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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

NORTHERN ALASKA
ENVIRONMENTAL CENTER, *et al.*,
Plaintiffs,

v.

DEBRA HAALAND, in her official
capacity as Secretary of the Interior, *et
al.*,

Defendants,

and

AMBLER METALS, LLC, *et al.*,
Intervenor-Defendants.

Case No. 3:20-cv-00187-SLG

PLAINTIFFS' OPENING BRIEF FOR SUMMARY JUDGMENT
(Civil Rule 56(a), Local Civil Rule 16.3)

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LIST OF SHORT NAMES AND ACRONYMS

404 Permit	Clean Water Act Section 404 Permit
AIDEA	Alaska Industrial Development & Export Authority
Ambler Road	Ambler Mining District Industrial Access Road Project
ANILCA	Alaska National Interest Lands Conservation Act
APA	Administrative Procedure Act
ARD	Acid Rock Drainage
BLM	Bureau of Land Management
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
DEIS	Draft Environmental Impact Statement
EEA	Environmental and Economic Analysis
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FEIS	Final Environmental Impact Statement
GHG	Greenhouse Gas
Guidelines	Clean Water Act Section 404(b)(1) Guidelines
JROD	Joint Record of Decision
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
NPS	National Park Service
POD	Plan of Development
ROD	Record of Decision
TSU	Transportation System Unit
UUD	Unnecessary or Undue Degradation
WOUS	Waters of the United States

INTRODUCTION

The southern Brooks Range, including Gates of the Arctic National Park and Preserve (Gates), is one of the wildest expanses of land in the United States and a thriving area for fish and wildlife, subsistence lifestyles, and exceptional recreation opportunities. The 211-mile Ambler Mining District Industrial Access Road (Ambler Road) would slice through this region to facilitate development of hardrock mines, harming thousands of acres of wetlands, miles of streams, and significantly and irreversibly impacting the region's lands, waters, animals, and people.

Despite the severe lack of information about the project, the Bureau of Land Management (BLM), U.S. Army Corps of Engineers (Corps), and National Park Service (NPS) approved the Ambler Road, in violation of multiple statutes. First, BLM and the Corps violated the National Environmental Policy Act (NEPA) by failing to adequately assess the project's direct, indirect, and cumulative impacts. Second, the Corps violated Clean Water Act (CWA) Section 404 by approving a permit for the filling of wetlands (404 permit) without adequately analyzing the impacts and mitigation. Third, BLM, the Corps, and NPS (Defendants) violated the Alaska National Interest Lands Conservation Act (ANILCA) by failing to comply with its mandatory process outlined in Title XI, and NPS violated ANILCA by failing to incorporate terms and conditions into its right-of-way to protect Gates. Finally, BLM violated the Federal Land Policy and Management Act (FLPMA) by failing to obtain complete project plans or adequately address impacts.

Because of these violations, this Court should vacate the joint record of decision (JROD), final environmental impact statement (FEIS), 404 permit, rights-of-way, and any related documents.

FACTUAL BACKGROUND

The southern Brooks Range and Gates are iconic areas of Alaskan wilderness.¹ The region and its rivers provide habitat for numerous fish and wildlife species, including salmon, sheefish, caribou, birds, and moose.² The region is home to the Western Arctic Caribou Herd, the largest herd in Alaska.³ Caribou are an important component of the ecosystem of Gates, and for subsistence users across Western Alaska.⁴ Fisheries are highly important to the area's ecosystem and communities, with salmon and other species using both large rivers and small tributaries.⁵ The area is home to rural communities and also offers exceptional wilderness recreation experiences.⁶

Mining companies have explored the Ambler Mining District for decades.⁷ There are known mineral deposits in the region, as well as mining claims along the Ambler

¹ NPS_0009792.

² NPS_0009792; NPS_0009795; NPS_0009816.

³ NPS_0009827.

⁴ *Id.*

⁵ NPS_0009816; BLM_0015506.

⁶ NPS_0009835; BLM_0015565.

⁷ BLM_0015406.

Road corridor.⁸ Trilogy Metals has been conducting exploration and intends to develop a mine in the Ambler Mining District that it would access via the Ambler Road.⁹

The Alaska Industrial Development and Export Authority (AIDEA), a State of Alaska-owned corporation, is the project applicant for the Ambler Road.¹⁰ In 2015, pursuant to Title XI of ANILCA, AIDEA submitted a consolidated application to Defendants for the Ambler Road.¹¹ The road would traverse the Brooks Range from the Dalton Highway west approximately 211 miles.¹² It would cross lands managed and owned by various entities, including approximately 20–25 miles of BLM-managed lands and 26 miles of NPS-managed land in Gates.¹³ AIDEA requested authorizations to construct and operate an all-season, industrial-access road for exploration and development of the Ambler Mining District.¹⁴

The Defendants initially deemed AIDEA's application incomplete under their respective statutory requirements.¹⁵ AIDEA submitted a Revised Application in 2016.¹⁶ The Revised Application still lacked detailed, site-specific information about the design or location of the Ambler Road, or baseline information about hydrology, wetlands, air

⁸ BLM_0016687.

⁹ ACE_0014974–80.

¹⁰ BLM_0015407.

¹¹ NPS_0050256–57.

¹² NPS_0050323.

¹³ NPS_0050264; NPS_0050323–25.

¹⁴ BLM_0015407–08.

¹⁵ NPS_0000022–25; NPS_0000028–35.

¹⁶ NPS_0000155–78.

quality, permafrost, and other resources because AIDEA had done little design work or field studies.¹⁷ Despite this, Defendants moved forward with their environmental review processes. In February 2017, BLM began the NEPA process for the Ambler Road.¹⁸ NPS also began developing an Environmental and Economic Analysis (EEA) for the portion of the road crossing Gates, as required by ANILCA.¹⁹

The road would permanently fill over 2,000 acres of wetlands and cross over 2,900 waterbodies.²⁰ It would require 29 bridges, with 11 large bridges crossing major rivers, including the Kobuk Wild and Scenic River.²¹ The project would discharge between 8.4–11 million cubic yards of fill into wetlands permanently,²² and over 47 miles (250,000 feet) of stream channels would be permanently impacted.²³

AIDEA proposed to construct the road in three phases over several years.²⁴ Phase I would be a seasonal gravel “pioneer road” that would be upgraded in Phase II to a single-lane, gravel-surface road with year-round access.²⁵ Phase III would expand the single-lane gravel road into a two-lane gravel road.²⁶ AIDEA’s application sought to

¹⁷ See, e.g., BLM_0104898–902.

¹⁸ BLM_000501–03.

¹⁹ BLM_0000503; ANILCA § 201(4)(d), Pub. L. No. 96-487, 94 Stat. 2371 (Dec. 2, 1980).

²⁰ ACE_0010060; NPS_0002193.

²¹ ACE_0010060; BLM_0007049.

²² ACE_0010061 (seeking to discharge 11 million cubic yards); ACE_0022272 (authorizing 8.4 million cubic yards).

²³ ACE_0022272.

²⁴ NPS_0000258–61.

²⁵ NPS_0000258–60.

²⁶ NPS_0000259.

construct all three phases, identifying Phase III as the completed project.²⁷ The road would require over 40 gravel mines (also referred to as material sites) — some of which may contain naturally occurring asbestos — to provide the material for the road, as well as airstrips, maintenance stations, and camps.²⁸

In August 2019, BLM released the draft environmental impact statement (DEIS) for the project,²⁹ the Corps publicly noticed the 404 permit,³⁰ and NPS released its draft EEA.³¹ BLM's draft EIS considered a no-action alternative and three action alternatives: Alternatives A (AIDEA's proposal), B (nearly identical to A, but with a southern route through Gates), and C (road routed south around Gates).³² The action alternatives all considered AIDEA's phased approach, with construction to Phase III.³³

In comments on the DEIS, numerous organizations and individuals, including Plaintiffs (Groups), criticized the agencies' failure to adequately analyze the full range of impacts from the project.³⁴ Groups explained that AIDEA's application lacked critical information, including project design and location details, and that the DEIS failed to adequately analyze AIDEA's phased construction approach.³⁵ Groups also criticized the

²⁷ NPS_0000261.

²⁸ BLM_0007018; BLM_0007023; BLM_0007230.

²⁹ BLM_0006981.

³⁰ ACE_0010059.

³¹ NPS_0003876.

³² BLM_0007017–18.

³³ BLM_0007017–19.

³⁴ *See, e.g.*, BLM_0112415–616; BLM_0015336–53.

³⁵ BLM_0112419–21.

EIS's failure to obtain or consider baseline information necessary to analyze the direct, indirect, and cumulative impacts.³⁶ Multiple commenters, including the Environmental Protection Agency (EPA), noted there was also insufficient information for the Corps to do its analysis under the CWA.³⁷

In March 2020, BLM issued the final EIS (FEIS) in cooperation with the Corps.³⁸ The FEIS states the agencies would do additional studies, data collection, and design work after project approvals as part of an unspecified "design/permitting" phase.³⁹ This to-be-determined information includes "documenting the road location and construction details."⁴⁰ The FEIS focused on Phase III for its impacts analysis.⁴¹

In July 2020, BLM and the Corps issued their JROD approving the right-of-way and 404 permit.⁴² The same day, NPS released its final EEA and approved the right-of-way through Gates.⁴³ BLM's and NPS's decisions approve AIDEA's proposed action (Alternative A), authorizing the northern route through Gates with buildout to Phase III.⁴⁴

³⁶ BLM_0112438–43.

³⁷ BLM_0112586–616; ACE_0010341–58.

³⁸ BLM_0016698–99.

³⁹ See, e.g., BLM_0016574; BLM_0016576; BLM_0016587; BLM_0116466; BLM_0016477; BLM_0016479.

