IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 12-70218

ALASKA SURVIVAL, SIERRA CLUB, and
COOK INLETKEEPER,
Petitioners,

v.

SURFACE TRANSPORTATION BOARD and
UNITED STATES OF AMERICA,
Respondents,

ALASKA RAILROAD CORPORATION and
MATANUSKA-SUSITNA BOROUGH, *et al.*,

Intervenors.

On Petition for Review of An Order of the Surface Transportation Board

PETITIONERS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Petitioners Alaska Survival, Sierra Club, and Cook Inletkeeper state that they are all not-for-profit charitable organizations; none of them has any parent companies, subsidiaries or affiliates that issue shares to the public; and there are no publicly-owned companies that have an ownership share in any of these parties.

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STATEMENT OF JURISDICTION

The Surface Transportation Board ("STB") has jurisdiction to authorize railroad line construction and operation under 49 U.S.C. § 10901. *See, e.g., Redmond-Issaquah R.R. Pres. Ass'n v. Surface Transp. Bd.*, 223 F.3d 1057 (9th Cir. 2000).

This Court has jurisdiction to review final orders of the STB under 28 U.S.C. §§ 2321(a), 2342(5), 2344. *Northern Plains Resource Council v. STB*, 668 F.3d 1067, 1076 (9th Cir. 2011).

The STB order on review was decided November 17, 2011 (Service Date November 21, 2011), and is final. The Petition for Review in this matter was timely filed January 20, 2012.

Petitioners have established standing in declarations filed in the Addendum to this brief. *See Hunt v. Wash. State Adver. Comm'n*, 432 U.S. 333 (1977). As those declarations show, petitioners' members are harmed by the STB Order, and this harm would be redressed by an order of this Court directing the STB to correct its violations. Venue is proper under 28 U.S.C. § 2343.

STATEMENT OF ISSUES

1. Whether the STB violated the requirements of 49 U.S.C. §§ 10901 and 10502 when it granted an exemption from its customary licensing requirements to authorize construction of a new rail line – and a companion access road – through Alaska's Susitna Lowland, despite record evidence that the rail line/access road was unneeded, financially unjustified and environmental damaging?

2. Whether the STB violated the National Environmental Policy Act ("NEPA") by evaluating the proposed rail line/road project in an environmental impact statement which:

— framed the purpose of the proposed rail/road project strictly in terms of achieving the sponsoring Railroad's corporate objectives, rather than a balanced mix of corporate, governmental, and public-benefit objectives?

— failed to evaluate an alternative project design which lacked an access road element, despite the urging of U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") to do so?

— speculated as to the likely environmental impacts of the projects on thousands of acres of fragile wetlands largely on the basis of "rapid assessment" and aerial surveys, as opposed to detailed ground-level studies?

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are set forth in the Statutory and Regulatory Addendum attached to this brief.

STATEMENT OF THE CASE

On December 5, 2008, the Alaska Railroad Corporation ("ARRC" or "Railroad") filed with the STB a petition (under 49 U.S.C. § 10502) for exemption from the licensing provisions of 49 U.S.C. § 10901 – for authorization to construct and operate approximately 35 miles of new rail line (and a companion access road) connecting Port MacKenzie, located on Alaska's Cook Inlet ("Port"), with a point on the Railroad's main line located near Houston, Alaska. The proposed Port MacKenzie rail line ("Project") would run in a generally north-south alignment beginning near the Cook Inlet (directly across from the Port of Anchorage) and leading north in the general direction of Denali National Park and Denali State Park.

During the public comment process held by the STB, Petitioners submitted comments challenging the legality, practicality, financial viability, and environmental justifications for the project. On November 17, 2011, after having prepared a final environmental impact statement ("FEIS"), the STB rejected all such comments and granted the Railroad's petition. 76 Fed. Reg. 72,752 (public notice only) (Petitioners' Excerpt of Record ("PE") 1. The Petition for Review in this matter was filed January 20, 2012.

STATUTORY BACKGROUND

A. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA")

Congress has regulated the railroads since enactment of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887). *See generally*, *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998). The ICCTA abolished the Interstate Commerce Commission ("ICC"), created the STB, and transferred to it certain aspects of the ICC's preexisting regulatory authority. *See* Pub. L. No. 104-88, 109 Stat. 803 (1995) (codified at 49 U.S.C. §§ 10101-16106). This case turns chiefly on two provisions of the ICCTA, Sections 10901 and 10502.

49 U.S.C. § 10901 provides in relevant part:

> (a) A person may—
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> (1) construct an extension to any of its railroad lines;
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> (2) construct an additional railroad line;
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> (3) provide transportation over, or by means of, an extended or additional railroad line; or
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> (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,
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> only if the Board issues a certificate authorizing such activity under subsection (c).
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> (b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.

> (c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

49 U.S.C. § 10502 provides in relevant part:

> (a) ... [T]he Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
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> (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
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> (2) either—
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> (A) the transaction or service is of limited scope; or
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> (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

Thus, the statute gives any railroad which seeks to extend its rail system a choice: it can ask the STB to conduct a full-blown "public convenience and necessity" proceeding under § 10901, or it can seek an exemption via a streamlined, fast-track proceeding under § 10502.

B. The National Environmental Policy Act ("NEPA")

NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The regulations implementing NEPA were designed to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id.* § 1500.1(b).

"Congress passed NEPA 'to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action.'" *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006) (*quoting Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005)). "NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Id.* (citation omitted; alteration in original). The law accomplishes this chiefly by calling for the preparation of an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

While NEPA does not allow a court to impose its views as to the appropriate course of action, courts must ensure that the agency took a "hard look" at the

environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976); *Conner v. Burford* 848 F.2d 1441, 1446 (1988); *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). The EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. Armed with extensive knowledge about alternative courses of action and the associated environmental impacts, agencies are more likely to make environmentally sound choices and impose more protective mitigation.

STATEMENT OF FACTS

This case involves a proposal by the Railroad, a Class-II regional operator owned in part by the State of Alaska, to expand its 470-mile rail network by constructing approximately 35 miles of new track, and an accompanying access road, starting from the Houston or Willow area on its existing line, which connects Wasilla and Denali National Park.[1] From there the spur would proceed south to a point near Port MacKenzie, on the north shore of Cook Inlet, located across and 1.5

[1] The Railroad's "petition for exemption" is numbered # 224121 in the STB'S certified index to the administrative record ("AR").

miles from the Port of Anchorage.[2] On December 5, 2008, the Railroad petitioned the STB – under 49 U.S.C. § 10502– for an exemption from the licensing provisions of 49 U.S.C. § 10901.

The STB instituted an "exemption" proceeding. It also commenced an environmental review under NEPA – a draft EIS ("DEIS") was released March 16, 2010. Comments on the DEIS were received from numerous individuals, companies, and government agencies.

