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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ANCHORAGE, a Municipal Corporation,)
acting through its Department, the Port of)
Anchorage,)

Plaintiff,)

v.)

FEDERAL HIGHWAY ADMINISTRATION,)
RAY LAHOOD, in his capacity as)
SECRETARY OF THE UNITED STATES)
DEPARTMENT OF TRANSPORTATION and)
DAVID C. MILLER in his capacity as)
DIVISION ADMINISTRATOR, FHWA;)

No. 3:11-cv-

Defendants.)

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
PENDING A SUPPLEMENTAL IMPACT STATEMENT
(5 U.S.C. § 702; 42 U.S.C. § 4332; 23 U.S.C. §139(c)(4))**

INTRODUCTION

1. This action challenges the *Record of Decision - Knik Arm Crossing Project (ROD)* dated December 8, 2010 insofar as it selects an alternative that calls for construction of the Anchorage Access Corridor to the Knik Arm Bridge “below the bluff” and through the north and east portions of land owned by the Municipality of Anchorage (**Municipality**), operated as the Port of Anchorage (**POA**).

2. The Federal Highway Administration (**FHWA** or **Defendant**) and the Knik Arm Bridge and Toll Authority (**KABATA**) analyzed alternative routes for a new bridge crossing Knik Arm (the Knik Arm Crossing or **KAC**) and connections to the committed roadway networks on both sides of Knik Arm (Approach Corridors). Defendant's final action, memorialized in the ROD, together with the *Final Environmental Impact Statement / Final Section 4(f) Evaluation (FEIS)* dated December 18, 2007, failed to consider or objectively evaluate impacts to the expanding Port of Anchorage. Also, the Selected Alternative is not consistent with the Purpose and Needs statement of the FEIS and ROD because the Selected Alternative impairs newly constructed infrastructure at the Port of Anchorage rather than furthering regional transportation infrastructure and the movement of freight and goods through POA. This failure and inconsistency violate the National Environmental Policy Act (**NEPA**) and the Administrative Procedure Act (**APA**).

3. The Municipality seeks declaratory judgment and injunctive relief declaring the agency action unlawful and setting aside the Record of Decision on the grounds that it violates

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NEPA, the APA, and it will cause irreparable harm to the Port of Anchorage and thereby to Plaintiff.

JURISDICTION, RIGHT OF ACTION, AND VENUE

4. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02. Judicial review is available under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 as saved by 23 U.S.C. §139(k).

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

6. By Federal Register notice published January 4, 2011, Defendants invoked the 180 day time limitation established in 23 U.S.C. §139(l)(1). The last day for judicially challenging the ROD expired July 3, 2011 which was a Sunday. Monday, July 4, 2011 was an official federal holiday. Accordingly, the Notice in the Federal Register properly established a deadline of July 5, 2011, the first working day following the holiday.

PARTIES

Plaintiff

7. Anchorage, a Municipal corporation, is a home rule municipality located in Southcentral Alaska. The Port of Anchorage is an enterprise of the Municipality.

8. The Municipality was a "cooperating agency" in development of the FEIS here at issue and the Port of Anchorage's Director of Communications & Business Development sat on the "Economic Working Group," an advisory panel to KABATA. In these capacities and as a

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commentator during agency comment periods, the Municipality repeatedly asserted concerns regarding the proposed roadway encroachment that is the subject of this Complaint.

9. Plaintiff and its citizens derive great benefit from the POA as more fully stated in the "Facts" section of this Complaint. Connector road construction through the POA under the Selected Alternative will directly and irreparably injure these interests.

10. The Selected Alternative will have direct and indirect effects on land use at and immediately north of the POA; on long-term development planning by the Municipality; on current and future use of the Port, including infrastructure expansion; and to both the economic prosperity and quality of life in the Anchorage urban environment.

Defendants

11. Defendant Federal Highway Administration is an agency of the United States Department of Transportation. It is responsible for ensuring a safe, secure, and environmentally sound national road system. It was the "lead agency" for the KAC Project's NEPA review.

23 C.F.R. § 771.107(g); 23 U.S.C. §139(a)(4).

12. FHWA has authorized the expenditure of federal funds on the Knik Arm Crossing Project.

13. David C. Miller is the signatory to the ROD on behalf of FHWA. He is named in his capacity as Division Administrator (together with his successors) because Plaintiff seeks an injunctive decree and Mr. Miller is the Federal officer personally responsible for compliance.