⁴⁰ BLM_0016452.

⁴¹ BLM_0015443.

⁴² BLM_0016710–17028.

⁴³ NPS_0009716.

⁴⁴ BLM_0016720; NPS_0009725.

BLM deferred approving the gravel mines, airstrips, and other facilities because AIDEA did not provide site-specific plans for those project components.⁴⁵

The JROD disclosed that AIDEA submitted another revised permit application to the Corps in February 2020 — after publication of the DEIS, but before issuance of the FEIS.⁴⁶ The Corps never released that revised application for public review or comment.⁴⁷ AIDEA substantially modified its project proposal in the revised application, which proposed to construct the road to Phase II, but not Phase III.⁴⁸ The revised application also modified AIDEA's proposal to request approval of only 15 gravel mines, despite the acknowledged need for over 40 mines, as well as access roads, 4 maintenance stations, 12 communication towers, 3 aircraft landing strips, and a fiberoptic cable.⁴⁹ The Corps approved the revised project in the JROD,⁵⁰ and issued its 404 permit consistent with that decision.⁵¹

In contrast, BLM and NPS issued rights-of-way for Alternative A as described in the FEIS and AIDEA's 2016 permit application.⁵² As a result, BLM's and the Corps' decisions within the JROD are inconsistent. In January 2021, BLM issued a 50-year

⁴⁵ BLM_0016722, BLM_0016734; BLM_0102329–30.

⁴⁶ BLM_0016844.

⁴⁷ Defs.' Answer to Second Am. Compl. ¶97 (ECF 46) [hereinafter Defs.' Answer].

⁴⁸ BLM_0016844.

⁴⁹ BLM_0016844–45.

⁵⁰ BLM_0016729–30.

⁵¹ ACE_0022593.

⁵² BLM_0016728–29; BLM_0016741; NPS_0009721.

right-of-way to AIDEA authorizing construction of Phases I through III.⁵³ It did not authorize construction of any gravel mines, construction camps, or maintenance stations.⁵⁴ BLM’s right-of-way allows AIDEA to submit future “plans of development” to BLM before constructing the various phases.⁵⁵ These plans would “describe in detail the construction, operation, maintenance, and termination of the right-of-way.”⁵⁶ BLM’s right-of-way allows AIDEA to defer its submittal of significant, additional baseline and other information long after the NEPA process concludes.⁵⁷ NPS also issued a right-of-way to AIDEA authorizing the Ambler Road.⁵⁸ The NPS right-of-way authorizes all three construction phases, similar to the BLM right-of-way, despite the Corps only authorizing a more limited version of the project.⁵⁹ The NPS right-of-way contains terms similar to BLM’s right-of-way, deferring the submission of extensive amounts of baseline and other project information to the future.⁶⁰

STANDARDS OF REVIEW

Under the Administrative Procedure Act (APA), courts “hold unlawful and set aside agency action, findings, and conclusions” if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or if adopted “without

⁵³ BLM_0102321–22.

⁵⁴ *Id.*

⁵⁵ BLM_0102328–29.

⁵⁶ BLM_0102328.

⁵⁷ *See, e.g.*, BLM_0102327; BLM_0102330–33.

⁵⁸ NPS_0049696–703.

⁵⁹ NPS_0049698; NPS_0049700.

⁶⁰ NPS_0049770–91.

observance of procedure required by law.”⁶¹ Agency action violates this standard when the agency relies on factors Congress did not intend it to consider, entirely fails to consider an important aspect, offers an explanation counter to the evidence, or is so implausible it cannot be ascribed to a difference in view or agency expertise.⁶²

Although an agency’s rational conclusions are entitled to deference, the Court must ensure that the decision has a firm basis in the record, and that the agency has articulated “a rational connection between the facts found and the choice made.”⁶³ Whether an agency’s action is “not in accordance with law” is a question of law.⁶⁴

PLAINTIFFS’ INTERESTS

Plaintiffs have standing because they and their members will suffer injuries in fact, those injuries are traceable to defendants’ actions, and are redressable by a favorable decision of this Court.⁶⁵ Each plaintiffs’ mission is to protect public lands and wildlife, including lands in the southern Brooks Range.⁶⁶ Their members use and enjoy the area

⁶¹ 5 U.S.C. § 706(2)(A), (D).

⁶² *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, (State Farm) 463 U.S. 29, 43 (1983).

⁶³ *Id.*; *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1048 (9th Cir. 2008).

⁶⁴ *Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Vill. of Copper Ctr.*, 101 F.3d 610, 612 (9th Cir. 1996).

⁶⁵ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000); *see also Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343–45 (1977) (associational standing test).

⁶⁶ Baraff Dec. at 3; Dawson Dec. at 2–3; Eisen Dec. at 3; Gestring Dec. at 2–3; Itchoak Dec. at 2–3; Johnson Dec. at 3–4; Maxwell Dec. at 4; McKinnon Dec. at 2–3; Miller Dec. at 2, 5; Ritzman Dec. at 2–3; Schmitt Dec. at 2–3.

that will be impacted by the Ambler Road, and many live in and rely on the area for their way of life.⁶⁷ These members are injured by the agencies' approval of the Ambler Road in violation of the law.⁶⁸ A favorable decision from the Court would redress these injuries.

ARGUMENT

I. BLM AND THE CORPS VIOLATED NEPA.

A. BLM and the Corps Failed to Obtain and Analyze Necessary Baseline Information.

BLM and the Corps failed to obtain and analyze necessary baseline information prior to authorizing the project. Under NEPA, BLM must “describe the environment of the area(s) to be affected ... by the alternatives under consideration.”⁶⁹ “Without establishing the baseline conditions ... there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with

⁶⁷ Baraff Dec. at 3–4, 7–8; Beaulaurier Dec. at 3–6; Boselli Dec. at 2–5; Dawson Dec. at 6–8; Dial Dec. at 3–7; Dronkers Dec. at 3–4; Eisen Dec. at 2, 4–5; Gaedeke Dec. at 2–6; Gestring Dec. at 3, 5; Itchoak Dec. at 6–8; Johnson Dec. at 7–10; Kantner Dec. at 2–4; Keim Dec. at 2–4; Maxwell Dec. at 9; McKinnon Dec. at 5–8; Meader Dec. at 2–6; Miller Dec. at 8; Nickisch Dec. at 2–5; Ritzman Dec. at 3–6; Schmitt Dec. at 6–7.

⁶⁸ Baraff Dec. at 7–9; Beaulaurier Dec. at 7–14; Boselli Dec. at 5–8; Dawson Dec. at 6–8, 10–11; Dial Dec. at 6–9; Dronkers Dec. at 4–6; Eisen Dec. at 5–10; Gaedeke Dec. at 5–14; Gestring Dec. at 3, 5–8; Itchoak Dec. at 8–12; Kantner Dec. at 5–6, 8–11; Keim Dec. at 4–8; Maxwell Dec. at 9–13; McKinnon Dec. at 5–10; Meader Dec. at 6–13; Miller Dec. at 8–12; Nickisch Dec. at 5–9; Ritzman Dec. at 6–11; Schmitt Dec. at 8–16.

⁶⁹ 40 C.F.R. § 1502.15. Citations are to the 1978 NEPA regulations in effect at the time of the decision.

NEPA.”⁷⁰ The lack of an adequate baseline assessment is fatal under NEPA: “[O]nce a project begins, the pre-project environment becomes a thing of the past and evaluation of the project’s effect becomes simply impossible.”⁷¹

Here, the agencies pointed to future, yet-to-be-conducted baseline studies for multiple resources instead of obtaining that information to inform their NEPA analysis now. For example, although the FEIS states that the project will require over 40 gravel mines and associated infrastructure, there is no baseline assessment of these sites; that assessment is deferred to the future.⁷² The FEIS noted that field studies and exploration work necessary to determine the design and gravel needs would occur post-permitting.⁷³ AIDEA claimed it identified potential gravel mine sites, but in fact had yet to conduct “[g]eotechnical investigations ... on the specific sizes, grades, and actual quantities” to verify those sites.⁷⁴ BLM acknowledged it was unknown whether there are sufficient volumes of asbestos-free gravel along the corridor and that potential sites would be tested in the future.⁷⁵ The agencies also allowed AIDEA to defer identifying areas of potential acid rock drainage (ARD) at these potential mine sites.⁷⁶ These field studies and

⁷⁰ *Half Moon Bay Fisherman’s Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988); *see also Or. Nat. Desert Ass’n v. Jewell*, 840 F.3d 562, 568–71 (9th Cir. 2016).

⁷¹ *N. Plains Resource Council, Inc. v. Surface Transp. Bd. (N. Plains)*, 668 F.3d 1067, 1083 (9th Cir. 2011) (internal quotations omitted).

⁷² BLM_0015455–56.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ BLM_0016854–55.

investigations are the exact type of critical information that must be collected in a baseline assessment prior to NEPA analysis.⁷⁷

The agencies approved the Ambler Road despite acknowledging that future baseline studies were needed to assess impacts to numerous resources. The agencies stated that “[g]eotechnical field studies and detailed thermal modeling would be completed” to identify the “presence, extent and stability” of permafrost, and that information would then be used to determine the project design and location in the future — after the agencies’ approved the rights-of-way and 404 permit.⁷⁸ The agencies also required AIDEA to identify rare plants at a later time.⁷⁹ For archaeological, historical, and cultural resources, the agencies relied on future baseline studies and surveys to determine the locations of those resources.⁸⁰

The FEIS further indicated that AIDEA “would document conditions of fish, birds, and key wildlife species prior to construction to establish a baseline” for those resources.⁸¹ The FEIS stated that “[f]urther field study would be necessary to identify all

⁷⁷ *N. Plains*, 668 F.3d at 1083.