The Port MacKenzie Line: A Rail/Road to Nowhere

Many comments from the government and private sectors struck a common chord: that no evidence had been presented by the Railroad or the STB that there was a discernible purpose or need for the Project, which could cost hundreds of millions of dollars to construct. PE 170. Given that several other active ports in the general vicinity, including Anchorage, Seward and Whittier, already enjoyed rail service, the creation of yet another port with rail service could not be shown to be economically justifiable – or even to provide real transportation benefits. *See* EPA's comments: "The draft EIS does ... not provide any quantitative or qualitative

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[2] *See* PE 160 (photograph of the two ports).

data to support the identified purpose and need, such as anticipated customers or freight volume projections." PE 112.

EPA also complained that the proposed alignment did not actually extend all the way to the Port MacKenzie "dock structure" that now exists on Cook Inlet. Rather, at the southern terminus there remains a gap of some two to three miles that will require the construction of additional trackage and/or transfer facilities, at an unknown additional cost and requiring supplemental environmental reviews and/or permits. *Id.* *See also* map at PE 86. Additionally, the planned terminus is situated on a bluff 150 feet above the waterway. The steepness of the slope will require the development of a conveyor system or truck-transfer system. PE 158.

Other record evidence demonstrates that it is unlikely that Port MacKenzie can become a profitable port even if the proposed rail line/access road is constructed. *See* PE 160 (consultant for Intervenor Matanuska-Susitna Borough reportedly stating that the Project is a "speculative investment whose long-term development potential is uncertain."). *See also* PE 161 (quoting Anchorage Daily News story: "Study shows a port at Port MacKenzie probably doesn't make sense economically,

and voters turned it down last fall, but the Matanuska Borough is still spending money to make sure it gets built.").[3]

The Port of Anchorage, located directly across from Port MacKenzie on the "Knik Arm" of the Cook Inlet, rejected the STB's assumption that construction of the new rail line would lower transportation costs for certain shippers because it would provide a shorter route to the Knik Arm – *i.e.*, 35 miles from Houston to Port MacKenzie compared to 70 miles to Anchorage. In reality, the new spur would create a dead end that would multiply the costs of using the spur compared to the main line, due to the need for round-trip shipments (sending empty trains back to the main line), added crew travel costs to reach a remote area, and other similar expenses.[4]

Evidence in the record also indicated that the single dock structure at Port MacKenzie suffers from certain unique nautical and environmental disadvantages.

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[3] *See also* Comment #56, PE 170, citing a series of cancelled or failed commercial enterprises that had, at one time, been cited as justification for building the rail line to Port MacKenzie.

[4] The Port of Anchorage also discounted the STB's contention that Port MacKenzie came close to being a viable port facility, with a ship visitation rate of almost one per week on average. From its vantage point across the Knik Arm, the Port of Anchorage had observed only eight ship dockings at Port MacKenzie in the past seven years. PE 141. This is consistent with the estimate in § 1.1.1 of the FEIS of zero to six ships per year over the four years surveyed.

For one thing, water currents on the Port MacKenzie side of the Knik Arm run several times faster than those on the Port of Anchorage side (which is located only 1.5 miles across the Cook Inlet (s*ee* photo PE 160), making Port MacKenzie more technically challenging for ship captains attempting to maneuver their vessels through the often ice-clogged waters. PE 142, 165. Second, when the Port MacKenzie dock was created in 2000, it soon proved to be a trap for sediment moving through the Knik Arm and into Cook Inlet, leading to the growth of a large shoal adjacent to the shore. Named the "Point MacKenzie Shoal" by the National Oceanic and Atmospheric Administration, this shoal reduces water depths to as little as two meters on the Port MacKenzie side of the waterway. PE 146, 153

Extensive and Unjustifiable Environmental Damage

A recurring theme of the comments was that the Project would do substantial and significant damage to a large, wildlife-rich and ecologically complex area of wild Alaskan backcountry. The Susitna Lowland is situated east of the Susitna River and south of the Talkeetna Mountains. Dominated by evergreen forests, the area is also criss-crossed with countless rivers and streams that ultimately drain into the Cook Inlet. FEIS § 5.3.3. This makes it excellent habitat for anadromous fish – chiefly salmon – as well as resident fish. *See* map at PE 89.

The area contains a number of important predator and prey species. The gray wolf, officially listed as an endangered species in most of the lower 48 states, is the top predator. FEIS § 5.3.3.1. Prey species include marten, beaver, red fox, lynx, and mink. Grizzly and black bear are common in the area, as are moose. *Id*. Moose are highly migratory and they tend to follow traditional migratory routes. *Id.* Their migratory range extends up to 198 square miles per individual. *Id.* Therefore, the creation of a long, linear obstruction like a rail line/access road can have massive impacts on moose migration and thus reproductive success. The Alaska Department of Natural Resources ("Alaska DNR") identified moose mortality as a key issue, characterizing the STB'S approach to moose conservation as "grossly insufficient" and one which "circumvents the EIS process." PE 122.

The Susitna Lowland is characterized by vast areas of open water and wetlands, which represent 43 percent of the wildlife habitat. FEIS 5.3.3. The proposed rail line and access road will be constructed largely by the conventional "backfilling" method, meaning that soil will be bulldozed and mounded so that railroad ties and track can be laid. PE 107. This will inevitably tend to block the flows that are typical of aquatic ecosystems. In a water-dominated environment like this it would be one thing to introduce discrete facilities such as oil or gas wells. But the creation of a raised linear barrier like a rail line/access road will block water

flows much like a dam or dike. Like the highways that were built across the Everglades, the construction of a surface rail line and access road will deal a devastating blow to what is essentially a single massive wetland. In EPA's words, it will create a large-scale "reduction in ecological connectivity." PE 111. EPA was blunt in its criticism of the Project's predictable damage to rivers, streams and wetlands:

> absent substantial efforts to avoid and minimize project impacts, the construction and operation of a rail line extension to Port MacKenzie may result in substantial and **unacceptable impacts on aquatic resources of national importance** (ARNIs). PE 115 (emphasis added).[5]

Most segments of the route that was finally selected by the STB elicited formal "Environmental Objections" from EPA for this reason.[6] PE 112-13.

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[5] The National Marine Fisheries Service faulted the STB for entertaining such an environmentally damaging project without taking meaningful steps to reduce the damage: "Although the DEIS describes the numerous negative impacts poorly placed rail crossings will have on wetlands, hydrogeological function and associated [Essential Fish Habitat] and anadromous species, there is little in this DEIS to indicate these impacts will be avoided and eliminated." PE 103.

[6] The only two segments of the final configuration that did not elicit an "Environmental Objection" from EPA – the "Mac-East variant" and the "Connector 3 variant" – had not yet been identified as options at the DEIS stage of the process. However, they are located close to other segments that EPA had labeled as environmentally objectionable.