5 U.S.C. § 702.

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14. Defendant Ray LaHood, in his capacity as Secretary of the U.S. Department of Transportation (together with his successors) is statutorily authorized and obligated to ensure supplementation of environmental documents if project changes become necessary. 23 U.S.C. §139(c)(4).

FACTS

Port of Anchorage Expansion Project

15. The Port of Anchorage serves over 80% of the citizens of Alaska, including the major military installations of the state. One hundred percent of the jet fuel to Elmendorf Air Force Base and eighty percent of the fuel to Ted Stevens International Airport are provided from the Port. It is designated by the Department of Defense as one of 19 "National Strategic Ports." It represents the major gateway for Alaska's waterborne commerce and plays a vital role in the regional economy.

16. Since 2003 the Port of Anchorage has been engaged in an "Intermodal Expansion Project" to accommodate larger ships, with deeper drafts and wider beams. It has also developed new barge berths and transshipment areas to improve the flow of goods to rural Alaska. The Port Expansion Project has included physical construction of myriad improvements, including a "North Extension I and II, Dry Berth and Wet Barge Berth." Physical construction of those areas began in 2005 and had substantially progressed by the end of 2007. These are the areas of the POA that will be adversely affected by the matters complained of herein.

17. The Port intends to extend the Railroad Line to the Dry Barge Berth area. The Dry and Wet Barge Berth and North Extension areas will be the most seismically stable areas of

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the Port for many years to come. In the event of a catastrophic earthquake these areas may be the only useable areas at the Port.

18. The Port Expansion Project is administered by the federal Maritime Administration, an agency of the United States Department of Transportation (**MarAd**). This agency ensures that the United States maintains efficient ports and effective inter-modal water and land transportation systems.

Knik Arm Crossing Project

19. Knik Arm Bridge and Toll Authority is a public corporation and instrumentality of the State of Alaska within the Department of Transportation and Public Facilities but the authority has a separate and independent legal existence from the state.

20. In January 2005 KABATA filed a Notice of Intent to pursue the Knik Arm Crossing Project. The purpose for the KAC project is to “further development of the transportation systems in the upper Cook Inlet by providing improved vehicular access and surface transportation connectivity” between the Municipality and the Matanuska-Susitna Borough through the Port MacKenzie District, with a financially feasible and efficient crossing.”

21. KABATA functioned as the "applicant" within the meaning of FHWA regulations. 23 C.F.R. § 771.107(f). KABATA functioned as the project "sponsor" within the meaning of applicable Federal-Aid Highway statutes. 23 U.S.C. § 139(a)(7).

22. As a first step in the National Environmental Policy Act process, KABATA began a nine-month "scoping" period in which KABATA and FHWA actively solicited input from

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stakeholders as to, *inter alia*, foreseeable impacts of alternative routes under consideration for the Anchorage Access Corridor to the proposed bridge.

23. In August 2005 the Municipality responded to the EIS Working Group's "Project Team" with a statement that Technical Screening Criteria used to select reasonable alternatives should clearly provide that an alternative be considered reasonable only if it supported both the Port of Anchorage and Port MacKenzie. Municipal Directors of Traffic and Planning Departments voiced concern with any alternative that would introduce additional traffic into the already congested and heavily developed industrial corridor that is the Port of Anchorage. These department directors cautioned that any corridor alternatives "that compromise the efficiency, safety and function of the Port of Anchorage and Alaska Railroad Corporation Intermodal operations will be very difficult to support."

24. The Municipality noted that the Knik Arm Crossing was not contemplated in a *Regional Port of Anchorage Master Plan* (1999).

25. Of all the variant corridor alternatives identified in the scoping documents, the Municipality only supported two, both of which would have entirely avoided the POA. The Municipality closed its August 2005 comments with a request that "impacts to the Port of Anchorage and Government Hill need to be clearly stated in the EIS documentation."

26. In October 2005, then Municipal Mayor Mark Begich wrote to Defendant David Miller. Mayor Begich had heard that FHWA had abandoned all "Above-the-Bluff" alignments for the Anchorage Access Corridor, electing to give further consideration to only "Below-the-Bluff" alignments. All proposed "Below-the-Bluff" alignments would traverse the entire length

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of the POA, including narrow, newly constructed areas. Mayor Begich cautioned that a "Below-the-Bluff" route would have significant cost and community impacts to the Government Hill Community and the Port of Anchorage. Mayor Begich opined that "without complete study of both major potential corridors, it will not be possible to accurately assess the balance of these concerns."

