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February 19, 2008

Betty Fauber
Administrative Director
Knik Arm Bridge and Toll Authority
550 W. 7th Avenue, Suite 1850
Anchorage, AK 99501

Re: Knik Arm Crossing Final Environmental Impact Statement

Dear Ms. Fauber:

We submit these comments on the Knik Arm Crossing Final Environmental Impact Statement ("EIS") on behalf of the Alaska Center for the Environment ("ACE"), Alaska Public Interest Research Group, Alaska Transportation Priorities Project, Anchorage Citizens Coalition, Cook Inletkeeper, Government Hill Community Council, and North Gulf Oceanic Society. Like the draft EIS, the final EIS falls short of the requirements of the National Environmental Policy Act ("NEPA"). The Federal Highway Administration ("FHWA") has not satisfactorily addressed the comments on the draft EIS submitted by ACE *et al.*, the Government Hill Community Council, and various agencies and local governments. We thus incorporate these comments herein by reference.[1] Moreover, the EIS shows that this costly and environmentally harmful project would reduce travel time for only 20% of the residents of the Upper Cook Inlet region, would increase average travel time and distance in the region, and would not spur economic growth. Finally, the bridge is ineligible for funding under the Federal Aid Highway Act ("FAHA"). In sum, the EIS not only falls short of NEPA and the FAHA, but the bridge would not meet the needs of the Upper Cook Inlet region, and we thus urge the FHWA to select the No Action Alternative.

I. The FHWA Defines the Purpose and Need for the Proposed Action in Unreasonably Narrow Terms That Foreclose Consideration of a Reasonable Range of Alternatives.

The EIS fails to provide the reasonable range of alternatives that NEPA requires. The purpose and need statement eliminates all action alternatives other than an 8,200-foot roadway bridge over Knik Arm, FHWA, *EIS* § 2.8 (Dec. 2008), making it impossible to assess the true merits and impacts of the proposed bridge. The FHWA does this even though Congress has abandoned the bridge for all intents and purposes. The comments on the draft EIS by ACE *et al.* note that the FHWA adopted a purpose and need statement that requires a bridge over Knik Arm even though Congress rejected such a limitation by deleting the earmarks for the bridge and appropriating the funds to "any purpose eligible under section 133(b) of title 23, United States

[1] These include the comments on the draft EIS by ACE *et al.*, the Municipality of Anchorage, the U.S Army Corps of Engineers, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the U.S. Marine Mammal Commission, National Oceanic and Atmospheric Administration, and the Government Hill Community Council.

Code." Pub. L. No. 109-115, § 186, 119 State. 2396, 2431 (2005). An agency must "consider the views of Congress" when preparing a purpose and need statement. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). In response to this comment, the FHWA acknowledges that Congress decided to "let the State of Alaska determine" what to do with the money, but the FHWA declines to revise the purpose and need statement. FHWA, *EIS* app. K (comment 295-20) (Dec. 2007).

The purpose and need statement provides as follows (footnotes included):

> The proposed project would further the development of transportation systems in the Upper Cook Inlet region by providing improved vehicular access and surface transportation connectivity between Anchorage and the Mat-Su through the Port MacKenzie District, with a financially feasible[2] and efficient[3] crossing to meet the needs for:
>
> 1. Improved regional transportation infrastructure to meet existing and projected population growth and locally adopted economic development, land use, and transportation plans, and as directed by the Alaska State Legislature in AS § 19.75
> 2. Regional transportation connectivity for the movement of people and the movement of freight and goods to, from, and between Anchorage, the Mat-Su, and Interior Alaska
> 3. Safety and transportation system redundancy for alternative travel routing and access between regional airports; ports; hospitals; and fire, police, and disaster relief services for emergency response and evacuation[.]

Id. at § 1.3. The comments on the draft EIS by ACE *et al.* identify language in this statement that requires a Knik Arm bridge. In addition to this language, the requirement that the project improve "regional transportation infrastructure to meet . . . locally adopted economic development, land use, and transportation plans, and as directed by the Alaska State Legislature in AS § 19.75" prevents non-bridge alternatives from being considered in the EIS. Specifically, the EIS states that the "plans" cited by the FHWA "have identified needs that can be met by an efficient and financially feasible Knik Arm crossing, specifically document support for a crossing, or list such a crossing as a major development to be considered for long-range planning purposes." *Id.* at 1-10. Moreover, AS 19.75 establishes the Knik Arm Bridge and Toll Authority ("KABATA") expressly to construct "a bridge to span Knik Arm." In other words, the purpose and need statement can only be satisfied by a single action alternative: An 8,200-foot bridge over Knik Arm.