⁷⁸ BLM_0016756; BLM_0016574; BLM_0015423; BLM_0015446; BLM_0015457 (“Locations of [gravel mines] and access roads should be chosen and designed based on site-specific geotechnical explorations...”); BLM_0079429 (“Site-specific information on current and future thaw subsidence risk does not exist.”).

⁷⁹ BLM_0016472.

⁸⁰ BLM_0015601.

⁸¹ BLM_0016477; BLM_0016574.

streams and []other aquatic habitats in the study area and determine potential fish use.”⁸²

Because of these information gaps, BLM included a mitigation measure to document fish and wildlife conditions prior to construction to establish a baseline.⁸³ AIDEA is only now filling these significant data gaps — after the agencies conducted their NEPA review and issued their approvals — as evidenced by its March 2021 plan for its “pre-construction phase.”⁸⁴ The agencies’ reliance on post-EIS, future studies to satisfy their assessment of baseline conditions violates NEPA.⁸⁵

This “permit first, analyze later” approach is directly contrary to NEPA and Ninth Circuit case law. In *Northern Plains*, the agency allowed post-approval surveys to be conducted for wildlife, fish, aquatic resources, and plants as mitigation measures instead of having that baseline information for the NEPA analysis.⁸⁶ The Ninth Circuit rejected

⁸² BLM_0015508; *see also id.* (needing additional data collection to document all streams); BLM_0015521 (requiring additional surveys documenting fish presence); BLM_0015428 (stating AIDEA would collect additional information for the fen).

⁸³ BLM_0016574.

⁸⁴ BLM_0104898–902. In that plan, AIDEA said it still needs to collect environmental, geologic, topographic, meteorological, hydrologic, biological, and cultural resources data to complete the project’s engineering and design. BLM_0104898; BLM_0104899 (noting the number, locations, sizes, and footprints of gravel mines and their access roads are to-be-determined); BLM_0104899 (determining areas of thaw-sensitive permafrost); BLM_0104900 (describing fish habitat studies because “[m]ost of the rivers and streams within the easternmost 50 miles of the Project have little or no data regarding fish habitat and water quality, fish species present, or critical spawning areas”); BLM_0104899–900 (indicating AIDEA would obtain data necessary to design waterway crossings); BLM_0104901 (describing cultural resource studies because “[l]arge portions of the Project have not been inventoried”).

⁸⁵ *N. Plains*, 668 F.3d at 1083–85.

⁸⁶ *Id.*

that approach as contrary to the agency’s “obligations to determine the projected extent of the environmental harm to enumerated resources *before* a project is approved.”⁸⁷ Because the agency did not collect that data in the first place, it was unable to consider it during the EIS process and before approval — a core requirement of NEPA.⁸⁸

The approach rejected in *Northern Plains* is functionally indistinguishable from the approach here. Instead of knowing baseline conditions and doing an adequate analysis of those conditions prior to approval, the FEIS relies on future baseline studies and surveys. Such future studies cannot be used to excuse the lack of detailed baseline information and analysis now.⁸⁹ The agencies’ decision to defer gathering and analyzing key baseline data violates NEPA.

B. BLM and the Corps Failed to Take a Hard Look at the Project’s Impacts.

The agencies violated NEPA by failing to take a hard look at the direct, indirect, and cumulative impacts of the Ambler Road.⁹⁰ This requires a “full and fair discussion of significant environmental impacts.”⁹¹ NEPA also requires agencies to evaluate site-specific impacts prior to making an irretrievable commitment of resources.⁹² An agency

⁸⁷ *Id.* at 1084.

⁸⁸ *Id.* at 1085.

⁸⁹ *Id.* at 1084–85.

⁹⁰ 42 U.S.C. § 4332(2)(c); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998); 40 C.F.R. §§ 1502.16, 1508.7, 1508.8, 1508.25(c).

⁹¹ 40 C.F.R. § 1502.1.

⁹² *California v. Block*, 690 F.2d 753, 761–63 (9th Cir. 1982).

cannot take a hard look at impacts when it does not have site-specific information about the project and project area, or adequate information about baseline conditions.⁹³

Here, the agencies violated NEPA by failing to adequately analyze the impacts of all the project components and project stages and failed to take a hard look at impacts to air quality.

1) BLM and the Corps Failed to Adequately Analyze Gravel Mining and the Full Range of Project Components.

The agencies made conflicting decisions about the gravel mines and other necessary project components (including airstrips, maintenance stations, and camps) in the FEIS and JROD. BLM deferred its analysis and approval of those elements until it received site-specific plans. Yet the Corps authorized 15 gravel mines and other components, despite the fact that the FEIS failed to take an adequate hard look at those components. The agencies did not acknowledge or explain these conflicting decisions. Both agencies violated NEPA.

a. The EIS Improperly Segmented Its Analysis of Connected Actions.

The FEIS failed to analyze the gravel mines and project components for the Ambler Road that are needed solely for the road. Under NEPA, agencies must consider connected actions together in a single EIS.⁹⁴ Connected actions cannot or will not proceed unless other actions are taken previously or simultaneously, or are interdependent

⁹³ *N. Plains*, 668 F.3d at 1084–85.

⁹⁴ 40 C.F.R. § 1508.25(a)(1).

parts of a larger action and depend on the larger action for their justification.⁹⁵ The focus is whether the projects have “independent utility.”⁹⁶ If one project cannot proceed without (i.e., “but for”) the other project, or if the first project is not “independent” of the second project, the two projects are connected actions and must be reviewed in the same NEPA analysis.⁹⁷ Agencies are also required to consider cumulative and similar actions in a single EIS.⁹⁸

The Ambler Road will be a gravel road, and gravel must be mined from somewhere to build it. The project will likely require over 40 gravel mines to supply 15 million cubic yards of gravel for construction, plus 220,000 cubic yards of gravel annually for maintenance.⁹⁹ The EIS identifies gravel mining for the road as a direct impact of the project.¹⁰⁰ The JROD also acknowledges the project necessarily requires additional components like construction camps, water treatment facilities, fuel storage tanks, maintenance stations, communications facilities, and access roads to the gravel mines.¹⁰¹

The gravel mines and project components are connected actions that needed to be, but were not, fully considered in the EIS. The gravel mines and project components serve

⁹⁵ *Id.*

⁹⁶ *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006).

⁹⁷ *Thomas v. Peterson*, 753 F.2d 754, 758–60 (9th Cir. 1985).

⁹⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 408–10 (1976); 40 C.F.R. §1508.25(a).

⁹⁹ BLM_0015636; BLM_0016655–57 (showing potential mine locations).

¹⁰⁰ BLM_0016571.

¹⁰¹ ACE_0022437; BLM_16724.

no purpose but for supplying gravel and support infrastructure for the road, and the project could not be built but for the mined gravel — the very definition of “connected actions” under NEPA.¹⁰² But the FEIS did not review these mines’ site-specific impacts. The JROD specifies that “BLM will evaluate site-specific [gravel] mining and reclamation plans submitted by the proponent” in the future.¹⁰³ BLM stated that it will “determine whether the FEIS for this Project is adequate, or whether additional site-specific NEPA is required based on potential issues” at that later time.¹⁰⁴ As such, the FEIS postponed its review of gravel mines to future analysis and permitting.

The FEIS also failed to analyze the impacts of other necessary project components.¹⁰⁵ The JROD admits the locations of construction and maintenance camps “will be identified in site-specific plans as part of the Plan of Development” and that BLM will evaluate site-specific plans and impacts later.¹⁰⁶ Deferring this analysis violates NEPA.¹⁰⁷

In addition, BLM failed to adequately review the cumulative effects of the gravel mines and other components.¹⁰⁸ Agencies are required to take a hard look at “*all* actions

¹⁰² 40 C.F.R. § 1508.25(a)(1).

¹⁰³ BLM_0016734; *see also* BLM_0102329–30 (“[AIDEA] shall apply for any additional facilities ([gravel mines], construction camps, maintenance stations, communication sites[,] etc.) not covered under this right-of-way as soon as the plans of development have been approved....”).

¹⁰⁴ BLM_0016734.

¹⁰⁵ BLM_0015421.

¹⁰⁶ BLM_0016722.

¹⁰⁷ *Thomas*, 753 F.2d at 758–60.

¹⁰⁸ *See Great Basin Mine Watch*, 456 F.3d at 968–74.

that may combine with the action under consideration to affect the environment.”¹⁰⁹ The gravel mines themselves are likely to cause significant impacts that needed to be evaluated, with gravel mines “up to 142 acres in size,” permanently impacting hundreds of acres.¹¹⁰ The associated maintenance stations, access roads, airstrips, and other infrastructure would also increase noise, fugitive dust, and air emissions, and require fill which would further amplify impacts of gravel mining.¹¹¹

The FEIS attempts to justify its failure to analyze the impacts from the gravel mines and other project components by pledging to review and approve them later.¹¹² But that is contrary to NEPA. BLM cannot segment consideration of connected actions; it must analyze them now.¹¹³

b. The Corps Improperly Authorized the Gravel Mines and Additional Project Components Because the FEIS Lacked a Site-Specific Analysis.

Despite the EIS’s failure to consider the direct, indirect, and cumulative impacts of the gravel mines and other components, the Corps authorized 15 gravel mines with access

¹⁰⁹ *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1104 (9th Cir. 2016) (citing *Te-Moak Tribe of W. Shoshone v. U.S. Dep’t of Interior*, 608 F.3d 592, 603 (9th Cir. 2010)) (internal quotation omitted).

¹¹⁰ ACE_0022437.

¹¹¹ ACE_0015743; ACE_0015751; BLM_0112454–55 (noting impacts of access roads on wildlife); *infra* Part I.B.3.

