca Inlet from avalanches that will more than likely occur each year.¹⁶⁷ These repeated impacts will result in significant erosion of gravel and sediment from the road being washed into Orca Inlet and covering the eelgrass that will likely be present just feet from the placed fill.

The Corps should require that a SEIS be completed. Pursuant to 40 C.F.R. § 1502.9(c)(1), agencies shall provide supplements to their draft or final environmental impact statement (FEIS), if: (i) “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns,” or (ii) “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” The new circumstances and information warrant an SEIS here.

VI. THE PERMIT MUST FAIL PUBLIC INTEREST REVIEW.

In determining whether NVE satisfies the EPA guidelines for a § 404 permit, the permit must pass the Corps’ “public interest” review. Under the “public interest” standard of review, there is the presumption that wetlands provide a productive and valuable public resource, which is why the Project itself must show that the reasonably foreseeable detrimental effects of the Project are outweighed by its potential benefits.¹⁶⁸ In issuing a § 404 permit, the Corps is required to consider all relevant factors and important aspects of the project in question. In other words, there must be a rational connection between the facts in the record and the Corps’ decision to issue the permit.¹⁶⁹

“Public interest” analysis requires the Corps to evaluate three sections of general criteria in every application:

- (i) the relevant extent of the public and private need for proposed structure or work;

¹⁶⁶ 40 C.F.R. § 1502.9(c)(1). Agencies shall provide supplements to their draft or final environmental impact statement (FEIS), if: (i) “[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns,” or (ii) “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” *Id.*

¹⁶⁷ See CH2MHill, *Avalanche Hazard Mitigation Analysis Cordova Deep Water Port* (June 2012); (lacking discussion of avalanches causing sections of the road to be eroded into Orca Inlet).

¹⁶⁸ See 33 C.F.R. § 220.4(b)(1).

¹⁶⁹ Under the “arbitrary and capricious” scope of review, a reviewing court will hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. See 5 U.S.C. § 706(2)(A). See also *Columbia Riverkeeper, Sierra Club v. ACOE & Port of Kalama* (W.D. Wash., 11/23/2020) Case 3:19-cv-06071-RJB, Doc 83 (404 permit vacated). Port facility project for methanol import and export facility at refinery located on the Columbia River enjoined because the Corps had failed to take a “hard look” with respect to the cumulative impacts of GHG and did not adequately account for any takings under ESA Section 7. Issuance of the permit for such a large project (~\$2 billion) without adequate consideration of these factors meant that the Corps acted in a manner that was arbitrary and capricious. The involved parties in *Columbia Riverkeeper* voluntarily dismissed their appeals.

(ii) where there are unresolved conflicts to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and

(iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure is likely to have on the public and private uses to which the area is suited.¹⁷⁰

“Public interest” analysis also requires the Corps to take into consideration:

“[a]ll factors which may be relevant to the proposal must be considered *including the cumulative effects thereof*: among those are 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.”¹⁷¹

The above list of factors is not an exhaustive list. The parties asserting a conflict of public interest may include other factors, and each factor is weighed according to the potential impacts uniquely attenuated to that permit in particular. Accordingly, the Corps must take into consideration any additional factors that were brought up during the commenting period.

It is important to note that the city of Cordova is supportive of an oil spill response unit, but not when it exists at the expense of the environment. Cordova is currently home to a Tier 1 on-call unit for oil spill incidents, and the residents understand that these teams are essential to a quick and efficient clean-up in an environmental hazard event. While the Shepard Point Project purports to expand Cordova’s capability in assisting and mitigating harm during an environmental hazard, the truth of the matter is that the facility itself will do more harm than good.

The conclusions reached by the Corps in the public interest do not align with specific concerns that are closely held by Cordova residents, namely, that the Shepard Point Project is unnecessary. The harmful impacts to the environment are severely understated, and the road will require significant maintenance (especially in the winter months) and run through dangerous avalanche and landslide chutes. The report that NVE relies on (regarding the risk of potential avalanche behavior on the proposed road) is 10 years old, and is thus obsolete. At the very least, NVE should be required to complete an SEIS, to better predict future avalanche trends.