The FHWA has abused its discretion by adopting an unreasonably narrow purpose and need statement. While an agency has discretion to define the purpose and need, "this discretion is not

[2] Financial feasibility is based on the ability to finance a total estimated project cost not-to-exceed $600 million.
[3] *Efficient* means a measure of traffic operating conditions that occurs when such factors as travel demand, effects on connecting transportation networks, facility length, travel time, and operating speed are collectively considered.

unlimited." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004). "[A]n agency cannot define its objectives in unreasonably narrow terms," *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997), "contriv[ing] a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). *See also Davis v. Mineta*, 302 F.3d 1104, 1118-20 (10th Cir. 2002). The FHWA has done this here.

The FHWA dismisses the concerns expressed by ACE *et al.* about the purpose and need statement and its effects on the range of alternatives by declaring that the purpose and need statement "provide[s] the flexibility for consideration of a large range of alternatives including roadway, non-roadway, and multimodal alternatives including expanded ferry and rail." *E.g., id.* at app. K (comment 295-19). Notwithstanding this declaration, the FHWA employs the purpose and need statement to eliminate all non-bridge alternatives from the EIS.[4] *Id.* at § 2.8.

The FHWA accomplishes this by applying the following purpose and need screening "criteria" (footnotes included) to the alternatives:

Criterion P&N-1 Would further development of transportation systems in the Upper Cook Inlet region by providing improved vehicular access and surface transportation connectivity between Anchorage and the Mat-Su at the Port MacKenzie District

Criterion P&N-2 Would be financially feasible[5], based on the ability to finance a total estimated project cost not-to-exceed $600 million (this criterion is for initial construction costs of the facility, Phase 1, and does not include ultimate build-out capacity that would be funded [at least in part][6] through toll-backed financing)

Criterion P&N-3 Would be sustainable; projected travel demand would provide estimated debt service and cover operation and maintenance costs

Criterion P&N-4 Would be efficient; defined as a measure of traffic operating conditions that occur when such factors as travel demand, effects on connecting transportation networks, facility length, travel time, and operating speed are collectively considered

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[4] In response to the comments of ACE *et al.* on the purpose and need statement and range of alternatives, the FHWA appears to abandon its efforts to justify the range of alternatives in the EIS, declaring that the draft EIS complies with NEPA, that many state and local plans call for a Knik Arm bridge, and that the bridge underwent extensive scoping. *Id.* at app. K (comment 295-26). This declaration does not justify the range of alternatives in the EIS.

[5] As part of the Scoping process, initial Rough-Order-of-Magnitude (ROM) construction cost estimates were prepared as a basis for preliminary corridor and corridor variant evaluations. Once reasonable alternatives were identified, additional refinement and cost and impact evaluations were performed, including cost estimates for controlled access right-of-way, preliminary engineering, construction administration, and contingencies. Due to the evolving process of alternatives development, early construction cost estimates prepared as part of the Scoping process are not readily comparable to later phase comprehensive cost evaluations.

[6] "When traffic increases, toll revenue *could help finance* an extension to the Ingra/Gambell couplet and add through-lanes." KABATA, *2007 Annual Report* 5 (Dec. 2007) (emphasis added).

Criterion P&N-5 Would further regional transportation infrastructure to meet existing and projected population growth

Criterion P&N-6 Would further regional transportation infrastructure in response to locally adopted economic development, land use, and transportation plans, and as directed by the Alaska State Legislature in Alaska Statutes chapter 19.75

Criterion P&N-7 Would further regional transportation connectivity for the movement of people to and from—and distribution between—Anchorage, the Mat-Su, and Interior Alaska

Criterion P&N-8 Would further regional transportation connectivity for the movement of freight and goods to and from—and distribution between—Anchorage, the Mat-Su, and Interior Alaska

Criterion P&N-9 Would improve safety and provide transportation system redundancy for alternative travel routing and access for emergency response and evacuation[7]