¹¹² BLM_0015444 (“The BLM may authorize portions of the project under separate permits, such as an authorization for the road [right-of-way] and separate authorizations for material extraction and sales.”).

¹¹³ *Thomas*, 753 F.2d at 758–60.

roads, 4 maintenance stations, 12 communications towers, 3 airstrips, and a fiber optic cable in its 404 permit.¹¹⁴ This violates NEPA.

NEPA requires agencies to evaluate the site-specific impacts of an action before making an irreversible and irretrievable commitment of resources.¹¹⁵ The FEIS did not take a hard look at the direct, indirect, and cumulative impacts specific to the gravel mines and other components it approved. As noted above, the agencies expressly deferred review of those impacts until a later time.¹¹⁶ The FEIS offers only cursory statements about generalized impacts from gravel mining and construction of other components, and relies instead on future permitting and potential mitigation measures.¹¹⁷ The Corps could not both defer analyzing the site-specific impacts from the gravel mines and other components in the EIS *and* make an irretrievable commitment of resources by issuing a 404 permit for some of them.¹¹⁸

¹¹⁴ *Supra* Part I.B.1.a & nn.49–51; ACE_0022593.

¹¹⁵ *Block*, 690 F.2d at 761–63; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (stating NEPA requires an agency has “available, and will carefully consider, detailed information concerning significant environmental impacts”); *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 443 F. Supp. 3d 995, 1007–12 (D. Alaska 2020) (explaining site-specific EIS must analyze impacts at project location).

¹¹⁶ BLM_0015444.

¹¹⁷ *See, e.g.*, BLM_0016458 (“AIDEA would provide a detailed mineral materials (e.g., gravel) mining and reclamation plan to BLM for approval at least 90 days prior to beginning any mining operations.”).

¹¹⁸ 5 U.S.C. § 706(2)(A). To the extent the Corps did not approve, but acknowledges the need for, additional gravel mines and project components, ACE_0022437, it improperly segmented its NEPA analysis. *Supra* Part I.B.1.a.

The Corps' authorization of those project components was particularly problematic given AIDEA's failure to verify the locations of gravel mines and other components.¹¹⁹ EPA raised serious concerns with AIDEA's failure to conduct field sampling to verify the locations for any gravel mines.¹²⁰ Because the gravel mine locations were only preliminarily mapped and studies were not done to determine their suitability, the actual mine site locations were not determined.¹²¹

In sum, the Corps' failure to analyze the direct, indirect, and cumulative impacts of the gravel mines and related components, while at the same time making an irretrievable commitment of resources by authorizing those project components, violates NEPA.

2) BLM and the Corps Failed to Adequately Analyze AIDEA's Phased Construction Approach and Impacts to Permafrost.

The agencies failed to take a hard look at the full range of impacts related to AIDEA's phased construction approach, and particularly the impacts of Phase I. Despite AIDEA's clear plans to build and use the road in phases and the unique impacts specific to those phases, the EIS focused its analysis on construction and operation of the Phase III road and purported to only discuss differences between phases when they were significant.¹²² By focusing its analysis on the impacts of the Phase III road, the EIS

¹¹⁹ See *supra* nn.72–76 and accompanying text.

¹²⁰ ACE_0010353–54.

¹²¹ *Id.*

¹²² BLM_0015443.

largely ignored the impacts of phased construction to most resources; to the extent it addressed Phase I for resources such as permafrost, its analysis was deficient.

Overall, the EIS included very little detail on the road's phases or how they would be constructed — largely because of the lack of project designs and detailed construction plans.¹²³ One of the key differences between Phase I and later phases is the shallow depth of the road embankment at Phase I, with later phases upgrading the road to a thicker embankment to insulate the road and mitigate impacts to permafrost.¹²⁴

The potential for permafrost degradation, particularly from the less-insulated Phase I, was a serious impact raised by agency staff and commenters.¹²⁵ EPA noted that about “92% of the [project] area is underlain by continuous permafrost susceptible to

¹²³ BLM_0068413, BLM_0078670, BLM_0078698 (stating there was only a “conceptual level of design and development” and estimating AIDEA had only designed 7–30% of the project); BLM_0102328 (requiring later submission of information and detailed plans for each phase).

¹²⁴ NPS_0000258–59; BLM_0015416; BLM_0112302. Phase I could not be used during heavy rainfall or the spring and early summer to minimize roadway damage during breakup because of its less rigorous design. BLM_0015419; BLM_0053895.

¹²⁵ BLM_0067465 (flagging Phase I could lead to sinkholes, contribute large sediment loads into streams, cause operations and maintenance concerns, and permafrost thawing will impact water quality in downgradient streams); BLM_0067368 (indicating Phase I is the “vulnerable stage” and mitigation would be difficult to implement); BLM_0067377 (NPS noting it “wouldn’t take much” to thaw permafrost at Phase I); BLM_0053878 (Corps noting need to assess how phases will compound with climate change); BLM_0079429 (BLM responding to EPA that site-specific information on thaw subsidence risk does not exist and would be gathered later); ACE_0010347, ACE_0010353 (EPA requesting quantification of permafrost impacts); BLM_0067430–31 (NPS explaining “everything flows from permafrost: water quality issues, erosion potential, long-term viability of road, and amount of gravel needed to support the road”).

thawing.”¹²⁶ In Gates, AIDEA estimated that 80% of the corridor would require road embankments greater than eight feet thick to protect permafrost from thaw.¹²⁷ Plaintiffs also submitted technical comments underscoring the serious risks of Phase I, explaining that the depth of permafrost is likely to decrease at a rate of 0.5 feet per year until the construction of Phase III, with greater impacts at Phase I because of its shallower depth and lack of insulation.¹²⁸ This is particularly troubling since AIDEA indicated the Phase I road could remain in place for up to ten years and be used for longer-term mine development.¹²⁹

Despite these serious concerns, the EIS lacked an adequate analysis of the unique and significant impacts to permafrost from Phase I. The FEIS has a cursory reference to the potential for phased construction to accelerate permafrost thaw because Phase I would not insulate the roadway similar to later phases.¹³⁰ The FEIS briefly notes drainage changes could impound water and warm subsurface soils and that, if permafrost thaw issues occur during early phases, shoulder rotations and embankment cracks could impact

¹²⁶ ACE_0010345.

¹²⁷ NPS_0000259.

¹²⁸ BLM_0112302.

¹²⁹ The record contains conflicting statements about Phase I’s duration. BLM_0053896 (AIDEA indicating mine operations could use the Phase I road); NPS_0000261 (indicating Phase II construction would commence once mine operations reach level requiring year-round access); BLM_0016100–02 (indicating construction of different phases may overlap); BLM_0067365 (noting inconsistencies in time periods for Phase 1, and unknown timeframe for Phase 3).

¹³⁰ BLM_0015450.

the road's surface, but the agencies did not analyze what impact those occurrences would have.¹³¹

These conclusory statements are not an adequate hard look at the full range of impacts from Phase I. Phase I has little, if any, mitigation for permafrost damage since it is lacking the insulation of later phases. Because Phase I would not include all the measures to insulate the roadway of later phases, the EIS needed to analyze the unique impacts specific to that phase, particularly for permafrost degradation. This includes an analysis of the extent and severity of permafrost degradation across the length of the road, how that degradation would be exacerbated by Phase I, how not having adequate insulation at Phase I could impact the road's long-term viability, how that could alter the amount of gravel needed for the road and its continual maintenance, how climate change could further amplify the impacts, and how that particularly vulnerable stage of the project might cause a host of other serious problems in downgradient waters. Considering the impacts of the Phase II and III roads was not sufficient because those phases included greater insulation and did not present the same threats to permafrost degradation as Phase I. The agencies failure to adequately consider the unique impacts to permafrost stemming from the Phase I road violated NEPA.

The agencies' conclusion that the mitigation measures to address permafrost thaw were likely to be successful was also arbitrary.¹³² The agencies could not adequately

¹³¹ *Id.*

¹³² BLM_0015450; BLM_0015423–24.
N. Alaska Envtl. Ctr. v. Haaland
Case No. 3:20-cv-00187-SLG

analyze the likely scope of these impacts or ways to mitigate them because they did not have baseline information about the extent and depth of permafrost in the project area or thaw subsidence risk.¹³³ As the Ninth Circuit recognized in analogous contexts, an agency's reliance on post-approval studies to gather baseline information, assess impacts, and then develop mitigation "deprives [the agency] of any foundation upon which to base their conclusion" that mitigation measures will be sufficient.¹³⁴ Without that information, the agency could "not know what impacts to mitigate, or whether the mitigation proposed would be adequate to offset damage."¹³⁵

In sum, BLM's failure to take a hard look at the unique impacts from the Phase I road violates NEPA.

3) The EIS Did Not Adequately Analyze Air Quality and Greenhouse Gas Emissions.

The EIS failed to take a hard look at project emissions and associated air quality impacts because it arbitrarily quantified only a small subset of project emissions, did not evaluate whether the project would comply with air quality standards, and its qualitative analysis ignored significant sources of emissions and aspects of project construction that impact air quality.

¹³³ See *supra* Part I.A; see also BLM_0079429 (indicating site-specific information on thaw subsidence risk does not exist and AIDEA will do geotechnical investigations to evaluate permafrost and risk of thaw and then design project to consider the risks); NPS_0000292-93 (AIDEA acknowledging "the extent and depth to permafrost is widely unknown" and stating AIDEA needs more detailed thermal information).

¹³⁴ *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988).

¹³⁵ *Or. Nat. Desert Ass'n*, 840 F.3d at 571.