There is also the valid concern that the port may be used for tourism and industry mining purposes. These concerns constitute a reasonably foreseeable detriment and should carefully be evaluated by the Corps in conducting a public interest review. Ultimately, all the negative potentialities greatly outweigh

¹⁷⁰ 33 C.F.R. §320.4(a)(2).

¹⁷¹ 33 C.F.R. §320.4(a)(1) (emphasis added).

any benefits that could reasonably be expected to result from the Project's completion. Therefore, the Native Village of Eyak's § 404 permit must fail.

a. The Shepard Point access road is hazardous for the community.

The Project's main purpose is to increase efficiency in oil spill response within Prince William Sound. However, the overland access to this location would be built in an otherwise roadless location.¹⁷² Although the Project now seeks to reduce the road's length from 4.5-miles to 4.32 miles, it traverses through 14 avalanche and landslide chutes.¹⁷³ The permitting changes to the road do not stipulate whether the route has moved out of the path of any avalanche chutes. Therefore, we assume that it does not.

NVE states that their most recent "avalanche studies" have identified that avalanches are likely to reach the tidewater only every 3 to 15 years.¹⁷⁴ However, the study on which NVE relies was conducted a decade ago. The 2012 risk assessment was done to evaluate the probability of a catastrophic avalanche incident, and the economic viability of conducting mitigation efforts.¹⁷⁵ The risk assessment was included in the appendix of the 2021 Final Environmental Report Packet, and is a necessary part of their § 404 permit.¹⁷⁶ However, this vast difference in time should render the economic and environmental impact evaluations inadequate.¹⁷⁷ The purpose of the 2012 study was to provide the most accurate data on avalanche statistics *at that time*. It relies on speculative trends for the future that are based on the past avalanche activity. Taking into consideration all of the significant environmental changes occurring globally since 2012, the Corps should evaluate new risk assessment data relating to avalanche events in the area around Cordova that accurately represent the current situation. Considering all this, the 2012 study does not accurately illustrate the frequency of avalanches in the area. This is why the Corps should—at the very least—require an SEIS, in order to review current avalanche trends and impact evaluations.¹⁷⁸

In its "public interest" analysis, the Corps must evaluate "the extent and permanence of the beneficial and/or detrimental effects which the proposed structure is likely to have on the public and private uses to which the area is suited."¹⁷⁹ This public access road is not well suited to the area because of

¹⁷² Under the NEPA process, a supplemental EIS always is required when the project substantially affects the environment. Federal agencies must include in every recommendation or report on a major Federal action that significantly affects the environment, in addition to a statement by the responsible official detailing the environmental impact of the proposed action. See 42 U.S.C. § 4332(2)(C)(i) (2006); see also 33 C.F.R. § 230.11(b) (1987).

¹⁷³ See *CH2MHill* 2013, *supra* note 142, at 2.

¹⁷⁴ *Final 2021 Environmental Report*, *supra* note 18.

¹⁷⁵ David Hamre, Chugach Adventure Guides, LLC, CH2MHill, *Avalanche Hazard Mitigation Analysis Cordova Deep Water Port*, at 17 (2012).

¹⁷⁶ *Final 2021 Environmental Report*, *supra* note 18.

¹⁷⁷ See *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (stating that "an agency that has prepared an [EIS or EA] cannot simply rest on the original document. The agency must alert to new information that may alter the results of its original environmental analysis[.]").

¹⁷⁸ See 40 C.F.R. § 1502.9(c)(1)(ii); see also *Greenpeace, Inc. and Cascadia Wildlands Project v. Earl Stewart, Tongass Nat'l Forest Supervisor*, 743 Fed.Appx. 878 (mem) (9th Cir. 2018) (vacating four planned timber sales because USFS had approved the implementation of an outdated classification system for measuring forest structure (noncompliant with current forest plans)). "We recognize this case has been litigated for over a decade; however, USFS has been given multiple opportunities to correct flaws in its project analysis[.]" *Id.* at 4.