Id. at § 2.2.1; FHWA, *Scoping Summary Report* 6-4 (Nov. 2005). "Alternatives had to meet all of the applicable criteria to be considered reasonable." FHWA, *EIS* at 2-2; FHWA, *Scoping Summary Report* at 6-4. Based on these criteria, and without credible analysis, the FHWA eliminates all non-bridge alternatives, including the following, from the EIS:

- Expandable commuter ferry
- Rail bridge across Knik Arm
- Commuter rail to Wasilla
- "Transportation Package" (multimodal alternative)[8] consisting of:
    - regular car ferry transit to Point MacKenzie
    - commuter rail between the Mat-Su and Anchorage
    - carpool and vanpool incentives for travel between the Mat-Su and Anchorage
    - expanded bus service and streetcar transit in Anchorage

FHWA, *Scoping Summary Report* at § 6.3; FHWA, *EIS* at § 2.5.2.

Four examples typify the problems with the development and application of the purpose and need screening criteria. First, the FHWA eliminates various alternatives under Criterion P&N-2

[7] The Glenn and Seward Highway corridors provide the sole north-south ingress and egress routes between the Mat-Su, Anchorage, and other communities south of Anchorage. In the event of a natural disaster or accident, overland connections within and access to the region's airports, ports, hospitals, and other emergency services would be severely limited.

[8] FHWA developed and evaluated the "Transportation Package" at the request of seven nongovernmental organizations (NGOs) that the Study Team analyze a four-part "Transportation Package" multimodal alternative. This alternative is described in Section 2.5.2.4 and more fully discussed in the *Scoping Summary Report: Comments, Issues, and Alternatives* (FHWA 2005a).

while failing to adequately consider whether the proposed bridge meets this criterion. Specifically, the EIS eliminates various alternatives that would cost over $600 million, but approves an 8,200-foot bridge over Knik Arm because it would cost under $600 million. FHWA, *EIS* at tbl. 2-7, tbl. 2-9. The approval of the bridge under this criterion contradicts various studies the FHWA omits from the EIS. For example, the FHWA omits its own study indicating the bridge would cost $639 million. FHWA *et al.*, *Cost Estimate Review Study* 4-5 (June 2006). Additionally, the FHWA omits the contemporaneous KABATA financial plan showing that the "initial construction costs" of the bridge would be $587 million in addition to $45 million for "development phase activities," for a total of $632 million, and that "total estimated project cost" – with debt service, bond issuance, and other transaction costs – would be $845 million. KABATA, *TIFIA Application* § D at 2 (June 2007). The failure of the FHWA to disclose and consider all information about the costs of the proposed bridge in applying Criterion P&N-2 is arbitrary and capricious and violates NEPA. *E.g.,* 40 C.F.R. §§ 1502.14, 1502.24; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Second, the FHWA applies many of the criteria without defining essential terms and without credible methodology. For example, under Criterion P&N-3, the FHWA imposes a higher standard on non-bridge alternatives than bridge alternatives. Specifically, the *Scoping Summary Report* and the EIS indicate that the ferry alternative – and, as a result, the multimodal alternative – is not "sustainable" because its revenue would not cover operation and maintenance, overhaul and maintenance, administrative, insurance, capital, and other costs of the ferry five years after start-up. FHWA, *Scoping Summary Report* at 6-40. In contrast, the FHWA finds that the bridge alternatives are "sustainable" because they cover operation and maintenance costs *in the year 2030*. *Id.* at § 6.8.3. Moreover, the EIS defines "efficient" in Criterion P&N-4 as "a measure of traffic operating conditions that occur when such factors as travel demand, effects on connecting transportation networks, facility length, travel time, and operating speed are collectively considered." FHWA, *EIS* at § 2.2.1. Rather than systematically apply the factors in this definition, the FHWA simply eliminates alternatives that would take longer to cross Knik Arm than a Knik Arm bridge. FHWA, *Scoping Summary Report* at § 6.8.1; FHWA, *EIS* at § 2.5.2. In short, the FHWA applies the purpose and need criteria inconsistently and incredibly to the alternatives, which is arbitrary and capricious and violates NEPA. *E.g.,* 40 C.F.R. §§ 1502.14, 1502.24; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Third, the FHWA eliminates non-bridge alternatives under Criterion P&N-5 based on their inability to meet "population growth" that would occur *only* if KABATA builds the bridge. The FHWA estimates that a bridge would "generate about 45,900 trips per day" in the year 2039. FHWA, *Scoping Summary Report* at 6-41; FHWA, *EIS* at § 2.5.2. While the FHWA never reveals the source of this estimate, a report prepared at the time of the *Scoping Summary Report* – but left out of the report and the EIS – projects a similar number of trips across the bridge. *See* Wilbur Smith Associates, *Knik Arm Bridge Preliminary Traffic and Toll Revenue Study* tbl. 2 (Nov. 2005) (estimating 42,000 daily trips across a Knik Arm bridge in 2039). More importantly, the report projects *only 6,100 trips* across Knik Arm in 2039 if KABATA does not build the bridge. *Id.* at tbl. 3. In other words, the demand estimates for the proposed Knik Arm bridge are inapplicable to the non-bridge alternatives because they project demand many times higher than the non-bridge alternatives would have to accommodate. The FHWA ignores this problem, however, and applies the higher bridge demand to eliminate three of the four non-