First, the EIS failed to analyze all project emissions. The EIS states that it considered the type, duration, and potential magnitude of air pollutants, and points to Appendix D, Table 24 as showing construction and operation activities with the potential to generate air emissions.¹³⁶ But that table only considers emissions from road traffic after the project is built.¹³⁷ It does not consider emissions from construction activities, aircraft traffic, gravel mining, camp use, and maintenance activities — which are all within the project’s scope. Because AIDEA provided “no specific construction and operations plan,” the EIS states it was not possible “to quantify the criteria air pollutants for construction, or maintenance and operations activities.”¹³⁸ By only considering emissions from very limited operational activities, the EIS skewed its analysis and minimized the extent and severity of air quality impacts. This is also true for its quantitative assessment of greenhouse gases (GHGs), which considered emissions from a narrow, but different, subset of construction and operation activities.¹³⁹

In limiting its quantitative analysis to road traffic, BLM ignored public comments explaining that construction activities and aircraft traffic would cause significant air quality impacts.¹⁴⁰ Commenters explained that, for a different, smaller project involving a

¹³⁶ BLM_0015483.

¹³⁷ BLM_0015669–70.

¹³⁸ BLM_0015483.

¹³⁹ BLM_0015671 (not evaluating GHG emissions from operation of maintenance stations, annual maintenance activities through anticipated life of road, construction and operation of any mines, or vehicle use of road); BLM_0015672 (considering only GHG emissions from ore transport).

¹⁴⁰ BLM_0112525.

seven-mile gravel road, one gravel pad, and one gravel mine, modeling showed the National Ambient Air Quality Standards (NAAQS) were nearly exceeded for multiple pollutants.¹⁴¹ Even with dust minimization measures,¹⁴² that modeling demonstrated construction of that smaller project would cause some pollutants to reach up to the 99% threshold for air quality standards.¹⁴³ The EIS did not respond to comments questioning how a road approximately 30 times longer with 40-plus gravel mines would not be expected to exceed the NAAQS, or otherwise justify its conclusory assertions that the project would not violate these standards in the absence of accurately quantifying and modeling the project's emissions.¹⁴⁴

To comply with NEPA, agencies must determine whether the project would comply with air quality standards, either qualitatively or quantitatively.¹⁴⁵ To the extent the EIS quantified a fraction of the project's emissions,¹⁴⁶ it did not explain how those emissions relate to NAAQS, standing alone or in tandem with background air quality. Understanding a project's emissions and how they contribute to background pollutant concentrations is critical to determining whether a project's emissions would violate

¹⁴¹ *Id.*

¹⁴² BLM_0122942.

¹⁴³ BLM_0122941 (table showing emissions from smaller project nearly exceeding multiple NAAQS)

¹⁴⁴ BLM_0112525.

¹⁴⁵ 40 C.F.R. § 1502.2(d) (requiring EIS “state how alternatives considered in it and decisions based on it will or will not achieve the requirements [NEPA] and other environmental laws and policies”); *see also Great Basin Res. Watch*, 844 F.3d at 1103; *Montana Wilderness Ass’n v. McAllister*, 658 F. Supp. 2d 1249, 1256 (D. Mont. 2009).

¹⁴⁶ BLM_0015668–70.

NAAQS.¹⁴⁷ No such analysis occurred here. The FEIS cites air quality background data from Denali National Park, located over 200 miles away, with the caveat that “it is not used to demonstrate compliance with NAAQS,”¹⁴⁸ but fails to explain how the agency could otherwise demonstrate compliance with NAAQS. The EIS also states its analysis “does not seek to estimate health-based ambient air quality concentrations”¹⁴⁹ — i.e., NAAQS.¹⁵⁰ But consideration of whether the project would comply with air quality standards is required under NEPA — agencies cannot simply forego this requirement.¹⁵¹ Finally, the EIS’s conclusory assertions that exceedances of air quality thresholds would be “minimized” because the nearest communities to the road are eight miles away and the winter construction season is “short” are not supported by any analysis in the record.¹⁵²

The qualitative analysis was further flawed because it focuses on particulate matter from fugitive dust but overlooks emissions from the extensive vehicle and aircraft traffic needed to support road construction, bridge building, gravel mining, culvert installation, and worker transport.¹⁵³ The non-fugitive dust emissions from these activities are not discussed. To the extent the EIS acknowledged emissions from

¹⁴⁷ See *Tinicum Twp., Pa. v. U.S. Dep’t of Transp.*, 685 F.3d 288, 294–95 (3d Cir. 2012) (generally explaining Clean Air Act and overlap with NEPA); see also BLM_0122790–92 (explaining determinations of air quality baseline and importance of adding background data to anticipated project emissions).

¹⁴⁸ BLM_0015481.

¹⁴⁹ BLM_0015484.

¹⁵⁰ 40 C.F.R. § 50.2.

¹⁵¹ *Supra* n.145; see also *infra* Part IV.C.

¹⁵² BLM_0015486.

¹⁵³ BLM_0015483; BLM_0015418–21.

construction camps and maintenance stations, it merely noted that “[a]ir quality impacts would also result” from these sources.¹⁵⁴ But the EIS did not identify the types of emissions, their duration, or magnitude.¹⁵⁵ It also ignored that activities to maintain the Phase I road and construct subsequent phases — with associated gravel mining, construction, and worker transport — would occur while the road is in use, compounding those emissions.¹⁵⁶ The impacts from these emissions occurring simultaneously are not analyzed in the EIS, which treats “operational” or traffic emissions as post-construction.¹⁵⁷ For these reasons, the EIS’s qualitative analysis was insufficient.

In sum, the EIS’s failure to take a hard look at the project’s air quality impacts violated NEPA.

II. THE CORPS VIOLATED THE CWA.

The Corps violated the CWA for three reasons: (1) it failed to demonstrate that the Ambler Road’s direct, secondary, and cumulative effects would not cause or contribute to significant degradation; (2) it lacked sufficient information to determine whether the project’s effects would cause significant degradation; and (3) it failed to avoid, minimize, and compensate for impacts to aquatic ecosystems.

¹⁵⁴ BLM_0015484.

¹⁵⁵ *Great Basin Mine Watch*, 456 F.3d at 971 (explaining general statements about possible impacts are not a hard look).

¹⁵⁶ *Supra* Argument I.B.1; BLM_0112524 (public comments explaining EIS needed to consider emissions from concurrent construction and operation).

¹⁵⁷ BLM_0015483.

The CWA prohibits the discharge of fill material into Waters of the United States (WOUS) without a 404 permit.¹⁵⁸ This includes filling wetlands, which is considered under the CWA “to be among the most severe environmental impacts.”¹⁵⁹ To grant a 404 permit, the Corps must analyze “the nature and degree of effect” the project will have on the “structure and function of the aquatic ecosystem,”¹⁶⁰ and the level of analysis must be commensurate with the scope and scale of the authorized impacts.¹⁶¹

The Corps and EPA jointly implement Section 404 and promulgated regulations governing the discharge of fill material to wetlands (Guidelines).¹⁶² All 404 permits must comply with the Guidelines.¹⁶³ The Corps cannot issue a 404 permit if the proposed discharge “will cause or contribute to significant degradation of [WOUS],”¹⁶⁴ or if “[t]here does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.”¹⁶⁵ Under the Guidelines, “significant” is anything “more than ‘trivial.’”¹⁶⁶ In making its determination regarding significant degradation, the Corps must fully evaluate the impacts of the

¹⁵⁸ 33 U.S.C. § 1311(a).

¹⁵⁹ 40 C.F.R. § 230.1(d).

¹⁶⁰ *Id.* § 230.11(e).

¹⁶¹ 33 C.F.R. § 332.3(c)(3)(iii).

¹⁶² *See* 33 U.S.C. § 1344; 40 C.F.R. § 230.2(a).

¹⁶³ 33 C.F.R. § 320.4(a)(1).

¹⁶⁴ 40 C.F.R. § 230.10(c).

¹⁶⁵ *Id.* § 230.12(a)(3)(iv).

¹⁶⁶ Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,336, 85,343 (Dec. 24, 1980) (codified at 40 C.F.R. Part 230).

activity, including secondary and cumulative effects, upon a variety of resources.¹⁶⁷

Secondary effects are effects on aquatic ecosystems stemming from the discharge of fill, beyond the effects from the actual placement of fill material.¹⁶⁸ Cumulative effects are those “attributable to the collective effect” of a number of individual projects, and the Corps must collect, document, and consider cumulative effects from the proposal in its decision-making process.¹⁶⁹

The Corps cannot issue a 404 permit “unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.”¹⁷⁰ The Corps’ regulations provide the framework for the Corps to ensure compliance with the Guidelines by avoiding and minimizing impacts, and compensating for unavoidable adverse impacts through mitigation.¹⁷¹ “The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to [WOUS].”¹⁷²

¹⁶⁷ See 40 C.F.R. §§ 230.10–230.54.

¹⁶⁸ *Id.* § 230.11(h).

¹⁶⁹ *Id.* § 230.11(g).

¹⁷⁰ *Id.* § 230.10(d).

¹⁷¹ 33 C.F.R. pts. 325, 332; 40 C.F.R. pt. 230 (mitigation sequence).

¹⁷² 40 C.F.R. § 230.93(a)(1).

A. The Corps Failed to Demonstrate the Project Would Not Cause Significant Degradation.

The Corps and AIDEA have not demonstrated that the Ambler Road would not cause or contribute to significant degradation.¹⁷³ To issue a 404 permit, the Corps must demonstrate the “discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.”¹⁷⁴ The EIS, record, JROD, and comments from EPA and the public demonstrate that the direct, secondary, and cumulative effects of the Ambler Road have the potential to cause or contribute to significant degradation. At a minimum, the Corps had to acknowledge these facts and explain its findings in light of them. It failed to do so.