The Project plans also call for the construction of an access road adjacent to the rail line. Obviously, the introduction of added vehicular access to the Susitna Lowland will increase human encroachment (hunting, trapping, camping) into this enormous expanse of wildlife habitat, and create its own direct environmental problems such as blocking water flows. PE 121-22. For these reasons, Alaska DNR, noting that most of the Railroad's existing rail lines have no associated access road, observed that the road will "increase [the Project's] environmental impacts substantially" and asked for reconsideration of this feature. PE 121. EPA similarly protested the construction of the parallel access road. PE 111. But at the end of the day the STB refused even to consider the possibility of eliminating the road. FEIS 23.2.1.

Conclusion of the NEPA Process and the Final STB Decision

The FEIS was issued March 25, 2011. It revealed a "preferred alternative" that was little different from the alternative routes/designs that had been considered in the DEIS. In response to the criticisms that had been leveled at the DEIS's "purpose and need" statement, its treatment of alternatives and its discussions of likely environmental impacts, the STB defended the DEIS rather than make any significant changes. *See* PE 175; *see generally* FEIS § 23—*Comment Summaries and Responses*. EPA then made another plea to the STB, submitting additional

written comments on the FEIS on May 2, 2011.[7] Again EPA insisted that there had been no showing of a justification, much less "necessity," for building the Project. PE 176. Again it expressed its "serious concerns" with the Project's inevitable adverse effects on aquatic resources, local residents and traditional subsistence activities conducted by Native Americans. *Id*. And again it faulted the STB for having failed to at least consider the alternative of building the rail line without a permanent, parallel access road. *Id.*

Again its arguments fell on deaf ears. On November 17, 2011, the STB rendered its final decision exempting the project from the customary licensing requirements of 49 U.S.C. § 10902. After considering a number of alternative alignments, the STB selected a route that extends generally from Houston, AK to a point two or three miles from Port MacKenzie.

In an unusual move, STB Commissioner Mulvey dissented. Noting that the STB has never denied, on any grounds, a railroad's application to construct new track, he asserted that this is one case where the alleged transportation benefits of the proposed construction project were vastly outweighed by the environmental

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[7] The issuance of any final EIS triggers the EPA's oversight responsibilities under § 309 of the Clean Air Act. 42 U.S.C. § 7609.

devastation that it would cause. Order at 21-23. He distinguished this case from others in which there was a demonstrable commercial need for new rail service, adding: "Here, however, the Board merely repeats ARRC's statement that the line would provide rail service between Port MacKenzie and interior Alaska and notes the benefits touted by the railroad. The Board makes no finding that these supposed benefits are significant or that they outweigh the potential environmental harms. *See* Decision at 5, 15, 20. I do not believe that such a finding is supported by this record." *Id.* at 23.

SUMMARY OF ARGUMENT

In granting the Railroad an exemption from its licensing regime, rather than performing the customarily rigorous review prescribed by its organic act, the STB violated the law. The customary review calls for a penetrating examination by the STB of the financial viability of the proposed project – including the extent of the demand for the proposed new service and the likelihood that the new rail line will be constructed and operated profitably. Congress called for this kind of analysis in order to protect rail users – and the public at large – from improvident investments by rail companies.

Despite the evidence before the STB indicating that there was scant demand for the new rail service, it granted the exemption. In so doing it blinded itself to any questions of commercial or financial viability. Instead, it granted the exemption based on loosely supported findings such as: an exemption would "minimize the need for federal regulation and reduce regulatory barriers to entry." This subverts the statutory command for a rigorous regulatory examination.

The STB's EIS fell short of the NEPA's requirements in three principal ways. First, instead of independently determining and expressing the official "purpose and need" for the Project, the agency simply parroted the Railroad's purposes – which

were little more than "build this kind of rail line/access road from Point A to Point B." This confined the environmental review process to alternative designs that were favored by the Railroad. Second, the STB refused to consider the alternative of approving the rail line without the access road feature, or with a minimized access road. Third, the EIS gave short shrift to the Project's likely adverse impacts on wetlands – one of the chief concerns of the federal environmental agencies. Instead of sending in its own people to ascertain which wetlands were more important or most easily circumvented, the STB used scientific short-cuts, such as publicly-available imagery and a "rapid assessment" process. These were roundly criticized by EPA and the National Marine Fisheries Service – to no avail. NEPA requires more analysis than this.

REVIEWABILITY AND STANDARD OF REVIEW

An agency's compliance with statutes requiring environmental review is governed by the Administrative Procedure Act ("APA"), which provides that a reviewing court shall set aside agency action that is either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998).

The duty of a court reviewing agency action under the "arbitrary or capricious" standard is to ascertain whether the agency examined the relevant data. *Motor Vehicle Mfrs. Ass'n. v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action is to be set aside "if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

Challenges to an agency's compliance with NEPA are reviewed under standards set forth in the APA. *See N. Idaho Cmty. Action Network v. U.S. Dep't of Transp*., 545 F.3d 1147, 1152 (9th Cir. 2008); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). If the agency prepares an EIS which fails to consider a viable or reasonable alternative, the EIS is inadequate. *See, e.g.*, *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008); *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006).

ARGUMENT

I. THE STB ILLEGALLY EXEMPTED THE PROJECT FROM THE LICENSING REQUIREMENTS OF SECTION 10901 OF THE ICCTA

In its Order the STB agreed to the Railroad's request that its application for authorization to construct and operate the Project be considered not under the conventional regulatory regime, found in 49 U.S.C. § 10901, but instead under the "exemption provision," 49 U.S.C. § 10502. Whether the STB has power to exempt a project the size of the one at bar is an open question. While research reveals no authority, other than the text of § 10502 itself, constraining the STB's authority to grant exemptions from the § 10901 licensing requirements, certainly its discretion to circumvent the regular rules is not boundless. Indeed, the D.C. Circuit recently opined that applicable standards under each of the two provisions are intertwined.[8] In the argument that follows, we explain how the STB'S decision

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[8] "Ordinarily, carriers wishing to construct a railroad ask the Board to issue a certificate of "public convenience and necessity" pursuant to 49 U.S.C. § 10901(c). HolRail instead sought an exemption from the certificate requirement by filing a petition under 49 U.S.C. § 10502(a), which allows the Board to exempt carriers from certain rail transportation requirements. All parties agree, however, that **HolRail's decision to file a section 10502(a) exemption petition rather than a section 10901(a) petition for a certificate of public convenience and necessity makes no difference**: if the Board grants a section 10502(a) exemption request, it summarily

violates the law's requirements from the perspective of either standard.