¹⁷⁹ 33 C.F.R. §320.4(a)(2)(iii).

significant impacts that the road will have on the safety of the community, particularly in the winter months when avalanches are most prevalent. The proposed access road will be open for oil spill response teams as well as to community members to be traveled at their leisure. The Shepard Point facility will allegedly be used only in emergency situations, but the access road nevertheless is a permanent structure that will require regular maintenance in perpetuity—by plowing the road and implementing an avalanche mitigation plan. These purposes contradict each other. Any roads that travel through areas prone to avalanches and landslides pose a serious risk of the loss of human life.

NVE notes that employing a “reasonable avalanche mitigation plan will allow for the year-round safe operation of the access road and the OSRF. Therefore, the impacts from avalanches are considered *minor and insignificant*.”¹⁸⁰ However, the risk and cost of mitigation are far from “insignificant.” NVE’s mitigation plan incorporates firing mounts, increases the width of the road, installs a gate and turn around point, and closes the road 2% of the time.¹⁸¹ The CH2M Hill 2012 report on which NVE relies notes that “[i]f the road must be kept open for virtually 100% of the time, then the use of simple and less costly forecasting and closure procedures ... “will not be enough to mitigate the inherent avalanche risk.”¹⁸² Employing fixed exploder devices...

... would be difficult due to the number of devices that would be necessary and the difficulty of constructing them in the needed locations. Either of these approaches will drive the mitigation costs in the *millions* for the capital project portion of the project, and into the low *hundreds of thousands* annually for operating costs.¹⁸³

These mitigation efforts are far from minor and insignificant in their comprehensive costs to NVE and the community.

Additionally, the maintenance on this proposed road is costly and hazardous. CH2M Hill notes that the avalanche danger is “roughly three times” as deadly as the Copper River highway because of the proximity of the road to the tidewater.¹⁸⁴ In the event that someone is swept off the road and into the freezing water, it will be nearly impossible to rescue them.¹⁸⁵ The difficulty of a rescue creates a 50% chance of survival in an avalanche on the proposed road, with the chances of survival decreasing as weather conditions worsen.¹⁸⁶ CH2M Hill evaluated these risk levels for 100 cars on the road per day.¹⁸⁷ The risk of a death with an avalanche encounter goes down if the road is traveled less, and equally, this risk will increase with more vehicle traffic traveling along the proposed access road.

¹⁸⁰ *Final 2021 Environmental Report*, *supra* note 18, at 13 (emphasis added).

¹⁸¹ *Id.* at 3; David Hamre, Chugach Adventure Guides, LLC and CH2MHill, *Avalanche Hazard Mitigation Analysis Cordova Deep Water Port*, at 3 (2012).

¹⁸² Chugach Adventure Guides, LLC and CH2MHill, *Avalanche Hazard Mitigation Analysis Cordova Deep Water Port*, at 10 (2012).

¹⁸³ *Id.* (emphasis added).

¹⁸⁴ *Id.* at 4.

¹⁸⁵ *Id.* at 5.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 3.

NVE's mitigation plan calls to close the road during inclement periods, depending on the weather forecaster's predictions.¹⁸⁸ Avalanche "conditions" are generally predictable, but knowing exactly when snow will slide is always unpredictable. NVE reasons that closing the road will reduce the risk of the loss of human life. However, this so-called mitigation effort does not negate the fact that the road must be cleared of snow and debris year-round. CH2M Hill concedes that the greatest probability of the loss of human life occurs during maintenance of the road.¹⁸⁹

The 2012 numbers indicate that there is an 8.3% chance of an avalanche hitting a vehicle annually.¹⁹⁰ Without proper mitigation in place, the annual probability of death (estimating roughly 100 vehicles traveling on the road per day) rises to 15.2% in an avalanche event.¹⁹¹ That number is too high. CH2M Hill adds that cleaning up that avalanche is "at least as risky as allowing 100 cars per day on the road."¹⁹² These statistics and calculations involve outdated numbers, and with climate change impacts the risk of the loss of life on the proposed road has increased. Cordova residents are right to be concerned about these numbers in that the proffered data does not reflect the true risk.