The EIS concluded that “[c]umulatively, the project has the potential to cause very substantial, long-term impacts to fish and aquatic life that could lead to very substantial impacts on subsistence use practices in the region, even with mitigation measures in place.”¹⁷⁵ The Corps acknowledged that the road would create issues of permafrost thaw and degradation,¹⁷⁶ introduce fugitive dust into wetlands and waterbodies with resulting

¹⁷³ *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1187 (10th Cir. 2002) (“The burden of proof to demonstrate compliance with the [Guidelines] rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued.”).

¹⁷⁴ 40 C.F.R. § 230.1(c).

¹⁷⁵ BLM_0015934.

¹⁷⁶ ACE_0022426.

turbidity and changes to water quality,¹⁷⁷ present risks of contamination from asbestos and ARD,¹⁷⁸ and require thousands of stream crossing and culverts.¹⁷⁹ EPA determined the project “may result in substantial and unacceptable impacts” to aquatic resources of national importance, i.e., the Kobuk and Koyukuk Rivers and their tributaries and wetlands, and the Nutuvukti fen.¹⁸⁰ EPA based this determination on the “outstanding natural resource value” of the region’s wetlands and waterways, habitat for fisheries and other wildlife, subsistence use, and unique ecosystems like the Nutuvukti fen — an “intricate” and “unique” wetland ecosystem.¹⁸¹ EPA noted that impacts “would result from water extraction activities associated with dust abatement, the development of [gravel mines] adjacent to waterways, and the release of hazardous materials and pollutants during operation and management of the road.”¹⁸²

Similar concerns were raised in expert comments. Siobhan Fennessy, Ph.D., explained that, because the Ambler Road would run perpendicular to the Brooks Range’s natural runoff flows, it “represents a major hydrologic alteration that will severely reduce stream connectivity, fragment habitats, and pose a barrier to fish passage,” and will cause “extensive” wetland and water quality impacts.¹⁸³ Christopher Frissell, Ph.D., also

¹⁷⁷ ACE_0022433.

¹⁷⁸ ACE_0022430–31.

¹⁷⁹ ACE_0022428.

¹⁸⁰ ACE_0010343.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ ACE_0010217; ACE_0010196.

explained that “massive alteration of wetland features and landscape hydrology — both directly underneath the foot print of the road — and indirectly through up-gradient and down-gradient alteration of surface and subsurface water flows — will inexorably result” from the road.¹⁸⁴

The Corps was obligated to demonstrate why concerns about the project’s widespread and permanent impacts were either unfounded or adequately addressed to ensure that the project would not cause or contribute to significant degradation.¹⁸⁵ It did not. The Corps attempted to brush off these significant direct and secondary impacts by asserting that AIDEA’s vague mitigation measures and post-permitting project design would reduce or eliminate them.¹⁸⁶ For instance, the JROD repeatedly states that adaptive management and future design features would ensure hydrological connectivity is maintained and impacts from contamination would be avoided.¹⁸⁷ The Corps’ findings are not supported by the record because it lacked critical information to make that determination,¹⁸⁸ and because those findings are contradicted by the EIS, Corps’ experts, and expert comments which explained mitigation would not completely resolve these issues.

¹⁸⁴ ACE_0010273.

¹⁸⁵ 40 C.F.R. § 230.10(c).

¹⁸⁶ ACE_0022426–27.

¹⁸⁷ *See, e.g.*, ACE_0022427–34.

¹⁸⁸ *Infra* Part II.B.

Specifically, the EIS acknowledged that, even with AIDEA's design measures in place, there would be widespread changes to overland, surface, and groundwater flows, and myriad other adverse impacts from the road.¹⁸⁹ The Corps' wetlands specialist also found that, even if mitigation practices are followed, embankment erosion and culvert blowouts (a culvert failure that washes portions of the embankment and pipe downstream) are "inevitable."¹⁹⁰ And Dr. Frissell confirmed that "there is no opportunity for avoidance of significant adverse hydrologic and aquatic habitat effects in and near the road corridor from this project; the only question is which streams and rivers will be more directly impacted."¹⁹¹ In sum, the record demonstrated the Ambler Road would adversely affect the structure and function of aquatic ecosystems.¹⁹²

To issue the 404 permit, the Corps had to factually support its conclusion that mitigation measures would sufficiently address these unacceptable adverse impacts.¹⁹³ But the Corps does not address these findings or consider the significance or magnitude of impacts that would result even with mitigation measures. Moreover, the Corps lacked critical baseline information about WOUS and project infrastructure to support this

¹⁸⁹ BLM_0015931–32 (noting construction would degrade fish spawning habitat, increase water temperatures, and introduce fugitive dust and toxins into waterways); BLM_0016473 (FEIS explaining bridges and culverts would only be "partially effective" at maintaining hydrological connectivity and wetland functions because of difficulty in predicting drainage pathways and potential that culvert installation and maintenance would be inadequate).

¹⁹⁰ ACE_0017416.

¹⁹¹ ACE_0010273.

¹⁹² 40 C.F.R. § 230.11(e).

¹⁹³ *Id.* § 230.10(c).

conclusion.¹⁹⁴ As a result, the Corps failed to meet its burden to demonstrate that such impacts will not cause or contribute to significant degradation.¹⁹⁵

Further, secondary and cumulative effects from the Ambler Road, such as the release of asbestos and ARD into the region's waters, risk causing significant degradation and the Corps has not demonstrated otherwise. The EIS determined there could be population-level effects to fish, even in the unlikely event that mining and associated activities are properly managed.¹⁹⁶ EPA explained that identifying and avoiding asbestos and ARD along the road corridor is necessary to ensure against significant degradation, but noted that "total avoidance may be difficult to achieve."¹⁹⁷ Dr. Fennessy explained "the indirect and cumulative impacts of [ARD] are likely to be severe" and can persist for decades.¹⁹⁸ Dr. Frissell pointed out that "the release of even low levels" of contaminants can cause "large and potentially irreversible biological effects."¹⁹⁹ Despite these issues being raised, the Corps deferred gathering information and assessing the impacts of gravel mining, ARD, and asbestos contamination until after permit issuance.²⁰⁰ By failing

¹⁹⁴ *Supra* Part I.A; *infra* Part II.B.

¹⁹⁵ 40 C.F.R. § 230.10(c), (d).

¹⁹⁶ BLM_0015928–29 (explaining recent study finding 100% of modern mines in the U.S. predicted compliance with water quality standards, but 76% exceeded those standards from mining, and 64% failed to mitigate water contamination).

¹⁹⁷ ACE_0010354 (EPA comments citing 40 C.F.R. § 230.10(c)).

¹⁹⁸ ACE_0010208.

¹⁹⁹ ACE_0010278.

²⁰⁰ *Supra* Parts I.A.–I.B.1.; ACE_0022394, ACE_0022397.

to address EPA's concerns and those raised by scientific experts, the Corps failed to support its decision that the project would not cause significant degradation.

The Corps likewise acknowledged that foreseeable future actions, including mining, would cause a wide range of "major impacts" to aquatic resources,²⁰¹ and that, while the impacts of reasonably foreseeable future mining activities were "unknown," they are likely to be extensive.²⁰² But the Corps did not explain why these cumulative impacts would not cause or contribute to significant degradation as required by the Guidelines.²⁰³ Nor did the Corps identify mitigation measures that would address cumulative impacts from mining. As a result, the Corps failed to demonstrate that the Ambler Road "will not have an unacceptable adverse impact either individually or in combination with [other likely impacts] affecting the ecosystems of concern."²⁰⁴

In sum, the record demonstrates that the Ambler Road and its secondary and cumulative effects are likely to cause or contribute to significant degradation. By disregarding these issues, the Corps' finding that the project will not cause or contribute to significant degradation is unsupported by the record.

²⁰¹ ACE_0022422.

²⁰² ACE_0022376 (predicting loss and alteration from future mining is expected to be at least thousands, if not hundreds of thousands, of acres).

²⁰³ 40 C.F.R. § 230.11(g).

²⁰⁴ *Id.* § 230.1(c).

B. The Corps Lacked Sufficient Information to Determine that the Ambler Road Complied with the Guidelines.

The Corps did not have sufficient information to determine whether the Ambler Road would comply with the Guidelines.²⁰⁵ As the court explained in *Friends of the Earth v. Hall*, without detailed information on a project's reasonably foreseeable impacts, a finding that no significant degradation will result lacks a rational basis.²⁰⁶ There, the court held that the Corps' "detailed ROD" in support of its 404 permit and future monitoring plans did not satisfy the CWA or NEPA because the agency failed to disclose and discuss crucial information regarding potentially "major" environmental impacts if the project's mitigation measures failed.²⁰⁷ "[E]xposing uncertainty and opposing scientific views is not enough, where essential information is lacking."²⁰⁸ The CWA prohibits issuance of a 404 permit where the Corps lacks accurate, critical information about aquatic resources and their impacts.²⁰⁹ Here, the Corps lacked accurate and critical information about the project and its potentially significant impacts to WOUS because AIDEA's application did not provide sufficient information and the EIS failed to adequately analyze impacts to aquatic resources.

First, the Corps identified data gaps in AIDEA's application that were never remedied. Early in the permitting process, the Corps informed AIDEA that it would

²⁰⁵ *Id.* §§ 230.11, 230.12(a)(3).

²⁰⁶ 693 F. Supp. 904, 946 (W.D. Wash. 1988).

²⁰⁷ *Id.* at 925–26, 939.

²⁰⁸ *Id.* at 931.