Under 49 U.S.C. §10901, the Board has licensing authority for the construction and operation of new rail lines. As amended by the ICCTA in 1995, § 10901 provides that the Board "shall issue a certificate authorizing activities for which such authority is requested in an application filed under sub-section (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity." Notably, while the 1995 Act re-contoured the law in certain respects, it also provided that the ICC's body of decisional precedent should be preserved and carried over to influence the decisions of the STB. *See N. Am. Freight Car Ass'n v. Surface Transportation. Bd.*, 529 F.3d 1166, 1169 n.2 (D.C. Cir. 2008). Thus, judicial as well as administrative precedents retain ongoing relevance in determining how the "public convenience and necessity" standard should have been applied in this case.

In a 1925 case, Justice Brandeis declared that the "public convenience and necessity" standard requires the ICC to pay close heed to the financial viability of

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issues a certificate of public convenience and necessity. *See Midwest Generation, LLC*, 6 S.T.B. 398, 401-02 (Oct. 3, 2002).

Holrail v. STB, 515 F.3d 1313, 1315 (D.C. Cir. 2008) (emphasis added).

any proposal to extend a carrier's rail network:

> … Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources that the financial burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefits; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. *See Railroad Commission v. Chicago, Burlington & Quincy R. R. Co*., 257 U.S. 563; *The New England Divisions Case*, 261 U.S. 184 ; *The Chicago Junction Case*, 264 U.S. 258 ; *Railroad Commission v. Southern Pacific Co*., 264 U.S. 331.
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> *Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U.S. 266, 277-78 (1925) (emphasis added).[9]

The ICC was fully cognizant that its § 10901 mandate commands a close examination of the finances whenever a railroad seeks approval to expand its network. "The statute does not define 'public convenience and necessity,' but the Commission has developed certain criteria for evaluating whether a proposed

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[9] This rule was reinforced in *ICC v. Oregon-Washington R. & Nav. Co.*, 288 U.S. 14, 36-7 (1933) ("If a railroad company can prove that the proposal either presently or in the reasonably near future will be self-sustaining, or so nearly so as not unduly to burden interstate commerce, the Commission may issue a certificate authorizing the proposed line."). *See also Purcell v. United States*, 315 U.S. 381, 384, 86 L. Ed. 910, 62 S. Ct. 709 (1942) ("When materials and labor are devoted to the building of a line in an amount that cannot be justified in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful whoever foots the bill."

construction transaction is permissible, principally:

(1) is the applicant financially fit to undertake the construction and provide service; (2) is there a public demand or need for the proposed service; and (3) will the construction project be in the public interest and not unduly harm existing carrier services?" *See Indiana & Ohio Ry. Co.—Construction and Operation*, 9 I.C.C. 2d 783, 792-93 (1993).

The STB itself has often acknowledged the enduring applicability of the three-part test. For example, in *Dakota, Minn. & Eastern R.R. Corp., Constr. Into the Powder River Basin*, 3 STB 847, 866 - 90 (2002), the STB devoted much of its authorization decision to a line-by-line examination of virtually every aspect of the proposed construction project's financial prospects. It followed a similar approach in *Norfolk Southern Corp. - Construction and Operation, Indiana Cty, PA*, (STB Finance Docket No. 33928, slip op. at 6 (May 15, 2003) ("In assessing the financial viability of the proposal to construct and operate a rail line, we consider both the resources that would be required to build the line and those needed to then maintain and operate the line."). The chief purpose of reviewing the financial soundness of proposals under consideration is to assure that poor business judgments by the railroad do not redound to the detriment of its customers, many of whom rely on access to quality freight rail service. *Id.* *See also Texas and Pacific Railway v.*

Gulf, Colorado & Santa Fe Railway, 270 U.S. 266, 277-78 (1925).

Despite multiple sources of authority requiring the STB to apply the "public convenience and necessity" standard when approving construction of a new rail line, in the proceeding below the STB made no findings as to the financial viability of the Project. At no point did it weigh or even address the considerable body of evidence suggesting that no potential customers for the new rail service are identifiable. It ignored EPA's complaints that the Project design was incomplete and thus infeasible from an engineering perspective because the drawings indicated that the new rail line did not get any closer than two miles from the lone "dock structure" that it is intended to serve. The STB assumed that spending hundreds of millions of dollars on this Project made sense merely in order to enable certain shippers to shave 35 miles off their current trips to the sprawling international port in Anchorage by sending their cargoes to the newer, unproven, functionally dubious, and stand-alone "dock structure" located at Port MacKenzie.

Distilled to its essence, the STB's rationale for granting the requested exemption was a determination that the skeletal elements of § 10502 had been satisfied by the Railroad, and that no consideration was therefore due the mountain of evidence that the Project was a government-subsidized boondoggle, that its claimed financial viability was transparently false, that none of the imagined

benefactors of the Project (*i.e.*, shippers) would have reason to use Port MacKenzie rather than the several south-Alaskan ports that are in active use today, and that the environmental impacts of the decision would be disastrous. Petitioners contend that this represents a misinterpretation of § 10502, and that the STB acted arbitrarily and capriciously when it determined that the Railroad had satisfied the requirements of §10502(a).

The relevant portion of § 10502 provides:

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
>
> (1) is not necessary to carry out the transportation policy of section 10101 of this title;...

The case law indicates that when the STB evaluates a petition for an exemption, it must ask whether the customary regulatory procedures are necessary to carry out the national rail transportation "policy" set out in § 10502, focusing on the sections of the "policy" related to the underlying statutory section from which the exemption is sought (here § 10901).[10] *Village of Palestine v. I.C.C.*, 936 F.2d

[10] *See* 49 U.S.C. § 10101:

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

1335, 1338-39 (D.C. Cir. 1991) (*cert. denied*, 116 L. Ed. 2d 773, 112 S. Ct. 868 (1992); *see generally, Winter v. I.C.C.*, 992 F.2d 824 (8th Cir. 1993). However, research reveals no authority, whether statutory, regulatory or case law-based, suggesting which of the 15 criteria set out in § 10101(a) relate to the construction-regulation requirement of § 10901. Nothing indicates whether three, five or even "most" of the 15 criteria must be satisfied. *See Village of Palestine*, 936 F.2d at 1342-44 (D.C. Cir. 1991) (*cert. denied*, 116 L. Ed. 2d 773, 112 S. Ct. 868 (1992) (dissenting opinion of Silberman, J.) (noting the statute's lack of clarity in this regard).

The only plausible interpretation of § 10502 is that it does not permit the STB to justify exempting a major rail construction project from § 10901's "purpose and need" requirement merely by pointing to one criteria in § 10101 that is indirectly relevant. Any plausible interpretion would require that granting an exemption is contraindicated where it would conflict with a significant number of the 15 criteria

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(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

– or where it would conflict with more criteria than it would honor. The law should not permit the STB, where it is inclined to grant an applicant a free pass from the ICC's licensing requirements, merely to peruse the list of 15 criteria like a menu in a restaurant, and casually tick off a few (or even one) that seem arguably apt (*e.g.*, "minimize the need for Federal regulatory control ..."). The STB did little more than that here. In the Order the STB merely stated:

> the rail line will provide and enhance intermodal competition by providing a freight option for traffic moving to and from the Port and promote the development of a sound rail transportation system with effective competition with other modes to meet the needs of the shipping public, consistent with 49 U.S.C. §§ 10101(4) and (5). Exempting the proposed construction project from the requirements of § 10901 will also minimize the need for federal regulation and reduce regulatory barriers to entry, in furtherance of 49 U.S.C. §§ 10101(2) and (7). Order at 6.