bridge alternatives. FHWA, *Scoping Summary Report* at § 6.8.1; FHWA, *EIS* at tbl. 2-7, § 2.5.2. The FHWA has thus failed to articulate a "rational connection between the facts found and the conclusions made" in violation of NEPA. *E.g., Midwater Trawlers Co-op v. U.S. Dep't of Commerce*, 282 F.3d 710, 716 (9th Cir. 2002).

Fourth, the EIS provides no basis for Criterion P&N-9. Criterion P&N-9 requires the alternatives to "improve safety and provide transportation system redundancy for alternative travel routing and access for emergency response and evacuation." FHWA, *EIS* at 2-3. The footnote to this criterion provides – without support – that "[i]n the event of a natural disaster or accident, overland connections within and access to the region's airports, ports, hospitals, and other emergency services would be severely limited." *Id.* As the comments on the draft EIS by ACE *et al.* indicate, "the FHWA fails to demonstrate any shortcomings in the present or future capacity of the regional transportation system to handle '[s]afety' or 'emergency response and evacuation' needs now or in the future, choosing instead to speculate about hypothetical shortcomings in the capacity of the system to handle hypothetical future disasters." The FHWA has not corrected this failure in the EIS. Consequently, Criterion P&N-9 is not a reasonable basis to eliminate non-bridge alternatives, as the FHWA does in the EIS. *Id.* at tbl. 2-7; *Westlands*, 376 F.3d at 866 ("Courts evaluate a Statement of Purpose and Need under a reasonableness standard.") (citing *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1066-67 (9th Cir.1998)); *Midwater Trawlers Co-op*, 282 F.3d at 716.

These examples are not meant to identify all of the problems with the purpose and need statement and range of alternatives in the EIS. Instead, they typify the problems with the EIS. It is axiomatic that NEPA requires the FHWA to demonstrate a "rational connection between the facts found and the conclusions made." *E.g., Midwater Trawlers Co-op*, 282 F.3d at 716. Federal courts will scrutinize purpose and need statements to determine whether they articulate legitimate needs and provide for a reasonable range of alternatives. *E.g., Citizens Against Burlington*, 938 F.2d at 196; *City of Carmel-by-the-Sea*, 123 F.3d at 1155; *Westlands*, 376 F.3d at 866. Federal courts will also scrutinize the alternatives screening process and the resulting range of alternatives. *E.g., California v. Block*, 690 F.2d 753, 766 (9th Cir. 1982); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813-15 (9th Cir. 1999); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519-20 (9th Cir. 1992); *Methow Valley Citizens Council v. Reg'l Forester*, 833 F.2d 810, 815-16 (9th Cir. 1987), *rev'd on other grounds*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). If a purpose and need statement, alternatives screening process, or range of alternatives fails to provide a rational connection between the facts found and conclusions made, or otherwise eliminates or omits reasonable alternatives, the EIS violates NEPA. *E.g., Idaho Conservation League*, 956 F.2d at 1519-20. This EIS has precisely these problems, and we thus urge the FHWA to select the No Action Alternative.

