



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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WATER DIVISION

July 6, 2020

Ms. Jason Berkner
Project Manager
U.S. Army Corps of Engineers
Alaska District
Regulatory Division
CEPOA-RD
Post Office Box 6898
JBER, Alaska 99506-0898

Dear Mr. Berkner:

The U.S. Environmental Protection Agency has reviewed the Public Notice POA-2020-00274 Frederick Sound, dated June 4, 2020, for compliance with the restrictions on discharge contained in the Clean Water Act Section 404(b)(1) Guidelines. The PN describes the proposal by the Alaska Department of Transportation and Public Facilities (ADOT&PF) to provide year-round surface transportation access on Kupreanof Island between the community of Kake and a new boat launch on the eastern shore of Kupreanof Island for public access to lands along the route and to create an additional access point to navigable waters on Frederick Sound. The applicant proposes to discharge 101,000 cubic yards of gravel fill material into 14.55 acres of wetlands and other waters of the U.S. to construct a roadway embankments, stream crossings, and a boat launch. The Kake Access Project would consist of constructing 5.39 miles of new road, incorporating approximately 42 miles of existing forest roads, and construction of a new boat launch. The proposed project is located within the Tongass National Forest.

The Guidelines at 40 CFR § 230 are the substantive environmental criteria for the evaluation of proposed discharges of dredged or fill material into waters of the United States, including wetlands. Compliance with the Guidelines must be demonstrated before proposed discharges of dredged or fill material may be permitted.

Based on the information available in the PN and supporting documents, it is not clear that the proposed discharges would comply with the CWA 404(b)(1) Guidelines. Specifically, it is not clear that the proposed discharge represents the least environmentally damaging practicable alternative (LEDPA) to achieve the project purpose or that all appropriate and practicable steps will be taken to avoid, minimize, and compensate for remaining impacts to aquatic resources, consistent with 40 CFR § 230.10(a) and (d) of the Guidelines. The EPA's detailed comments are contained in the enclosure.

The EPA appreciates the opportunity to provide comments on the proposed project. We look forward to working with the District as necessary to address the issues raised in this letter. Should you have any questions or require further information, please do not hesitate to contact me at (206) 553-0285 or by

email at jensen.amy@epa.gov, or you may contact Betsy McCracken at (907) 271-1206 or by email at mccracken.betsy@epa.gov.

Sincerely,

Amy Jensen
Regional Wetland Coordinator
Wetlands and Oceans Section

Enclosure: EPA's Comments on Public Notice POA-2020-00274 Related to Clean Water Act
Section 404(b)(1) Guidelines

cc: Mr. Douglass Cooper, U.S. Fish and Wildlife Service (Douglass_Cooper@fws.gov)
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Enclosure to EPA's Comment Letter on Public Notice POA-2020-00274

The following are detailed comments submitted by the U.S. Environmental Protection Agency in response to the U.S. Army Corps of Engineers Public Notice POA-2020-00274, applied for by the Alaska Department of Transportation and Public Facilities (ADOT&PF).

Comments Related to Clean Water Act Section 404(b)(1) Guidelines

As referenced in the cover letter, the Guidelines at 40 CFR § 230 are the substantive environmental criteria for the evaluation of proposed discharges of dredged or fill material into waters of the United States, including wetlands. Compliance with the Guidelines must be demonstrated before proposed discharges of dredged or fill material may be permitted. The Guidelines specify that a proposed discharge is considered noncompliant if the application contains insufficient information to determine compliance.¹ The Guidelines prohibit discharges that do not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem.² This requirement includes appropriate and practicable compensatory mitigation to offset unavoidable environmental impacts associated with discharges permitted under CWA § 404.

Based on the information available in the Kake Access Road (Project) PN and the application, it is not clear that the proposed discharges would comply with the CWA 404(b)(1) Guidelines. Sections A-C provide our comments regarding information and evaluation relevant to each requirement and recommendations regarding how the Corps' record for this project can be improved to demonstrate compliance with the Guidelines.³

A. Restrictions on Discharge: LEDPA⁴

The Guidelines at 40 CFR § 230.10 identify several specific restrictions on discharges. The first of these, at 40 CFR § 230.10(a), specifies that, "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes.⁵ Where the activity associated with a discharge is not "water dependent," practicable alternatives that do not involve a discharge to wetlands and other special aquatic sites "...are presumed to be available, unless clearly demonstrated otherwise."⁶

Once practicable alternatives are determined for a proposed discharge, only the Least Environmentally Damaging Practicable Alternative (LEDPA) may be authorized. Once the LEDPA has been identified, that is the version of the project which is evaluated against the other restrictions on discharge found in subsections § 230.10(b), (c), and (d).