The STB never explained how the administrative record lent support to each of these "findings." Nor did it take account of contrary evidence, in an attempt to reconcile its decision with the entire record. Petitioners submit that the decision is therefore insufficient under the APA.

An examination of the § 10101 criteria mentioned by the STB, PE 6, in justifying its exemption decision demonstrates that the STB's findings regarding elements (4) and (5) are unsupported and, indeed, contradicted by the sum total of the evidence in the record. Specifically:

— As for item (4), exempting the Project from the STB normal licensing procedures will not:

"ensure the development and continuation of a sound rail transportation system;"

"[promote] effective competition among rail carriers and with other modes;" or

"meet the needs of the public and the national defense."

Building a "railroad to nowhere" will in no way contribute to the soundness of our nation's rail transportation system. Unneeded, unjustified, and destructive pork-barrel projects like this one can only weaken the rail system by requiring that resources (such as inspection and maintenance funds) be devoted to idle trackage, as opposed to those tracks which are actually in active commercial use.

— As for item (5), there is no basis in the record for the STB's finding that the Project will promote "effective competition among rail carriers." The Railroad is the only railroad in the state of Alaska, indeed it has a monopoly over the market. Nor can it be argued that exempting the Project from § 10901 will promote "competition ... [with] other modes." The stated purpose of the Project is to substitute the proposed rail line for existing truck service. If the Project is constructed, the effect will clearly be to eliminate the competition.

— As for item (2), granting the exemption will not "minimize the need for Federal regulatory control over the rail transportation system" unless this is a Catch-22. *i.e.*,

that every exemption, by definition, reduces the reach of the federal regulatory system. If anything, extending the ARRC line deep into the Alaskan wilderness will require more regulatory oversight by the STB, as the expanded ARRC network will remain under its jurisdiction and undoubtedly give rise to future regulatory issues in the future.

— As for item (7), granting the requested exemption will in no way "reduce regulatory barriers to entry into and exit from the industry." The Railroad already has monopoly control over the Alaskan freight market. Neither the Railroad nor anyone else is attempting either to enter or exit this market – or "the industry."

Any fair application of all the applicable § 10101 criteria compels the conclusion that granting an exemption for the Project runs **contrary** to national rail transportation policy. For example, the mandate of § 10101(3), which directs the STB "to promote [an] efficient rail transportation system," will clearly be disserved by permitting the Railroad to use tax dollars and shippers' funds to build a "railroad to nowhere." Similarly, granting the exemption in no way advances the policy expressed in § 10101(9) – "to encourage honest and efficient management of railroads." As for the § 10101(14) policy – "to encourage and promote energy conservation," the proposed new rail line would do just the opposite.

Though the STB implies, Order at 6, that any move from truck-based shipping to rail-based shipping automatically produces fuel "efficiency," this is only true where significant amounts of cargo are switched from one mode to another and the distances involved are significant. Here, on the other hand, the record demonstrates that (1) the new rail line will reduce the distance from the Alaskan interior to a port facility by only 35 miles (well under an hour's travel for most rolling stock) and (2) there is little demand for the service of the proposed rail line and thus there will be little use of it. Therefore, the alleged energy savings are illusory. At best they will be dwarfed by the incalculable amounts of energy required to construct the rail line and access road (including mining and processing of raw materials, etc.) and to maintain it – especially in the long and harsh Alaskan winters. The STB cannot be allowed to wave the rubric of "energy efficiency," like a talisman, over any proposal to build a railroad, thereby justifying an exemption from the conventional licensing requirements of § 10901.

Nor can the STB be allowed to fashion talismans out of "reduc[ing] regulatory barriers" (49 U.S.C. § 10101(7)) or "minimiz[ing] the need for Federal regulatory control" (49 U.S.C. § 10101(2)). The best way of achieving these policies, as the STB seems to interpret them, would be to dissolve itself. A more rigorous analysis and application of the statutory requirements is necessary in order for the STB's

Order to satisfy the "arbitrary and capricious" standard of review.

II. THE STB'S FEIS WAS LEGALLY INADEQUATE UNDER NEPA

The STB's decision to exempt the Project from its licensing requirements was flawed not only substantively but also procedurally. Petitioners contend that the FEIS fell far short of the prevailing standards of legal adequacy for three principal reasons. First, the STB erred when it reflexively endorsed and adopted the Railroad's statement of purpose and need for the Project, rather than recognize that responsibility for framing the objectives of the undertaking was shared between the agency and the applicant. Second, the STB stiffly refused to consider the pleas of EPA and many others that it evaluate the alternative of building the rail line without a companion access road for vehicles. Third, the FEIS gave extremely short shrift to the enormous amount of damage that construction of the project would inflict on many square miles of pristine Alaskan wetlands.

A. The STB Impermissibly Adopted the Railroad's Project Goals as the "Purpose and Need" Without Any Independent Scrutiny

An agency preparing an EIS must specify the underlying "purpose and need" for the proposed action. 40 C.F.R. § 1502.13. The framing of the project's "purpose and need" is crucial because it provides a context which defines the range

of "reasonable alternatives" that must be evaluated in the EIS. *City of Carmel-by-the-Sea v. Dep't of Transportation.*, 123 F.3d 1142, 1155 (9th Cir. 1995), citing *Citizens Against Burlington, Inc. v. Busey*, 290 U.S. App. D.C. 371, 938 F.2d 190, 192 (D.C. Cir. 1991). When preparing an EIS, it is the agency, not the project proponent, that "bears the responsibility for defining at the outset the objectives of an action." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991), 938 F.2d at 195-96. Where an agency thoughtlessly adopts a private party's narrow goals as the overall purpose and need, the agency "necessarily consider[s] an unreasonably narrow range of alternatives," and thus necessarily violates NEPA. *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1072 (9th Cir. 2010).