²⁰⁹ *Id.*; 40 C.F.R. § 230.12(a)(3)(iv).

require a functional or aquatic site assessment, and that mapping of wetland types was required to compare alternatives and evaluate how impacts could be avoided and minimized.²¹⁰ The Corps also raised concerns that AIDEA's application did not address "[h]ow roads cross and are parallel to major river crossings."²¹¹ This information was needed for the length of the corridor. AIDEA also failed to provide data regarding aquatic resources in the eastern 50 miles of the road corridor.²¹² The Corps informed AIDEA it would need wetland classification mapping, LiDar (high-resolution ground maps created via laser scans), and fieldwork to identify aquatic resources along the road corridor.²¹³ The Corps informed AIDEA that "[t]here can be no accurate determination of impacts to WOUS until this issue is resolved."²¹⁴ AIDEA never provided this information.

The Corps issued the 404 permit despite never obtaining this information. Specifically regarding the lack of data for the eastern 50 miles of the corridor, the Corps allowed AIDEA to rely on prior fieldwork delineating wetlands 15 miles away from the road corridor with "similar aerial signatures."²¹⁵ But as EPA noted, even with that prior data, there was still an outstanding need for accurate mapping of wetlands and streams along the actual road corridor, and the agencies were still missing the locations of all

²¹⁰ ACE_0006551.

²¹¹ ACE_0005154.

²¹² ACE_0006541.

²¹³ *Id.*; ACE_0006929; BLM 0051904.

²¹⁴ ACE_0003488; BLM_74137 (agencies explaining they "need to know the existing functions of wetlands, and a functional assessment of wetlands that should be field determined and quantitative to get a 404 permit").

²¹⁵ ACE_0014772.

stream crossings.²¹⁶ EPA also questioned the Corps' decision to defer its analysis of culvert impacts at specified locations.²¹⁷ Indeed, BLM recently confirmed that “[m]ost of the rivers and streams along the Project alignment have little or no data regarding the flow regime and no data [has] been gathered in the 50 easternmost miles of the alignment to support the Project.”²¹⁸ In its JROD, the Corps allowed AIDEA to defer obtaining data for the eastern 50 miles of the corridor until “the final design phase,” at which time it would “identify additional drainages and ... avoid and minimize the impacts to wetlands and aquatic resources to the extent practicable.”²¹⁹

Knowing the locations of WOUS is necessary to determine the nature and degree of impacts from the project and ensure impacts are avoided and minimized before 404 permit issuance.²²⁰ And the Corps cannot issue a 404 permit if “[t]here does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.”²²¹ Because the Corps was missing that key information, it was unable to ascertain the nature and degree of impacts and, ultimately, support its determination that the project will comply with the Guidelines. To the extent

²¹⁶ BLM_0099126 (EPA noting FEIS acknowledgment that drainages less than 12 feet wide in vegetated areas were not mapped); *see also supra* n.84.

²¹⁷ ACE_0010348, ACE_0010355 (EPA comments explaining need to identify culvert locations to assess impacts); ACE_0022391 (JROD stating AIDEA would identify culvert locations later); *see also* ACE_0010273–74 (Dr. Frissell explaining lack of information on waterway crossings).

²¹⁸ BLM_0104900 (2021 AIDEA field work plan).

²¹⁹ ACE_0022391.

²²⁰ 40 C.F.R. §§ 230.10(d), 230.11(b), (e).

²²¹ *Id.* § 230.12(a)(3)(iv).

the Corps justified its decision to forego gathering and considering this information by relying on mitigation, that is arbitrary.²²² As explained, the Corps cannot rely on mitigation measures as a substitute for identifying WOUS and evaluating the impacts of the proposal in the first instance.²²³

Second, the EIS fails to adequately analyze impacts relevant to the Corps' decision. EPA explained that "the [Public Notice], [draft] EIS, and supporting documents do not contain sufficient information to address the factual determinations required by 40 C.F.R. § 230.11 and to make a reasonable and defensible judgment that the proposed discharges will comply with the Guidelines."²²⁴ For example, the EIS did not analyze impacts to the Nutuvukti fen, purportedly justifying the omission because the fen is on NPS-managed lands, and thus subject to a separate, non-NEPA process.²²⁵ But the Corps must identify and assess the nature and degree of all potential impacts to aquatic resources from the proposed fill, including those on NPS-managed lands.²²⁶ Expert

²²² ACE_0022426–28, ACE_0022435 (acknowledging general issues of permafrost thaw, fugitive dust, and thousands of stream crossings are problematic, but assuming without support that mitigation measures and construction to Phase II would reduce impacts to extent practicable).

²²³ *Supra* n.220.

²²⁴ ACE_0010345; *see also* BLM_0074800–01 (EPA DEIS comments noting discussion of impacts to waterways was insufficient and underrepresented impacts, and explaining quantitative evaluation of estimated direct, indirect, and cumulative impacts to aquatic resources is necessary for permitting).

²²⁵ BLM_0079435 (FEIS comment response). To the extent the Corps requires AIDEA to relocate the road to avoid the fen at a later time, ACE_0022420, the Corps has not analyzed the impacts of that new route.

²²⁶ 40 C.F.R. § 230.11(e).

comments likewise pointed out that the EIS lacked detailed information explaining the extent or magnitude of the disruption to natural patterns of floods, erosion, and blocked wetland surface water drainage, among other impacts.²²⁷ EPA further identified that “[t]he analysis of temporary, secondary and cumulative impacts to aquatic resources lacks site-specific data to allow for a full evaluation of project impacts to the project area and downstream waters.”²²⁸ This information is critical to determine the nature and degree of impacts, but these gaps were not rectified in the FEIS.²²⁹

EPA also questioned the scientific basis for limiting the EIS’s analysis of impacts to wetlands and waterways to 100 meters beyond the project footprint, noting impacts could extend up to 1,000 meters.²³⁰ The Corps itself undermined the EIS’s limited analysis, confirming that “indirect impacts to wetlands *will occur* outside of the 100 meter direct impact corridor, mostly due to changes in hydrology and thermal regime caused by the road structure, even with culverts” and acknowledged that impacts should

²²⁷ ACE_0010202; ACE_0010285.

²²⁸ ACE_0010342; *see also* ACE_0010205–06 (Dr. Fennessy explaining road’s impacts would extend beyond the corridor and questioning why impacts of road’s numerous hydrological alterations were not quantitatively addressed); ACE_0010274 (Dr. Frissell explaining EIS lacked “any reasoned assessment of the downstream hydrologic effects of the extent and distribution of wetlands expected to be impacted” because it did not assess number, distribution, and characteristics of sites where erosion, turbidity, barriers to fish passage, and alteration of hydrological flow could occur).

²²⁹ 40 C.F.R. § 230.11(e); BLM_0016576–77 (comment responses explaining FEIS fisheries analysis updated to include contaminants and address mitigation effectiveness, but not otherwise indicating additional analysis and noting data is incomplete and unavailable); BLM_0016574 (comment responses not indicating any additional information was provided regarding impacts to water resources).

²³⁰ ACE_0010353.

have been considered to 300 meters.²³¹ Despite its own critique, the Corps issued its JROD without obtaining the information necessary to analyze the full nature and degree of the project's aquatic impacts.

The Corps disregarded its own and EPA's concerns about the lack of information in AIDEA's application and the EIS and issued the permit without information it identified as necessary. The Corps cannot require an applicant to obtain baseline information, assess significant degradation, and "avoid and minimize the impacts to wetlands and aquatic resources to the extent practicable" *after* 404 permit issuance.²³² That information was critical to determining whether the project would comply with the Guidelines, and the Corps' decision to issue the permit without it was arbitrary and capricious.

C. The Corps Failed to Adequately Mitigate Impacts.

Compensatory mitigation is required to offset "unavoidable impacts" to aquatic ecosystems.²³³ The Corps' failure to require compensatory mitigation,²³⁴ despite its own finding that there would be unavoidable impacts from the Ambler Road, violated the CWA.

²³¹ ACE_0017417 (emphasis added).

²³² 40 C.F.R. § 230.12(a)(3)(iv); *id.* § 230.10(d); ACE_0022391.

²³³ 40 C.F.R. § 230.93.

²³⁴ Def.'s Answer at ¶101.

First, the Corps' statement that it would not require compensatory mitigation because "mitigation in the form of avoidance and minimization is sufficient"²³⁵ is unsupported. As described above, the Corps lacked baseline and project information to find that AIDEA's design measures and mitigation would minimize and avoid impacts.²³⁶ There is no detailed mitigation plan and numerous aspects of the project plans are not finalized, including the actual locations and designs of the road, gravel mines, and other project components.²³⁷ The Corps does not explain its determination that impacts were sufficiently mitigated in light of this missing information. Additionally, the record demonstrates that significant and unavoidable adverse impacts would occur even if all mitigation measures are properly implemented.²³⁸ Moreover, some of the mitigation measures the Corps points to do not actually mitigate project impacts. For instance, the Corps claims the reduction in the number of gravel mines (41 to 15 sites) is an important avoidance and minimization measure.²³⁹ But the JROD admits that an "additional 26 material sites up to 142 acres in size and spaced every 5 to 10 miles along the roadway" may be permitted later to supply sufficient quantities of gravel.²⁴⁰ The Corps cannot categorize impacts as being avoided or minimized when it anticipates permitting them

²³⁵ ACE_0022399.

²³⁶ *Supra* Parts II.A–B.

²³⁷ *Supra* Part I.B.

²³⁸ *Supra* nn.189–91 and accompanying text.

²³⁹ ACE_0022426.

²⁴⁰ ACE_0022437; *supra* Part I.B.1.

later.²⁴¹ The Corps' conclusory statements about avoidance and minimization are not an analysis of whether "appropriate and practicable steps have been taken which will minimize" the Ambler Road's impacts.²⁴²

Second, the Corps failed to require compensatory mitigation "sufficient to replace lost aquatic resource functions."²⁴³ The Corps "must determine the compensatory mitigation to be required ... based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity."²⁴⁴ The Corps did not find that such mitigation was impracticable.