We further urge the FHWA to select the No Action Alternative because, as a policy matter as well as a NEPA matter, there is no need for the bridge. The EIS incorrectly depicts the boundary at which people would save travel time to Anchorage – the metric the FHWA adopts to measure the benefits of the bridge – so as to suggest that most of Wasilla would save time traveling to Anchorage by using the bridge. *Compare* FHWA, *EIS* at 3-1, fig. 3.1, *with* KABATA, *Land Use*

and Transportation Forecasting Technical Report 6 (Feb. 2006).[9] This contradicts the information in the *Land Use and Transportation Forecasting Technical Report*, which indicates the bridge would reduce travel time to Anchorage only for people south and west of Wasilla. KABATA, *Land Use and Transportation Forecasting Technical Report* at 6; FHWA, *EIS* at app. K (comment number 295-23). Since only 20% of people in the Upper Cook Inlet region would live in this area in 2030 if the bridge is not built, the bridge would not reduce travel time to Anchorage for 80% of the people in the region. *See* FHWA, *EIS* at tbl. 4-1 (projecting that 549,200 people will live in the Upper Cook Inlet region in 2030, with 111,400 of them in areas that would experience reduced travel times to Anchorage – the Southwest Mat-Su Borough, West Mat-Su Borough, Houston, and outside the "modeled Mat-Su area").[10] Additionally, the bridge would neither alleviate traffic nor spur economic development in the region; according to the EIS, average travel time ("VHT") and distance ("VMT") would increase if KABATA builds the bridge, FHWA, *EIS* at tbl. 4-4, and total regional employment would be the same with or without the bridge, *id.* at tbl. 4-24. In short, the Knik Arm bridge is a costly and ineffectual solution to a non-existent problem.

Faced with these facts, the FHWA resorts to "state and locally adopted economic, port, land use, transportation, and comprehensive plans" and AS 19.75 to support the claimed need for the bridge. *E.g., id.* at app. K (comment 295-21). In its comments on the draft EIS, the Municipality of Anchorage aptly questions this strategy:

> The [Municipality] believes the citations [to state and local plans that purportedly support a Knik Arm bridge] are selective and do not always convey the full context of the referenced works. . . . [S]everal different plans for the Port of Anchorage are cited, but not in their chronological sequence nor in recognition of evolving knowledge and conditions over time. . . . Several other references on page 1-11 cite actions indicating support for a Knik Arm crossing study. It could be noted that these were largely responsive to KABATA prompting. [The Municipality] believes the Draft EIS language is biased toward favorable findings, and not altogether objective. We believe that is inappropriate, especially so for large-scale public investment decisions of this magnitude.

Municipality of Anchorage, *Comments on the Knik Arm Crossing Draft EIS* 19-20 (Nov. 17, 2006). We agree that the cited plans and AS 19.75 are not a credible basis for the Knik Arm bridge. We thus urge the FHWA to select the No Action Alternative.

II. The FHWA Has Not Adequately Assessed or Disclosed All Reasonably Foreseeable Direct, Indirect, and Cumulative Impacts.

[9] We also note that the FHWA erroneously depicts the recommended alternative as connecting to Ingra-Gambell, FHWA, *EIS* at fig. 2.39, despite the fact that neither KABATA nor the FHWA commit to providing this connection.
[10] This population estimate is based on a population estimate for the Mat-Su Borough of 187,500. FHWA, *EIS* at tbl. 4-1. The EIS does not discuss, reference, or otherwise address the lower estimate of 137,682 provided by the Alaska Department of Labor and Workforce Development in October 2007 – two months before the FHWA issued the EIS. Eddie Hunsinger, Alaska Dep't of Labor, *Population Projections, 2007 to 2030* 10 (Oct. 2007). This is arbitrary and violates NEPA. *E.g.,* 40 C.F.R. § 1502.24.