Regardless of whether the Shepard Point facility is going to be utilized solely as an oil spill response facility or whether it will be developed further, it is obvious that this hazardous "access road" will require constant care at too great a risk. The permanence of this access road poses a danger to maintenance workers and the public. This alarming factor outweighs any potential gain that the Shepard Point Project will provide to Prince William Sound during the rare event of an oil spill incident.

b. Oil spill response is often performed with smaller fishing vessels, and the public need for a deep-water port is minimal.

NVE seeks to construct a deep-water dock for oil spill response teams to stage and allow for deep-dock vessels to resupply. The Project arguably does not meet the Corps' evaluation for the need of the proposed structure or work because it is an unnecessary encumbrance to the area around Cordova. The Corps should account for the fact that smaller sized commercial fishing vessels already can carry out effective oil spill response and with minimal delay, whereas the remote siting of the facility at Shepard Point precludes any quick and speedy access to needed resources.

Timing is particularly important when it comes to mitigation of an oil spill incident as the first 72 hours are critical. The Shepard Point staging area would be 5 nautical miles north of Cordova, adding travel time for oil spill response teams traveling from Prince William Sound by 3.9 nautical miles, and the Gulf of Alaska and Copper River Delta by 10.1 nautical miles. Therefore, a staging location in Shepard Point would delay all response time by an hour or more during an inherently time-sensitive operation.

¹⁸⁸ NVE's § 404 permit stated that mitigation was not required; the 1990 Memorandum of Understanding (MOU) between the Corps and EPA provides the procedural framework for considering mitigation so all Corps and EPA field offices follow consistent procedures determining the type and level of mitigation necessary to ensure compliance with § 404(b)(1) guidelines. See 40 C.F.R. § 1508.20 "Mitigation;" see also *Coeur D'Alene Lake v. Kiebert*, 790 F.Supp 998, 1009 (D. Idaho, 1992).

¹⁸⁹ Chugach Adventure Guides, LLC and CH2MHill, *Avalanche Hazard Mitigation Analysis Cordova Deep Water Port*, at 9 (2012).

¹⁹⁰ *Id.* at 4.

¹⁹¹ *Id.* at 5.

¹⁹² *Id.*

In its reply to past comments, NVE compares the Shepard Point Project to Whittier to prove how having a deep-water dock will save response time.¹⁹³ NVE also notes how Valdez relies on a deep-water dock for its oil spill response.¹⁹⁴ But NVE does not address why those comparisons are relevant as Cordova currently has an effective first responder fleet of local fishermen.¹⁹⁵ Response fleets consisting of on-call local commercial fishermen are able to respond far more quickly and efficiently than a response facility that is geographically delayed by an hour or more.

Pursuant to Alaska law, Cordova participates in the Ship Escort Response Vessel System (SERVS) program. The program was created in 1989 following the tragic Exxon Valdez oil spill. Its main goal is to prevent oil spills and provide response and preparedness. First responder training consists of over 100 drills and exercises each year, in order to work with the larger boats to contain and clean-up in the event of an oil spill. These crew members are considered Tier 1 responders who are pre-contracted, pre-trained, and the core fleet to respond during an incident.¹⁹⁶

Additionally, any supplies for staging an oil spill response would need to be flown in or have quick access to resources in town. The location of Shepard Point does not make that task feasible in the event of an oil spill event, as supplies will need to travel from the Cordova airport, or from town all the way to the Shepard Point area. This is particularly exacerbated in the winter months when response crew delays will more likely occur because of road maintenance and avalanche danger. These kinds of delays can easily be mitigated by staging the oil spill response facility at one of the practicable alternatives. Therefore, the Shepard Point Project is an unnecessary encumbrance on the Cordova region.¹⁹⁷

c. Public concern for tourism increase and resource mining weighs against the Shepard Point alternative.