To be sure, agencies may not ignore private applicants' objectives; an agency may pursue both private and public goals.[11] However, these two objectives are not "mutually exclusive or conflicting;" they simply "instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate

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[11] *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) ("Agencies ... are precluded from completely ignoring a private applicant's objectives."); *Citizens Against Burlington*, 938 F.2d at 196 ("[T]he agency should take into account the needs and goals of the parties involved in the application.")

consideration to alternatives that fall between the obvious extremes." *Colorado Envtl. Coalition*, 185 F.3d at 1175. This Court's decision in *Nat'l Parks* is instructive. There the Bureau of Land Management's EIS contained a "purpose and need" statement that embodied four goals - one reflecting the agency's mission and three reflecting the ambitions of the private permit applicant. This, the Court ruled, reflected an unfair tilt in the applicant's favor. An agency should be sensitive to the applicant's goals and needs, but such goals and needs must inform, rather than drive the agency's decisionmaking. 606 F.3d at 1070-71.[12]

In its Order, the STB took exactly the opposite approach from that required by this Court in *National Parks*. Rather than framing the Project's overarching objectives in a way that merely respected the Railroad's objectives – or in a way that blended public and private purposes – the STB stated that it was focused exclusively on achieving the goals articulated by the Railroad. Indeed, in the FEIS the STB presented the formal purpose-and-need statement not as its own, but as the

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[12] *Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), is another case that explored the balance between public and private goals that must be struck in an EIS. In that case this Court upheld a "purpose and need" statement prepared by the Army Corps of Engineers, even though it reflected a roughly even balance between the public and private objectives. But as noted by the Court in *National Parks*, *Angoon* is readily distinguishable because the Corps' regulations mandate that it seek to advance the objectives of permit applicants. *See National Parks* at 1070-71.

Like the BLM, the STB has no similar regulations. *See* 49 C.F.R. Part 1105.

Railroad's:

> 1.2 Purpose and Need
> The Applicant has stated that the purpose of the proposed rail line is to provide rail service to Port MacKenzie and to connect it with the existing ARRC main line, providing Port MacKenzie customers with rail transportation between Port MacKenzie and Interior Alaska. PE 91.

Among these goals was to "make the development of natural resources in interior Alaska more economically feasible" and "to foster and promote long-term economic growth and development in the State of Alaska." PE 62. This equation did not leave room for advancing the "public convenience and necessity" as directed by the ICCTA, and did nothing to achieve NEPA's goals.[13]

Lest there be any question as to whether the adequacy of the STB's "purpose and need" statement was sufficiently raised during the administrative proceeding, the record shows that EPA hammered on this topic. For instance, in its comments on the DEIS, EPA requested that the official statement of purpose and need be altered substantively, so as to better address matters involving the public interest.

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[13] *See*, *e.g.*, 42 U.S.C. § 4331: "...it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

PE 112 ("the EIS should include and clear and concise statement of the underlying purpose and need for the action, and clearly reflect the greater public need for the project."). It reemphasized this point in its comments on the FEIS ("...the EIS does not provide need and a clear demonstration for public necessity..."). PE 177.

Perhaps the most ardent skeptic of the official statement of purpose-and-need was STB Commissioner Mulvey in his dissent. Focusing on what he characterized as the Railroad's – rather than the STB's – statement of purpose and need, he described it as "particularly weak," and noted that it expresses little more than "Port MacKenzie's aspirations." PE 22. Other commenters offered the same criticism of the Project's official purpose and need.[14]

[14] *See, e.g.*, PE 170 (comments of Sharon and Douglas Smole); PE 148 (Comments of Grace Whedbee.)

Remarkably, the STB described its statement of purpose and need as one which is perfectly congruent with the law:

> ... the proposed rail line involves a petition by a common carrier, ARRC, for a license or approval. It is not a federal government-proposed or sponsored project. In cases like this, courts have held that **the project's purpose and need are to be defined by the private applicant's goals**, in conjunction with the agency's enabling statute. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). (emphasis added). PE 15 (emphasis added).

Not only does this stance fail to reflect the law of the Ninth Circuit, it distorts the rule set out in *Citizens Against Burlington* and all other pertinent authorities.

B. The STB Impermissibly Refused to Evaluate an Important Alternative Design: Construction of the Rail Line With No Adjacent Access Road

Several commenters raised concerns about the Railroad's plan – endorsed by the STB – to construct an access road running adjacent to the proposed rail line. *See* PE 175 (STB summary of comments and responses). EPA attacked the proposed access road on two fronts. First, as a substantive matter, it recommended that the access road be eliminated from the design because its adverse impacts would be significant and needless. PE 118. In the alternative, EPA recommended that the STB at least frame an alternative design, for evaluation within the FEIS, for a rail line with no access road. *Id*. As yet another alternative, it suggested that the STB

evaluate an access road design involving a partial, or "minimized" road. PE 118, 177. The STB rejected all recommendations summarily:

> "... the Applicant plans to construct an access road in the rail line ROW to enable them to move equipment and materials along the long, linear ROW during rail line construction. Following construction, the Applicant plans to use the road to support rail line maintenance activities." PE 175.

This bull-headed approach is contrary to NEPA's requirements. NEPA requires every agency, when considering a proposed project, to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14. Analysis of alternatives to a proposed federal action "is the heart" of an EIS. *Id.* An EIS "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* To adequately consider alternatives to the proposed project, the agency "must look at every reasonable alternative within the range dictated by the nature and scope of the proposal." *Friends of Southeast's Future v. Morrison,*153 F.3d 1059, 1065 (9th Cir. 1998).

An EIS is inadequate if there are any "reasonable but unexamined alternatives." *Id.* Accord, *Westlands Water Dist. v. U.S. Dep't of Interior,* 376 F.3d 853, 868 (9th Cir. 2004). An alternative that is consistent with the policy goals of the

project and is potentially feasible must be analyzed in depth. *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 813-14 (9th Cir. 1999).[15] That the proposed project may be preferable to an alternative does not relieve an agency of its duty to analyze the alternative; so long as the alternative is reasonable, it must be examined. *Citizens for a Better Henderson*, 768 F.2d 1051, 1057 (9th Cir. 1985).

Section 102 of NEPA mandates STB consultation with other federal agencies when it prepares an EIS: Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. 42 U.S.C. § 4332. EPA qualifies on both counts. It has a renowned expertise in the area of protecting aquatic ecosystems. It has also been charged by Congress with reviewing EISs prepared by other agencies and, where appropriate, noting its objections formally. *See* Clean Air Act § 309, 42 U.S.C. § 7609. The STB's utter disregard for EPA's comments and recommendations only serves to underscore its blatant disregard for NEPA's requirements.

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[15] Conversely, an alternative does not need to be analyzed if that alternative is unreasonable. *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).

C. The STB's EIS Impermissibly Gave Scant Attention to the Adverse Effects of the Project Upon Wetlands

The portion of the Susitna Lowland that will be harmed by the Project can only be described as extremely wet. Forty-three percent of the habitat in the region consists of wetlands, rivers, lakes, or streams. FEIS 5.3.3. Moreover, the region remains largely unoccupied by humans, meaning "that the wetlands in the study area are very highly functional because they are predominantly intact, undisturbed systems." FEIS 4.5.3.2. In other words, the adverse environmental effects of the Project will be greatly amplified when compared to the usual terrestrial rail construction project.