Like the draft EIS, the EIS fails to fully and fairly disclose the significant environmental impacts of the proposed bridge. The FHWA ignores many of the comments submitted by ACE *et al.* regarding the inadequate disclosure of impacts in the draft EIS. Even the resulting disclosure in the EIS, however, shows that a bridge would significantly degrade water quality and marine and terrestrial fish and wildlife habitat, leading to long-term and widespread negative impacts to fish populations, wildlife populations, and the environment generally. *E.g., id* at 4-185, 4-198 to 4-199, 4-201, 4-215, 4-227, 4-230, 4-243, 4-244, 4-248, 4-255, 4-259 to 4-260, 4-301, 4-309, 4-310, 4-312, 4-315 to 4-316, 4-320, and 4-322. Among the remaining questions, however, is how the bridge would reduce air pollution, as the FHWA claims on page 4-129 of the EIS, when table 4-4 of the EIS indicates the bridge would increase average travel time and distance. Moreover, the FHWA indicates that impacts to terrestrial mammal populations are "not known" *id.* at 4-261, while in another section it indicates the impacts could be "substantial," *id.* at 4-322, and in yet a third section it indicates the bridge "would not contribute to long-term adverse cumulative effects on the regional diversity of terrestrial habitats or wildlife populations," *id.* at 4-312. The EIS contains incomplete, unsupported, and contradictory discussions of environmental impacts that leave decision makers and the public uninformed and confused about the impacts of the bridge and demonstrate that the EIS does not adequately disclose the reasonably foreseeable environmental impacts of this project, in violation of NEPA. *E.g.,* 40 C.F.R. § 1502.1.

We further question the value and basis of the statement in the EIS that the bridge "would incur no damage and be immediately operational following the 100-year return period earthquake, and sustain significant but repairable damage following a major 1,000-year earthquake." FHWA, *EIS* at 4-139. The FHWA appears to draw this conclusion based in part on "an assumed peak ground acceleration of 0.36g." *Id.* Whatever the basis for this assumption, it falls below the levels (up to 0.8g) recorded in Kobe, Japan during the magnitude 6.8 earthquake that struck in 1995. It also falls below the 0.725g level the EIS states could be encountered in a 1,000-year earthquake. *Id.* Additionally, it presumably falls below the design levels for a 2,475-year earthquake that the *Seismic Studies Technical Report*, referenced in the EIS, urges KABATA to prepare the bridge to withstand: "Design measures should be taken to ensure ductile behavior in connections and major structural elements to prevent collapse under Maximum Considered Earthquake loads and efforts should be made to dissipate energy effectively whenever possible." KABATA, *Seismic Studies Technical Report* 15 (Feb. 2006). Since the bridge would be placed in a zone of high seismicity "capable of producing giant earthquakes of Magnitude 9^{+}" of several minutes duration (which is longer than those contemplated by the American Association of State Highway and Transportation Officials on which the FHWA partly bases its ground acceleration assumption), *id.* at 9-11, the discussion of seismic impacts to the bridge does not provide the full and fair discussion of environmental impacts that NEPA requires. *E.g.,* 40 C.F.R. § 1502.1.

We support the comments on the draft EIS by various federal agencies that ask the FHWA to add to the EIS the discussions of impacts found in various reports, appendices, and other documents referenced in the EIS. These agencies include the U.S Army Corps of Engineers ("Corps"), the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the U.S. Marine Mammal Commission, and the National Oceanic and Atmospheric Administration ("NOAA"). *Id.* at app. K. They conclude that the EIS does not adequately discuss, among other things, the impacts of the bridge on wildlife habitat and populations, and the means by which direct,

indirect, and cumulative impacts on these and other resources would occur. *Id.* The FHWA largely ignores their critiques, *id.*, and the EIS consequently leaves decision makers and the public without a reasonably thorough discussion of the impacts of the bridge, in violation of NEPA. *E.g., Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 508 F.3d 508, 526-27 (9th Cir. 2007); *Pac. Coast Fed'n of Fishermen's Ass'ns. v. Nat'l Marine Fisheries Serv.*, 482 F.Supp.2d 1248, 1255 (W.D. Wash. 2007).

We support the comments on the EIS submitted separately by the Government Hill Community Council concerning the lack of compliance on the part of the FHWA with the requirements of section 106 of the National Historic Preservation Act, 16 U.S.C. § 470s, and section 4(f) of the Department of Transportation Act of 1966, as amended, 23 U.S.C. § 138. Among the issues these comments identify, the Council has not been allowed to fulfill its role as consulting party in section 106 and section 4(f) negotiations and consultations. Furthermore, the Council identifies critical failures of the EIS, including the failure of the Erickson Variant to satisfy the purpose and need criteria in the EIS, and the failure of KABATA and FHWA to adequately evaluate a reasonable range of alternatives.