In its proposal to modify its § 404 permit, NVE is requesting the expansion of the width of the dock and an addition of a small boat ramp. NVE does not provide a valid reason for these expansions. The City of Cordova harbors the deepening concern that the proposed modifications to the permit are a ruse meant to further the personal ambitions to develop resource mining in the future, and potentially to allow an influx of tourism. Cordova is a small town that has deep roots in its Alaskan Native heritage and cultural history. Home to one of the last great salmon runs on the planet, there is a communal pride around the world-famous

¹⁹³ *Response to Comments*, *supra* note 48, at 74, 212.

¹⁹⁴ *Id.*

¹⁹⁵ The Cordova Times, *Oil spill response training is a community event* (May, 5, 2017)

<https://www.thecordovaitimes.com/2017/05/05/oil-spill-response-training-community-event/>.

¹⁹⁶ See, Prince William Sound Regional Citizens' Advisory Council, *Fishing Vessel Oil Spill Response Training*,

<https://www.pwsrccac.org/programs/oil-spill-response/fishing-vessel-training/> (2022).

¹⁹⁷ *Friends of the Mahoning River v. U.S. Army Corps of Engineers*, 2021 WL 4133763, involved a failed “public interest” analysis done in the construction of a hospital that would have filled roughly 16 acres of wetlands and roughly 1,600 linear feet of streams in Trumbull County, near Cleveland, Ohio. The Corps chose the project site solely on the basis that there was no practicable alternative (after considering 23 distinct alternative sites; another site was later determined to have better characteristics and would have less of an impact), and did not conduct an independent review of the hospital’s economic viability that would go to the purpose and public need for the project. Inaccurate population data showed a rise in population and low unemployment in the area when, in fact, the opposite was true. Therefore, the Corps did not properly establish that it was in the public interest to issue a permit for the construction of a new hospital and residential housing in an area with declining population and a depressed economy. The district court for the N.D. Ohio held the permit was issued in a manner that was arbitrary and capricious. See *Friends*, at 5.

Copper River. These values are at risk because the possibility that a deep-water dock will bring harmful pollutants to the air and water. Cruise ships and tourist traffic, along with resource mining will result in a marked depletion of natural resources like timber and raw minerals.

In its “public interest” analysis, the Corps must evaluate the detrimental impacts a structure will have in the future for both the private and public sectors. NVE has denied future plans for the Shepard Point facility in past comment periods.¹⁹⁸ Regardless, NVE’s recent comment reply denials do not account for the fact that the facility will be empty and unmanned for most of the year. There is a concern that the funds it will take to keep the facility operational, and ready at a moment's notice, will be expensive enough for NVE to consider leasing the facility area for other means.

Tourism and resource mining are two such industries that may bolster the local economy, but is it worth the true cost? These industries reap uniquely detrimental effects on the environment. With a deep-water dock, a massive cruise ship with a draft of over 25 feet will be able to port in Cordova. Any increase of cruise ships, and indeed all other boats and ships, into Cordova will greatly impact the environment. To compare, Skagway has a deep-water port that accommodates 1 to 5 cruise ships every day between May and September each year. As a result, over the years the pollution in the air and vegetation has increased due to combustion.¹⁹⁹ Treated wastewater from cruise ships is permitted to be dumped into the ocean. The size of the ship determines where they can dump the treated wastewater. Generally, cruise ships are permitted to dump their treated wastewater after moving more than 3 miles offshore, but some cruise ships are permitted to dump anywhere when moving 6 knots or faster (other ships are permitted to dump black and grey water while at the docks).²⁰⁰ Despite being treated, it poses a contamination risk for the ecosystems and fisheries, as it is toxic to both the aquatic and human health.

