

EO - 1700



Fw: Port MacKenzie Revised PA Comments

David Navecky to: judith.bittner, doug.gasek, cvaughn, ngabriel

04/06/2011 08:45 AM

From: David Navecky/STB

To: judith.bittner@alaska.gov, doug.gasek@alaska.gov, cvaughn@achp.gov, ngabriel@achp.gov

FYI - Comments from the Alaska Railroad.

Dave

—— Forwarded by David Navecky/STB on 04/06/2011 08:44 AM ——

From: <johnson.jay@DORSEY.com>

To: <David.Navecky@stb.dot.gov>

Cc: <LindamoodB@akrr.com>, <egray@matsugov.us>, <Brad.Sworts@matsugov.us>, <fseagerboss@matsugov.us>, <kusske.floyd.kathryn@DORSEY.com>, <ASummerville@icfi.com>, <RStarzak@icfi.com>

Date: 04/05/2011 03:35 PM

Subject: Port MacKenzie Revised PA Comments

Dave,

I'm attaching ARRC's comments on the revised Programmatic Agreement that you circulated on March 31. We would be happy to discuss them further with you as appropriate.

Regards,

Jay

<<Revised PA Comments.pdf>>

Jay C. Johnson

Of Counsel

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Revised PA Comments.pdf



EX-

April 5, 2011
David Navecky
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

PROJECTS, ENGINEERING, and GRANTS
TEL 907.265.3095

RE: STB Finance Docket No. 35095, Alaska Railroad Corporation – Petition for Exemption To Construct And Operate A Rail Line Extension To Port MacKenzie, Alaska

Dear Mr. Navecky:

I am writing this letter to provide the Alaska Railroad Corporation (ARRC)'s comments on the revised Programmatic Agreement (PA) circulated by email on March 31, 2011.

Overall, ARRC is pleased with the changes to the PA, and believes they are generally consistent with the discussion that took place during the March 23 conference call among the parties. In ARRC's view, the process of preparing this document has been efficient and responsive to the parties' concerns.

ARRC does have one significant concern with new language in the revised PA. In both section II.D and section IV.A, new language in the PA references the permits that ARRC will obtain from the U.S. Army Corps of Engineers, Alaska District (USACE). These are the only two mentions of USACE in the operative provisions of the PA.

USACE is not a signatory to the PA. Thus, before USACE can issue a Clean Water Act permit to ARRC, it must fulfill its obligations under Section 106 of the National Historic Preservation Act (NHPA). The new "Whereas" clause on page 3 of the revised PA explains that USACE "may comply with Section 106 by agreeing in writing to the terms of this [PA] . . ." But until USACE determines whether it will sign the PA, or take some other approach to compliance with Section 106, ARRC believes that it should not be included in the operative provisions of the PA. More specifically, ARRC does not think it is appropriate for any of the PA's operative provisions to be contingent on the permit that ARRC is requesting from USACE.

The simplest way to account for this issue, in ARRC's view, is to remove section II.D from the revised PA, and delete the new language referencing USACE from section IV.A. In the event that the Board deems it necessary to include some provision allowing for review of the final Area of Potential Impacts (APE), ARRC proposes the following language for section II.D:

~~Within Not later than 60 days after STB issues a license and the USACE issues a permit under Section 404 of the Clean Water Act (33 U.S.C. § 1344) for the Undertaking, the Working Group developed in Stipulation III, and HTK, WDMA, and other Concurring Parties interested in the Iditarod~~

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Dog Sledding Historic District ~~who participated in the workshop in Stipulation V, shall review the STB-licensed and USACE-permitted alternative and~~ ARRC's final construction plans, apply the APE definition provided in subsection II.C of this Agreement, and delineate the proposed final APE for the Undertaking. ARRC shall submit the proposed final APE for the Undertaking to the STB and SHPO who shall have a 30-day review and comment period. ARRC shall incorporate comments as appropriate, and submit the final APE to all Signatories, Invited Signatories, and interested Concurring Parties for their reference and records. If the licensing or permitting processes result in any changes to the final APE, ARRC shall submit those changes to all Signatories, Invited Signatories, and interested Concurring Parties. The location of sensitive archaeological sites shall not be shown on a map of the final APE because of its broad distribution.

These proposed changes will prevent any delay in the delineation of the final APE while USACE considers ARRC's permit application. Indeed, under this proposed language, ARRC can begin delineating the final APE even before the Board acts. Last month, ARRC submitted a permit application package with its final construction plans to USACE. The parties can develop a final APE based on the preferred alternative in the Final Environmental Impact Statement and ARRC's final construction plans. Any changes to the final APE that are licensed by the Board or permitted by USACE—and ARRC does not expect that such changes would be significant—would be circulated to the parties. Finally, it is worth noting that the segments of the project that ARRC plans to begin constructing this summer do not affect the Iditarod Dog Sledding Historic District.

The lengthy vetting process provided in the section II.D is not required by any law or regulation. In fact, the Programmatic Agreement for the recently-approved Northern Rail Extension project simply required that "[a]ny future refinements to an APE in conjunction with this Undertaking shall be made in consultation with the SHPO, consistent with 36 CFR 800.4." Adjusting the language in section II.D as suggested above is completely consistent with applicable regulations, will not delay the Board's issuance of the PA to the parties for signature, and will allow ARRC to proceed with its plans to begin construction during the upcoming summer season without adversely affecting the protections for potential historic properties under the PA.

For all the reasons discussed above, ARRC requests that the language in section II.D of the revised PA be changed, and that the new reference to USACE's permitting process in section IV.A be stricken.

ARRC has discussed this issue with the Matanuska-Susitna Borough, and the Borough fully supports the changes requested in this letter, which will enable the project to proceed on schedule.

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Please contact me if you would like to discuss these changes in more detail.

Sincerely,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

Brian Lindamood, PE
Project Manager

cc: Elizabeth Gray
Brad Sworts
Fran Seager-Boss