In § 4.5 of the EIS the STB provided many pages of information addressing how these wetlands might be affected. But it's not the quantity of pages that matters under NEPA, it's the quality of the analysis that the agency conducts.[16] As

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[16] *See Northwest Environmental Advocates v. National Marine Fisheries Service*, 460 F.3d 1125, 1146 (9th Cir. 2006) (Fletcher, J., dissenting) ("The Corps has certainly produced an enormous record during this NEPA process; however, simply producing a record of the size presented to us in this case does not mean that the agency has answered the correct questions, undertaken relevant studies, or adopted appropriate methodologies.

the NMFS made clear in its comments on the DEIS, in order to (1) enable an adequate understanding of the alternative routes and construction methods (*e.g.*, bridges and culverts) needed to minimize the wetlands damage and (2) provide an information baseline sufficient to evaluate mitigation methods (required by the Corps of Engineers under § 404 of the Clean Water Act, 33 U.S.C. § 1344.), it was vital to have experts conduct a site-specific examination of the project area. Instead of doing this, the STB employed a "rapid assessment" survey method and referred merely to available aerial photography and computer-generated geographic information system ("GIS") data. FEIS §§ 4.5.2, 4.5.3.

This met with the sharp disapproval of both EPA and NMFS. In its comments, EPA was clear and direct in its criticism:

> "[t]he draft EIS contains very limited information regarding wetland function, and this information is not site-specific. Additional, detailed, site-specific information regarding wetland type and function will be necessary to compare the environmental impacts of the various alternatives." PE 115.
>
> "... appropriate and practicable steps have not been taken to minimize potential adverse impacts on the aquatic ecosystem We believe that the scope of this consideration was too limited and that the DEIS does not analyze other alternatives and mitigation that could reduce significant impact. Therefore, EPA has concluded that this project violates Clean Water Act Section 404(b)(1) guidelines and the NEPA regulations at 40 C.F.R. § 1502.14, and that other alternatives need to be considered... PE 111.

EPA also noted that among the important alternatives and mitigation measures that STB failed to consider are the prospects of bridging stream crossings and elevating

portions of the rail line, which would reduce direct filling of streams and wetlands as well as disruption of flow patterns. PE 113–14, 116–17.

Those concerns were echoed by the U.S. Army Corps of Engineers in its comments, which noted a lack of detail regarding the specific design of the rail line and its impacts, as well as a deficiency in the assessment of the quality and funtion of the wetlands that would be impacted. PE 209.

NMFS was equally direct in its challenge to the STB's methods:

> "... in reviewing methods employed to determine wetland type and function, NMFS concludes the amount of wetlands impacted may be significantly underestimated and not accurately characterized using rapid and aerial surveys [sic] methods. Wetland surveys and functional assessments need to be conducted in a manner that generates defensible results..."

NMFS urged the STB to "[c]onduct wetland delineations of final alignments to refine the detail and description of site-specific wetland function and hydrologic contribution of transected streams and rivers." PE 108.

Given the financial and physical magnitude of the Project and its predictably devastating effects on the Susitna Lowland, the STB's simplistic reliance on off-the-shelf data —and failure to consider alternative construction methods that would minimize the impacts of the project —renders the EIS inadequate as a matter of law. Though the text of NEPA provides only bare-boned guidance as to what

must be included in an EIS, it does specify that the analysis be "detailed." 42 U.S.C. § 4332(C). The NEPA implementing regulations provide that EIS "information must be of high quality" 40 C.F.R. § 1500.1(b). *See also Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379 (9th Cir.1997) (requiring"quantified or detailed information").[17]

Cuddy demonstrates well why the STB's cursory treatment of wetlands damage mitigation did not meet the prevailing standard for analytical rigor. In *Cuddy*, this Court invalidated an EIS which identified a number of "mitigation measures" which might be employed in the future to offset the adverse effects of a timber sale, but which did not explain how each of those measures would accomplish that goal. This made it impossible for the reader or agency decisionmaker to make an informed choice among the alternatives. *See* 137 F. 3d at 1380.

[17] *See also City of Carmel-By-The-Sea v. U.S. Dept. of Transp*., 123 F.3d at 1142, 1154 (9th Cir. 1997) (impacts must "be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.").

The Forest Service's perfunctory description of mitigating measures is inconsistent with the "hard look" it is required to render under NEPA. "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Carmel-By-the-Sea v. U.S. Dep't of Transportation.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989)). "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Northwest Indian Cemetery Protective Ass'n. v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319 (1988).

Yet in the instant case the STB never attempted even that level of specificity in the FEIS. Rather, it referred to mitigation of wetlands damage as a future prospect that would be handled, if at all, by the Railroad:

Although the overall acres of impacts to wetlands for this alternative would be relatively low, the intensity of the impacts could be greater than others, depending on the avoidance, minimization, and mitigation measures incorporated into the project. PE 202 (referring to route segments that were selected as part of the "preferred alternative.").

Whereas *Cuddy* rejected the mere listing of possible mitigation measure, here the agency didn't even provide a list. In effect, the STB simply brushed off this important aspect of its environmental review responsibilities. This quick-and-dirty approach does not comply with the requirements of NEPA.

CONCLUSION

For these reasons, the Court should vacate and remand the STB's Order.

Respectfully Submitted,

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Counsel for Petitioners

DATED: May 14, 2012

STATEMENT OF RELATED CASES

No other cases in this Court are deemed related.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing brief is printed in proportional typeface of 14 points or more and contains 9886 words.

/s/ James B. Dougherty

DATED: May 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2012, I will electronically file the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. To the best of the undersigned's knowledge, all counsel of record in this case are registered users of the electronic filing system.

/s/ James B. Dougherty

James B. Dougherty

ADDENDUM A

PERTINENT STATUTORY PROVISIONS

49 U.S.C. §§ 10101, 10502(a), 10901(a)-(c)

5 U.S.C.A. § 706

42 U.S.C.A

49 U.S.C. § 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8th Cir.) to operate transportation facilities and equipment without detriment to the public health and safety;

(9th Cir.) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

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§10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent

consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

****

§10901. Authorizing construction and operation of railroad lines

(a) A person may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) provide transportation over, or by means of, an extended or additional railroad line; or

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

Administrative Procedure Act § 10, 5 U.S.C. § 706:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. § 4332

National Environmental Policy Act § 102:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the

appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize

international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

ADDENDUM B

STANDING DECLARATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA SURVIVAL, SIERRA CLUB, and COOK INLETKEEPER,	)	Case No. 12-70218
Petitioners,	)	
v.	)	
SURFACE TRANSPORTATION BOARD and UNITED STATES OF AMERICA,	)	
Respondents.	)	

I, Audrey Faulkner, do declare and state that I have personal knowledge of the following matters:

1. My name is Audrey Faulkner and I reside in Anchorage, Alaska.

2. I have been a member of Cook Inletkeeper. I am also a member of Alaska Survival. I joined Cook Inletkeeper in August 2011 and joined Alaska Survival on January 20, 2012. Cook Inletkeeper, founded in 1995, is a private nonprofit organization incorporated under Alaska law and dedicated to protecting the vast Cook Inlet watershed and the life it sustains, including threatened streams, lakes and estuaries of the Cook Inlet watershed. Alaska Survival is an organization that is dedicated to various environmental, rail, herbicide, land management and agricultural issues as well as protecting wild lands, waters, and wildlife in the Susitna Valley region. Alaska Survival was incorporated as a non-profit corporation in the mid-1980s.