Cordova sits near the mouth of the Copper River, which is home to the world-famous Copper River salmon run from May to September. This prized salmon run drives Cordova’s economy. The potential introduction of cruise ships inevitably will initiate the addition of toxic substances that will negatively affect the future of these runs. NVE denies that the future potential for increasing tourism or mining are factors that should be considered (NVE has no current plans to initiate such leases). However, notably, within the consent decree appendix, it states: “In addition to the oil spill response benefits of this project, the proposed road would allow for the lightering of tourists into Cordova from tour vessels.”²⁰¹ This is inconsistent with NVE’s previous statements, and clearly denotes consideration and thought toward the idea that the Project is not solely for oil spill response. It is quite clear that the Project is not solely for oil spill response, but also for future planning and the economic growth of Cordova. The Corps should carefully evaluate the proposed modifications and the underlying permit because it will detrimentally impact the future of Cordova. There are more appropriate alternatives that better align with the city of Cordova’s core values than the Shepard Point site.

¹⁹⁸ *Response to Comments*, *supra* note 48, at comment reply 210.

¹⁹⁹ See Linda Geiser, et. al., *Effects of Cruise Ship Emissions on Air Quality and Terrestrial Vegetation in Southeast Alaska*, National Park Service, Oct. 26, 2021, <https://www.nps.gov/articles/aps-9-2-6.htm>.

²⁰⁰ Alaska Department of Environmental Conservation, Division of Water, *2021 Large Cruise Ship Discharge Status* (Aug. 11, 2021); Alaska Department of Environmental Conservation, Division of Water, *2021 Small Cruise Ship Discharge Status* (Aug. 11, 2021) <https://dec.alaska.gov/water/cruise-ships/cruise-reports/#vesselDischargeTables>.

²⁰¹ Agreement and Consent Decree, p. 35, 25 Nov. 1992, A92-175CI.

The residents of Cordova generally approve of sustainable tourism, as it brings a reasonable amount of business to the small community and allows the residents to share their beautiful town with the world. However, cruise ships are not a sustainable way to promote tourist activity. In addition to the pollution that will come with the introduction of large leisure companies, the visitors themselves would have to travel through a dangerous narrow route from Shepard Point to the city of Cordova, thereby increasing the probability of injury or loss of human life as a result of road conditions.

Cordova is also a very small town. There are insufficient facilities to manage a large cruise ship, and accommodating such an influx would require a significant infrastructure expanse that goes against the very nature of the public interest implicit to the residents of Cordova. This type of change should involve the informed consent from the residents, allowing them to decide for themselves whether it is in their best interest. However, NVE has been actively and intentionally attempting to limit the information being released.

d. The Native Village of Eyak lacks transparency with the Cordova community.

NVE has motives that extend beyond the creation of an Oil Spill Response Facility. In a December 8, 2021 meeting, the Native Village of Eyak gave a presentation on the Shepard Point Project modifications to the Prince William Sound Regional Citizens' Advisory Council's Oil Spill Prevention and Response Committee. During this meeting, a Cordova resident commenter asked what the Native Village of Eyak was doing to inform the community about this Project. Burt Adams, the Executive Director of the Native Village of Eyak, replied that any hesitancy to reach out to the public and release information was because of the "potential for litigation."²⁰² Craig Hughes, the Project manager for the design team, then added that the intent of keeping information from the public was to "control the narrative" around the Project.²⁰³

These kinds of statements are indeed concerning for the community and create an impression that NVE is not being forthright about its processes and motive. Secrecy and obscurity quickly breed widespread community distrust in the Project. Moreover, NVE's attempt to keep Cordova in the dark about the Project runs contrary to the fundamental purpose of public notices surrounding permit applications.