27. Defendant FHWA was aware of Municipal concerns. In its *Scoping Summary Report: Comments, Issues and Alternatives* (FHWA, November 16, 2005), hereinafter *Scoping Summary*, Defendant noted that Above-the-Bluff alternatives had been identified in response to comments that such alternatives would avoid or minimize impact to, *inter alia*, the Port of Anchorage. Defendant FHWA noted that the Municipality had disavowed any need for a Port to Port (Anchorage to MacKenzie) connection.

28. Defendants nonetheless rejected all Above-the-Bluff alignments due to military constraints and financial infeasibility. Only Below-the-Bluff alignments were carried forward for further review and all of the variants contemplated construction of a roadway traversing the eastern (upland) side of POA.

29. In its *Scoping Summary* of November 2005, Defendant FHWA acknowledged its obligation to carefully identify and then assess avoidance of impacts to the POA during the next phase of roadway alignment studies. Defendant also acknowledged that the back (upland) of the POA area should be considered when studying approach corridors.

30. Yet, when commenting on the Draft Environmental Impact Statement (**DEIS**) in November 2006, the Municipality noted that impacts to the POA remained a "primary issue" and

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the Municipality continued to have significant concerns about the proposed route's impacts on the Port's water-side and land-side operations. Land-side issues related to the limited land available for port operation and expansion. Slope stability was noted to be critically important for any road adjacent to the east boundary of the port.

31. FHWA responded that slope stability was initially addressed with a retaining wall but the final determination regarding road/slope interface would be made in the design phase of the project. In response to the concern of crowding on Port lands, FHWA addressed tidelands north of Cairns Point and an old Department of Defense property located adjacent to the southeast corner of the Port but said nothing about the crowding impacts KAC would have on then existing Port lands or the then-ongoing Port expansion.

32. In correspondence dated April 28, 2006 the U. S. Army Corps of Engineers also responded to the FHWA regarding the KAC Project insofar as it would impact waters of the United States. While the Corps was focused upon water-side impacts, the Corps did clearly say: "we must evaluate the KAC for compatibility with the purposes of the Federal project at the Port of Anchorage. We cannot issue a permit which will adversely affect the federal project at the Port of Anchorage."

33. Nothing in the FEIS of December 2007 reflects any reasoned evaluation or study of the oft-repeated concerns raised by the Municipality regarding upland impacts to the expanding POA. Chapter 2, "Alternatives," acknowledges minimal land space for operations and the need to minimize effects to Port property and operation but provides no discussion of

impacts, no analysis of alternatives which could avoid impacts, no minimizing mitigation, no substantive discussion.

34. Chapter 3 of the FEIS, "Affected Environment," recognizes that the Port was then (in 2007) "proposing expansion" but says nothing about the conflicting land use along the narrow upland portions of the Port.

35. Chapter 4 of the FEIS, "Environmental Consequences," acknowledged that the Selected Alternative would convert portions of Municipal tidelands to transportation, thereby eliminating or substantially impairing the Port's ability to expand in the vicinity of Cairn's Point, but -- without analysis of the Port's then ongoing expansion -- the FEIS concluded that "the POA would continue to function as they are and overall land use of these properties would not change. This [Southern Alignment] would not affect the overall supply of land for port-related uses."

36. The "Cumulative Impacts" portion of the FEIS, dated December 2007, recognized Port expansion as a "Reasonably Foreseeable Future Action." By December 2007 the Port expansion was well underway. The North Backlands (21 acres) had been filled, including 100,000 cubic yards of rock dike. The Dry and Wet Barge berths had also been filled.

37. Defendants acknowledged that POA and KAC operations would have a cumulative impact on land uses and summarily stated that the KAC project was being conducted in close coordination with POA expansion to avoid conflicts and ensure compatibility between the two projects. Without any analysis, Defendants concluded that "the KAC project is consistent with the Port of Anchorage Master Plan;" and, "Cumulative effects relating to planning and policy inconsistencies between the two projects would be minor, because the

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proposed KAC project would remain consistent with all current planning requirements, including those relating to POA expansion."