We support the comments on the EIS by Defenders of Wildlife *et al.*, the Marine Mammal Commission, and others that identify various shortcomings in the discussion of impacts to Cook Inlet beluga whales. Among the problems identified in these comments, the discussion of impacts to the beluga whale understates the challenges the whale faces and minimizes or ignores information indicating that the bridge may drive the whale population to extinction. *E.g.,* NOAA, *Comments on the Knik Arm Crossing Draft EIS* 2 (Nov. 17, 2006). The EIS, as a result, violates NEPA by depriving decision makers and the public of a reasonably thorough discussion of the impacts of the bridge. *E.g., Ctr. for Biological Diversity*, 508 F.3d at 526-27.

Lastly, we understand that the Corps is developing a hydrologic model of Knik Arm to address, among other things, the impacts of the bridge on siltation near the Port of Anchorage. This modeling should provide important information on the bridge and its effects on the Knik Arm ecosystem and related structures. Though we understand the FHWA believes its modeling provides an accurate assessment of the impacts of the proposed bridge, *e.g.,* FHWA, *EIS* at app. K (comment 199-7), we urge the FHWA to withhold a Record of Decision on the proposed Knik Arm bridge until the Corps issues the results of this modeling.

III. The Range of Alternatives in the EIS is Too Narrow for the Corps to Use as a Basis for Permitting the Bridge Under Section 404 of the Clean Water Act.

The U.S. Army Corps of Engineers has repeatedly stated to the FHWA that the range of alternatives considered by the FHWA is too narrow for the Corps to use as a basis to decide whether to permit the bridge under section 404 of the Clean Water Act. "Under the [Clean Water Act section 404] Guidelines a permit can only be issued for the least environmentally damaging practicable alternative, so long as that alternative does not have other significant adverse environmental consequences. At this point, the [preliminary draft EIS] contains insufficient information for us to determine Guidelines compliance and is inadequate with respect to our permit action." Corps, *Comments on the Preliminary Draft EIS* 1 (Apr. 28, 2006). *See also* 40 C.F.R. § 230.10(a). The FHWA has not worked with the Corps – a cooperating

agency on the EIS – to resolve this problem. As a result, the Corps cannot rely on the EIS to permit the bridge under section 404 of the Clean Water Act. *See Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, 409 (9th Cir. 1989) ("Obviously, an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable. This court in *Hintz* quite properly suggested that the applicant's purpose must be 'legitimate.'").

IV. The FHWA Violated the FAHA by Approving the Addition of the Knik Arm Bridge to the Anchorage Area Transportation Improvement Program.

The FHWA unlawfully approved the addition of the Knik Arm bridge to the transportation plans of the Anchorage Metropolitan Area Transportation Solutions Policy Committee ("AMATS"). The Federal Aid Highway Act requires metropolitan planning organizations ("MPO") like AMATS to prepare long- and short-range transportation plans. 23 U.S.C. § 134(c)(1). When an MPO proposes to include a "major metropolitan transportation investment" in its plans, it must either prepare a "major investment study" ("MIS") or an EIS to consider the effects of and alternatives to the proposed project. 23 C.F.R. § 450.318(a), (i) (2006). Furthermore, when an MPO adopts or revises its transportation plans, the FHWA must certify that the MPO did so in compliance with the FAHA implementing regulations, including the MIS/EIS requirement. *Id.* at § 450.330(a). AMATS has never undertaken an MIS, nor did it have a final EIS when it added the Knik Arm bridge to its transportation plans on June 27, 2007. Nonetheless, the FHWA certified that AMATS revised these plans in compliance with the FAHA regulations. Letter from David C. Miller et al., FHWA, to Gordon Keith, AMATS, *AMATS TIP Air Quality Conformity Determination* 1 (June 29, 2007). This approval violates the FAHA and renders the addition of the Knik Arm bridge to the AMATS plans ineffective. 23 C.F.R. § 450.330(a). As a result, the bridge is not lawfully included in the Alaska statewide transportation plans and is thus ineligible for federal funding and should not be considered by the FHWA in the EIS. *E.g.,* 23 U.S.C. § 134(j)(5).

V. Conclusion

As set out above, the EIS violates NEPA. Furthermore, this costly and environmentally harmful project would reduce travel time for only 20% of the residents of the Upper Cook Inlet region, would increase average travel time and distance in the region, and would not spur economic growth. Lastly, the project is ineligible for funding under the FAHA. For all of the foregoing reasons, we urge the FHWA to select the No Action Alternative.

Thank you for considering these comments. Please contact me if you need more information.

Yours truly,

/s/

Justin Massey
Staff Attorney