V. CONCLUSION

In sum, the Shepard Point Oil Spill Response Facility is an all-around flawed Project. The Project should fail the § 404 criteria because it is not the "Least Environmentally Damaging Practicable Alternative." The Project should also fail the Corps' public interest review. NVE claims to represent the public interest implicit to the Cordova residents, and the Indigenous and Native Eyak who have lived in the area surrounding the Orca Inlet in Southern Alaska for ten thousand years, but the details of the Project—all laid out in this letter—indicate otherwise. The Project is a ruse engineered to bring in larger industry and

²⁰² Prince William Sound Regional Citizens' Advisory Council's Oil Spill Prevention and Response Committee, *OSPR Meeting on Native Village of Eyak's Shepard Project Update*, at 50:07 (Dec. 8, 2021) (available at https://drive.google.com/file/d/1Cuvdi9WLOI2iP_zJAwapopY_Db1-QdAT/view?usp=sharing).

²⁰³ *Id.* at 51:04.

tourism, not just to bolster a more efficient clean-up in the event of an oil spill. If that were the case, perhaps the facility would already be operational at one of the practicable alternative sites.

The prevailing concern is that in approving NVE's § 404 permit, the Corps has not properly evaluated the Least Environmentally Damaging Practicable Alternative sites, and that the access road itself, along with deep draft vessels and additional boats and ships docking at Shepard Point (and resulting air and water pollution) inevitably will have a negative impact on the entire pristine Orca Inlet waters, landscapes, and coastlines. Notably, there are several alternative locations to site an oil spill response facility within Cordova, one site being the Orca Cannery site.

Even if the Corps determines that NVE has met the § 404 requirements, it should not pass the "public interest" analysis because the impacts of the facility do not outweigh the potential benefits the Shepard Point facility would provide in the event of an oil spill. Accessibility and maintenance to the access road in the winter months poses a significant concern. The area that the road is planned to traverse is inundated by avalanche chutes and is well known for its avalanche activity due to the unpredictability of Cordova's unique weather. NVE has proposed a mitigation plan which is inadequate to address the avalanche problem. NVE suggests closing the road when needed but closing the access road during inclement weather months goes against the very purpose and need of an access road, which is to enable quick and efficient access to the facility in the event of an oil spill.

Cordova is more than willing to host an oil spill response facility, but not at the great cost that the Shepard Point project will have on the environment. It seems that NVE aims to bring more tourism to Cordova through this deep-water port. The myriad detrimental effects that tourism activity will have on the surrounding community, land, and water have Cordova residents justifiably worried. If the Project is allowed to proceed, the result will be further extraction of natural resources, not remotely resembling a regenerative effort.

Cordova residents have always endorsed nonintrusive tourism, but Cordova is not a "tourist town" and never will be. It would seem that while many people do come to Cordova because of an innate desire to experience and share in the wild, there are others who aim to destroy, control, and own it. Despite NVE's assurance that tourism expansion is not in its current plan, the lack of transparency with the public regarding the Project and the need to "control the narrative," shines a spotlight on NVE's hidden agenda. These proposed permit modifications call into question whether the whole Project is necessary for its stated purpose because Cordova already has a very effective oil spill response consisting of on-call commercial fishermen able to respond quickly and efficiently. Therefore, the remote siting of the facility at Shepard Point does not make oil spill response any more efficient or feasible. The Project itself is irrational and nonsensical.

In conclusion, the Shepard Point Project, inclusive of all of the requested Project Modifications, is and remains contrary to the public interest inherent to the residents of Cordova and the Indigenous and Native Eyak for the reasons discussed above. Commenters urge that all involved agencies carefully review NVE's request to modify its § 404 permit, and to consider the following courses of action:

- a) Revoke the permit so that the Corps can fully analyze the Orca Cannery alternative and because the Shepard Point alternative fails the Corps' public interest review;

- b) Specifically deny NVE's request to modify the permit as to the road realignment, increased staging pad area, and larger boat ramp; and
- c) Require an SEIS because of the significant changes in circumstances since the 2006 EIS.

Thank you for considering these comments.

Sincerely,



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President, Prince William Sound Audubon Society



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