38. The ROD of December 2010 selected a route that will traverse lower Knik Arm, landing approximately one mile north of the recently expanded Port of Anchorage on tidelands owned by the Municipality. The roadway leading from the bridge on the Anchorage side will pass through a material portion of the newly expanded Port of Anchorage, at grade or upon a buttressed fill, effectively eliminating the usefulness of the Dry Barge Berth and materially impairing the functionality of other portions of the POA. The placement of the road relative to the bluff is shown on an aerial photo previously supplied to the Municipality by KABATA. *Exhibit #1, Road on Photo Overlay (5/11/11)*, appended. The roadway will be fenced on both sides, effectively eliminating any use of the land between the roadway and the bluff and restricting effective use of land between the roadway and Knik Arm due to limited operational area. The Selected Alternative will interfere with the northern extension of Rail line to the already constructed berths. In the event of a serious earthquake, the KAC Project alignment creates a risk of interfering with emergency operations at the most seismically stable portion of the POA.

COUNT I

**Failure to Consider or Objectively Evaluate Impacts
to the Port of Anchorage
(National Environmental Policy Act)**

Plaintiffs repeat and incorporate by reference the allegations contained in the preceding paragraphs.

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39. The National Environmental Policy Act requires federal agencies to prepare environmental impact statements on any proposal for “major Federal actions significantly affecting the quality of the human environment” 42 U.S.C. § 4332(C).

40. Every EIS must include "a detailed statement ... on the environmental impact of the proposed action." 42 U.S.C. §4332(C)(i).

41. The environment of concern is "man's environment." 42 U.S.C. § 4332(A). This includes the urban environment with its various amenities and values such as the efficient transshipment of goods.

42. Adverse impacts on the Port of Anchorage can indirectly impact all Alaskans who rely on that Port for the transshipment of goods. Connector road construction under the Selected Alternative will irreparably injure the Port's vital role in the regional economy.

43. Project review must include economic and technical considerations as well as consideration of environmental values. 42 U.S.C. § 4332(B); 23 C.F.R. §§ 771.105(b), .111(h).

44. An EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives” to the agency’s proposal. 40 C.F.R. § 1502.14(a). Here, where financial feasibility played a key role in the rejection of Above-the-Bluff corridors, Defendants were obliged to rigorously evaluate the financial impacts of using Below-the-Bluff corridors within the expanding Port of Anchorage.

45. Despite myriad requests to do so, Defendants did not take a hard look at the salient impacts of their proposed Anchorage Access Corridor on the Port of Anchorage.

WHEREFORE, Defendants violated NEPA and their NEPA implementation regulations by failing to identify, consider or objectively evaluate impacts of the Knik Arm Crossing on Port of Anchorage inlands.

COUNT II
Failure to Meaningfully Respond To Municipal Concerns
(Administrative Procedure Act)

Plaintiffs repeat and incorporate by reference the allegations contained in the preceding paragraphs.

46. Defendants ignored repeated Municipal concerns yet declared that they were working "in close coordination with POA" and so would avoid conflicts and ensure compatibility between the two projects.

47. Regulations governing environmental reviews by the Federal Highway Administration mandate that any FEIS "describe the mitigation measures that are to be incorporated into the proposed action" which are typically stated as commitments. 23 C.F.R. §771.125(a), (d) and §771.109 (b), (d).

48. Although the Municipality informed Defendant FHWA that the Knik Arm Crossing was not contemplated by the Port of Anchorage Master Plan and that Below-the-Bluff corridors would be difficult to support if such corridors compromised the efficiency of the Port, the FHWA did not thoroughly review KAC's impacts on the expanded Port's inland operating area and, consequently, neither identified nor committed to mitigation measures but, instead, declared that the proposed KAC project would remain consistent with all current planning requirements, including those relating to POA expansion.

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49. Defendants' failure to consider all relevant factors rendered their process and decision making arbitrary, capricious and otherwise not in accordance with law. 5 U.S.C. §706(2)(A).

WHEREFORE, Defendants violated the Administrative Procedure Act.

COUNT III

Failure to Comply with the Knik Arm Crossing Purpose and Needs Statement (National Environmental Policy Act & Federal-Aid Highway Act)

Plaintiffs repeat and incorporate by reference the allegations contained in the preceding paragraphs.