¹ 40 CFR § 230.12(a)(3)(iv).

² 40 C.F.R. § 230.10(d) and § 230.12(a)(3)(iii).

³ 40 C.F.R. § 230.6(b); 40 C.F.R. § 230.11; and 40 C.F.R. § 230.12(b).

⁴ 40 C.F.R. § 230.10(a).

⁵ 40 CFR § 230.10(a)(2)

⁶ 40 C.F.R. § 230.10(a)(3).

ADOT&PF's application states that there is "an abundance of wetlands in the analysis area". The proposed project proposes fill in freshwater forested and shrub, emergent, riverine and; estuarine and marine deepwater waters of the U.S. (WOTUS). It is required to identify the LEDPA to avoid and minimize impacts to these WOTUS to the maximum extent practicable.

ADOT&PF is proposing a bridge across 12-Mile River. We agree that a bridge is the LEDPA. However, as depicted in Enclosure D of the Public Notice (PN), the proposed bridge specifications do not appear to be the LEDPA; a larger bridge could be constructed that would avoid the discharge of fill and rip-rap into the channel of 12-Mile River. In order to demonstrate compliance with 230.10(a), the applicant must demonstrate that it is not practicable to construct a bridge greater than the proposed 128-foot bridge, which would avoid the discharge of fill and rip rap into the channel of 12-Mile River. As currently described in the PN, the applicant's current plan does not demonstrate that it is necessary to discharge fill into 12 -Mile River.

Furthermore, the PN and the application do not address whether bridges were considered at any of the 57 proposed culvert locations. To address 230.10(a), the applicant must demonstrate that it is not practicable to avoid discharge into WOTUS at each of the 57 proposed culvert locations. If culverts in the existing road are proposed for replacement, the PN should clearly identify which will be new culverts and which are replacement culverts. It is also not clear if any of the proposed discharge of fill at the individual culverts will allow for stream function and passage of fish and aquatic life. The EPA understands that such fill could be considered the LEDPA but there is currently insufficient details of the streams or the crossing structures in the PN and Project application to make that determination.

ADOT&PF is proposing a boat launch in marine waters of Frederick Sound. The purpose of the boat launch has not been identified. Without information on the purpose, we cannot evaluate whether there are reasonable alternatives or whether the proposed alternative is the LEDPA.

B. Restrictions on Discharge: Minimizing Impacts and the Mitigation Sequence

The identification of practicable alternatives and the LEDPA pursuant to 40 CFR § 230.10(a) is fundamental to reducing project impacts. Once the LEDPA has been identified, the Guidelines⁷ instruct us to "Identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge, based upon the specialized methods of minimization of impacts in Subpart H."

The requirement to avoid, minimize, and offset the LEDPA's aquatic resource impacts derives from 40 CFR § 230.10(d) which states: "...no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps."

According to the plan included in the PN, the applicant proposes to place fill in half the channel of 12-Mile River disrupting the natural stream morphology, including flood flow and debris conveyance by necking down the channel. The natural hydrograph creates and maintains habitat

⁷ 40 CFR § 230.5(j)

and allows passage of fish and aquatic life, and constricting the channel alters the ecological function of the river. The applicant has not demonstrated that all steps to minimize potential impacts from the proposed Project have been taken.

The Guidelines prohibit discharges that do not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem.⁸ This requirement includes appropriate and practicable compensatory mitigation to offset unavoidable environmental impacts associated with discharges permitted under CWA Section 404. In the Section 404 regulatory program, compensatory mitigation is defined as the restoration, establishment, enhancement and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved⁹.

The Guidelines identify that “Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular DA permit.”¹⁰ They also identify that: “the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.”¹¹

Pursuant to 33 CFR § 325.1(d)(7), applications for discharges of dredged or fill material into waters of the United States must include a statement describing how impacts to waters of the United States are to be avoided and minimized, as well as either a statement describing how impacts are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts.

ADOT&PF’s CWA 404 PN Enclosure A dated June 4, 2020 contains the required mitigation statement. The mitigation statement describes how impacts to waters of the United States are to be avoided and minimized. However, the Project’s mitigation statement in the PN does not describe how remaining impacts would be compensated for, or adequately explain why compensation should not be required.

Pursuant to 40 CFR § 230.94(b)(1), the PN must contain the applicant’s mitigation statement, including the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program. The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts and must provide enough information to enable the public to provide meaningful comment on the proposed mitigation.

⁸ 40 C.F.R. § 230.10(d) and § 230.12(a)(3)(iii).

⁹ 40 CFR § 230.92

¹⁰ 40 CFR § 230.93(a)(1)

¹¹ 40 CFR § 230.93(f)(1)