3. I am a lifelong Alaskan with deep roots in the state. My grandparents were pioneers to the state in the 1920s, gold mined in Nuka Bay and then homesteaded in Anchorage. My parents homesteaded near Big Lake, Alaska, but settled in Anchorage and currently live on part of the old homestead in Anchorage. Throughout my life, I have farmed with my parents in Anchorage and the Matanuska Valley. Our first fields were on our homestead

in Anchorage. We then purchased a farm in Wasilla off Pitman Schrock Road. Our current farm is at Point MacKenzie, Tract 7 of the Point MacKenzie Agricultural Project. The 437 acre farm is owned by Flyway Farm, LLC, a family company, of which I am a member. I spend my summers and many weekends at the farm, and intend to continue doing so in the future.

4. This farm at Point MacKenzie was my parents retirement dream. They purchased it in 1999 and worked hard to turn it into a lovely, tranquil place where they could enjoy farming, an activity that made them happy and kept them young. Putting up hay was always the highlight of my Dad s year. I too encourage my kids to pitch in every haying season because it keeps them grounded and in touch with family. We intend to continue this family tradition of farming because we cherish the experience and peacefulness of farming. Since my Dad's passing in early 2011, it will be a reminder of my father and his desire that his children and grandchildren have the opportunity and privilege to farm.

5. I am aware that the Surface Transportation Board granted an exemption from the prior approval requirements of 49 U.S.C. §10901 for the construction and operation of a proposed Port MacKenzie rail line.

6. The current proposed route for the Point MacKenzie rail spur bisects our farm and cuts it into two sections. We will be directly impacted by the Port MacKenzie rail spur, aesthetically, socially and economically.

7. The Mac-East "Variant," introduced late in the EIS process, was the route ultimately approved by the Surface Transportation Board. Last minute routing changes in the form of a "variant" to the original Mac-East Route, without notice to affected parties and property owners, is of particular concern to me and my family. As far as I am aware, the Mac-East Variant route was not disclosed anywhere in the prior scoping documents or in the draft environmental impact statement, and first appeared in the Final EIS. No government agency had an opportunity to submit formal comments on this location. Furthermore, after the Final EIS was published, and with no notice to affected parties, property owners, or governmental agencies, the Mat-Su Borough and Alaska Railroad re-located the Terminal Reserve Area, which was identified in the EIS and Final EIS in the industrial-zoned port area, to the middle of the Point MacKenzie Agricultural Project. I believe that the proposed rail spur and terminal reserve area in the middle of the Point MacKenzie Agricultural Project is inconsistent with Alaska statutory agricultural covenants on this land.

8. Our farm at Point MacKenzie was going to be our family farm and my parents final "resting place." With the agricultural restrictions on Point MacKenzie, it fit into our plans

to preserve open space for our children into the future. A three-mile-long railroad terminal, switching station, maintenance and housing facility—as proposed with the Port MacKenzie rail line and terminal reserve—is inconsistent with the agricultural restrictions, and would put an end to all farming and future enjoyment of our land. I strongly oppose a rail spur and terminal reserve area being put anywhere near the agriculture project. The railroad will injure our rural way of life, the aesthetics of the area, will cause an economic loss for our farm, and will damage the fragile environment.

9. The proposed rail line, with its 24 hour-a-day hauling of commodities, like coal, will create coal dust and render our hay crop and others crops unsaleable. The railroad would also use herbicides or pesticides along the rail line which would further limit the kind of farming that can be done on our farm. Finally, the rail spur and terminal reserve could impact the watershed that feeds our local lakes, and the herbicides and/or pesticides used along the rail could harm our water supply and effect fishing and recreational opportunities in the area.

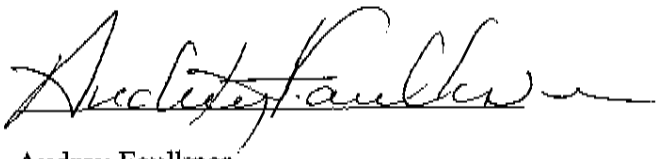
10. The environment where the Point MacKenzie rail spur and terminal reserve is proposed is a sensitive ecosystem. The area contains pristine water which supplies local drinking water wells as well as a commercial water system that supplies the Point MacKenzie Prison Farm with potable water. Additionally, the area contains many low willow trees which make for ideal moose habitat. We enjoy watching and knowing that moose and other wildlife are alive and well on our farm and the surrounding areas. Indeed, the DEIS comments submitted by the Alaska Department of Fish & Game indicate that the local moose populations will be harmed if the proposed rail line is actually built. We fish in the local lakes, and enjoy farming, and visiting others that live in the local farm community. If this rail spur and terminal reserve are built, I would be reluctant to participate in these activities because the area would be less pristine and less peaceful and the farming community would be disrupted. I would also be concerned about whether the fish would be edible and our crops fit for human consumption.

11. The construction of the Port MacKenzie rail line would have several negative social and economic impacts. The area near Port MacKenzie is extremely rural and would be ill-equipped to deal with a sudden influx of workers to build the rail line and to work at the Port. Building temporary and permanent housing for workers on the rail line would also decrease property values for me and other landowners in the area. The Port MacKenzie rail line will have significant environmental impacts and there is no current need for this rail line.

12. The failure of Surface Transportation Board to conduct an adequate and complete environmental statement of the proposed facility has harmed me because it overlooked environmental, economic, and aesthetic consequences that will affect me personally. I believe that if the court were to require the Surface Transportation Board to conduct a full EIS accounting for all of the impacts associated with this project, the new route and the terminal reserve area, my interests would be better protected and I would have more faith in the environmental impact statement process.

I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Executed this 11 day of May 2012.



Audrey Faulkner

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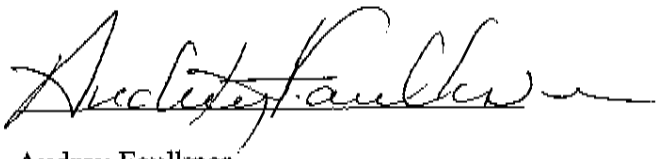

Audrey Faulkner