50. Every EIS must be prefaced with a statement describing the purpose of, and need for, the project that is the subject of the EIS. 40 C.F.R. § 1502.13; 23 U.S.C. § 139(f)

51. The purpose for the Knik Arm Crossing is to further development of transportation systems in upper Cook Inlet and two purported needs for the KAC are to improve regional transportation infrastructure and serve efficient traffic operation.

52. The Selected Alternative is not consistent with the Purpose and Needs statement of the FEIS and ROD because the Selected Alternative impairs newly constructed infrastructure at the Port of Anchorage and adversely impacts operating efficiency at that intermodal facility rather than furthering regional transportation infrastructure and the movement of freight and goods through POA.

53. Every EIS must discuss the environmental consequences of alternatives under consideration, including possible conflicts between the proposed action and the objectives of applicable, local, land-use plans. 40 C.F.R. §1502.16

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54. Defendants failed to discuss the conflict between the KAC Project and the *Regional Port of Anchorage Master Plan*.

WHEREFORE, Defendants have violated the National Environmental Policy Act and the Federal-Aid Highway Act.

COUNT IV
Failure to Coordinate with MarAd
(National Environmental Policy Act)

Plaintiffs repeat and incorporate by reference the allegations contained in the preceding paragraphs.

55. The Federal Highway Administration (**FHWA**) and the Federal Maritime Administration (**MarAd**) are both agencies within the Federal Department of Transportation.

56. NEPA mandates that all agencies of the Federal Government use a systematic, interdisciplinary approach that will insure integration of varied interests in planning and decision making. NEPA §102(A), 42 U.S.C. § 4332(A).

57. Prior to making any detailed statement, the responsible Federal official is required to consult with and obtain comments from any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. 42 U.S.C. § 4332(C).

58. Regulations developed by the Federal Highway Administration implementing NEPA require that other federal land management agencies that may be significantly affected by the action be notified early and their views solicited. 23 C.F.R. § 771.111(e). One objective of both NEPA and these regulations is to ensure the identification of cumulative impacts and

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potentially conflicting needs so as to balance infrastructure development and economic prosperity.

59. Under these mandates, FHWA had an obligation to confer with MarAd to ensure that the Knik Arm Crossing Project funded by FHWA was compatible with, and not in conflict with, the Port of Anchorage Intermodal Expansion Project administrated by MarAd.

60. Throughout the *Scoping Summary* and the FEIS there are very few references to MarAd. Although listed as a "cooperating agency," MarAd was substantively described as "the lead federal agency of the Port of Anchorage expansion, a project *near* the Knik Arm Crossing Study Area." *Scoping Summary* at Table 2-1 (emphasis supplied).

61. The North Extension I and II, Dry Berth and Wet Barge Berth of the Port Expansion Project are not near the area to be impacted by the Knik Arm Crossing. They lie directly in its path.

62. On information and belief, nothing in the administrative record for the KAC Project indicates that there occurred a substantive, meaningful conference between Defendant FHWA and MarAd concerning the land use conflict that is the subject of this Complaint.

WHEREFORE, Defendants violated NEPA and applicable regulations by failing to accurately inform MarAd that the Port Expansion Project would be directly and adversely impacted by the KAC Project and by otherwise failing to adequately coordinate with MarAd and/or staff for the POA to identify and analyze cumulative impacts and potentially conflicting needs and ensure balanced infrastructure development and economic prosperity.

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PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests that this court:

1. Enter a declaratory judgment that:

a. the FEIS for the Knik Arm Crossing Project violates NEPA by failing to identify the impacts upon the POA arising from, and failing to explore reasonable alternatives to, the location, method of construction, and other aspects of a below-the-bluff corridor through the northern reaches of the Port of Anchorage;

b. FHWA and defendant David C. Miller acted arbitrarily by approving the Northern Access - Erickson Alternative without fully assessing significant impacts on the Port of Anchorage;

c. FHWA and defendant David C. Miller failed to objectively pursue their purpose and need statement in violation of NEPA; and

d. Defendants violated NEPA by failing to coordinate with MarAd.

2. Vacate the Record of Decision and remand to the FHWA and Secretary LaHood for additional investigation and explanation on the matters addressed herein.

3. Award Plaintiffs the costs of this action, including reasonable attorneys' fees; and

4. Grant such other relief as this Court deems just and proper.

Dated this 5th day of July, 2011.

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