During the permitting process, the Corps stated that compensatory mitigation would be required "because the project is a large project that would access a vast undeveloped landscape with an abundance of diverse and productive wetlands, streams, ponds and lakes that have high value to communities."²⁴⁵ The Corps explained in 2019 that the agency would determine the amount of compensatory mitigation required "for unavoidable loss of functions to aquatic resources,"²⁴⁶ and later confirmed it would require compensatory mitigation at a minimum for impacts within Gates.²⁴⁷ However, the

²⁴¹ 33 C.F.R. § 325.1(d)(2) (requiring all activities related to project that need a 404 permit be in same permit application).

²⁴² 40 C.F.R. § 230.10(d).

²⁴³ *Id.* § 230.93(f)(1). Replacing lost functions from unavoidable losses is "[t]he fundamental objective of compensatory mitigation." 33 C.F.R. § 332.3(a)(1).

²⁴⁴ 40 C.F.R. § 230.93(a)(1).

²⁴⁵ ACE_0014884.

²⁴⁶ *Id.*

²⁴⁷ ACE_0015314; ACE_0018192.

Corps did not ultimately require any compensatory mitigation, finding for the first time in the JROD that the project's unavoidable resource losses did not warrant compensatory mitigation.²⁴⁸

In reaching this conclusion, the Corps overlooked its own guidance and arbitrarily limited its analysis of the factors that may require compensatory mitigation. The Corps' Guidance identifies six factors that may warrant compensatory mitigation,²⁴⁹ four of which are relevant to the Ambler Road. They include: (1) projects in rare or difficult to replace wetlands; (2) projects that permanently impact more than one-tenth an acre of wetlands or WOUS, or 300-feet of streams where the watershed condition warrants mitigation; (3) placement of fill within 300 feet of fish-bearing waters and jurisdictional wetlands with "more than minimal" impacts; and (4) large-scale projects with adverse aquatic resource impacts, such as mining development and highway projects.²⁵⁰ The Ambler Road traverses and will impact aquatic resources of national importance;²⁵¹ permanently impacts over 1,400 acres of wetlands and over 47 miles of streams in a watershed that warrants mitigation;²⁵² places fill in fish-bearing waters causing

²⁴⁸ ACE_0022422.

²⁴⁹ U.S. Army Corps of Eng'rs, *Alaska District Compensatory Mitigation Thought Process* 5 (Sept. 18, 2018), <https://www.poa.usace.army.mil/Portals/34/docs/regulatory/2018MitigationThoughtProcess.pdf> (listing factors and explaining they are consistent with Corps' regulations).

²⁵⁰ *Id.*

²⁵¹ *Supra* nn.180–82 (EPA comments).

²⁵² ACE 0022272; *infra* n.260 and accompanying text.

significant impacts;²⁵³ and is a large-scale highway project for a mining development with adverse aquatic impacts.²⁵⁴ The Corps ignored all but the third factor regarding watershed conditions, and did not explain its determination that no compensatory mitigation would be required in light of the record evidence demonstrating the relevance of the other factors. The Corps' failure to address these factors was arbitrary.²⁵⁵

Even regarding the watershed factor that was considered, the Corps' analysis was arbitrary. The Corps stated that compensatory mitigation would not be required because the project — in tandem with existing disturbance — would impact less than 5% of the watershed.²⁵⁶ But nothing in the CWA or the Corps' regulations limit its consideration of mitigation to only those impacts that impact a certain threshold of a watershed.²⁵⁷ The goal of the Corps' watershed approach “is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.”²⁵⁸ It does not set a threshold percentage for impacts that

²⁵³ *Supra* nn.183, 189 (explaining project's adverse effects to fish).

²⁵⁴ *Supra* Part II.A.

²⁵⁵ *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010) (“We cannot defer to a void.”); *see also Glista v. Unum Life Ins. Co. of Am.*, 378 F.3d 113, 122 (1st Cir. 2004) (explaining administrative agency's guidance documents are relevant to evaluating whether agency's actions were arbitrary); *Town of Barnstable v. FAA*, 659 F.3d 28, 34–36 (D.C. Cir. 2011) (same).

²⁵⁶ ACE_0022414–15.

²⁵⁷ *See* 33 C.F.R. § 332.3(f)(1); *State Farm*, 463 U.S. at 43 (affirming agency action is arbitrary where it “relied on factors which Congress has not intended it to consider” or “offered an explanation for its decision that runs counter to the evidence before the agency”).

²⁵⁸ *Id.* § 332.3(c)(1); *see also id.* § 332.2 (defining “watershed approach” as an analytical tool for assessing locations and types of mitigation).

must be reached before the Corps requires compensatory mitigation. Even EPA has critiqued this threshold percentage approach as potentially violating the CWA.²⁵⁹ Moreover, the Corps admitted that the magnitude of the project's impacts could be "high," even at a large watershed scale, given the amount of information still missing on the project.²⁶⁰ The Corps' conclusion that the project's impacts were not significant enough to warrant compensatory mitigation ignores this prior acknowledgment.²⁶¹ The Corps' refusal to require compensatory mitigation based on its finding that only a small portion of the watershed would be impacted is arbitrary.

Because the Ambler Road and its secondary and cumulative effects would have extensive and unavoidable adverse impacts, compensatory mitigation was needed to replace lost wetland and aquatic resource functions.²⁶² While the Corps is entitled to deference in determining the extent of mitigation, it cannot forego compensatory mitigation altogether where the record demonstrates that there would be unavoidable resource losses.²⁶³ In sum, the Corps' failure to require mitigation to replace lost aquatic resource functions violated the CWA.

²⁵⁹ Plaintiffs' Motion for Judicial Notice at Ex. A (ECF No. 102-2).

²⁶⁰ ACE_0017417.

²⁶¹ ACE_0022422.

²⁶² 33 C.F.R. § 332.3(a)(1).

²⁶³ 40 C.F.R. § 230.93(a)(1).

III. THE AGENCIES FAILED TO COMPLY WITH TITLE XI OF ANILCA.

Congress enacted Title XI to provide for “an orderly, continuous decisionmaking process” and minimize adverse siting impacts when permitting transportation system units (TSUs) through conservation system units and “to insure the effectiveness of the decisionmaking process.”²⁶⁴ To achieve these goals, Congress established “a single comprehensive statutory authority for the approval or disapproval of applications for such systems.”²⁶⁵ Title XI applies broadly to “any Federal department or agency that has any function or duty” under “any law of general applicability ... to grant any authorization ... without which a transportation or utility system cannot, in whole or in part, be established or operated.”²⁶⁶

Section 1104 requires a very specific process.²⁶⁷ It mandates the submission of a consolidated application on a specific form to all relevant federal agencies on the same day.²⁶⁸ Section 1104 then provides a precise timeline for notice to the applicant regarding the application’s completeness, and, if complete, publication of the EIS.²⁶⁹ All agencies must then make a decision whether to approve the application.²⁷⁰ In reaching its decision,

²⁶⁴ 16 U.S.C. § 3161(a), (c).

²⁶⁵ *Id.*

²⁶⁶ *Id.* § 3162(1), (3).

²⁶⁷ *Id.* § 3164. Congress stated these procedures “supersede[] rather than supplement[] existing law.” Attach. 1 at 2, S. REP. NO. 96-413, at 246 (1979).

²⁶⁸ 16 U.S.C. § 3164(c); *see also* ANILCA § 201(4)(c) (addressing rights-of-way across Gates).

²⁶⁹ 16 U.S.C. § 3164(d), (e).

²⁷⁰ *Id.* § 3164(g); *see also* ANILCA § 201(4)(e) (providing deadline for Gates).

each permitting agency must make specific findings including whether alternative routes are available, the impacts on resources from the TSU, and what measures are necessary to “avoid or minimize negative impacts.”²⁷¹

Title XI further requires that rights-of-way include protective terms and conditions.²⁷² These include, but are not limited to, requirements to ensure the right-of-way is compatible with the conservation system unit’s purposes “to the maximum extent feasible”; “requirements for restoration, revegetation, and curtailment of erosion”; requirements to ensure compliance with air and water quality standards; requirements that the right-of-way be “the minimum necessary width,” and designed to control or prevent damage to the environment, fish and wildlife habitat, property, and public health; requirements to protect subsistence; and requirements to avoid and minimize other adverse impacts.²⁷³

Congress was clear: failure to comply with Title XI’s procedures renders the agencies’ approvals without “any force or effect.”²⁷⁴

²⁷¹ 16 U.S.C. § 3164(g).

²⁷² *Id.* § 3167; ANILCA § 201(4)(e) (making section 1107’s process applicable to Gates).

²⁷³ 16 U.S.C. § 3167(a).

²⁷⁴ *Id.* § 3164(a); *Friends of Alaska Nat’l Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011, 1024–26 (D. Alaska 2020) (explaining Title XI’s mandatory procedures).

A. The Defendants Failed to Follow Title XI's Mandatory Procedures.

The Defendants were required to follow Title XI's procedures to permit a TSU through Gates.²⁷⁵ They did not, rendering their approvals void.

The Defendants violated Title XI because they ultimately did not consider the same project application based on AIDEA's 2020 modified Corps permit. AIDEA submitted its original application to the agencies in 2015 which was deemed incomplete.²⁷⁶ AIDEA revised its application in 2016,²⁷⁷ after which NPS began its EEA process and the other agencies began the NEPA process.²⁷⁸ In 2019, AIDEA made changes to the proposed project to incorporate communications infrastructure and submitted a modified application to all the agencies at that time.²⁷⁹

However, in February 2020, AIDEA revised the project further but only submitted those revisions to the Corps; it did not submit the revised proposal to BLM or NPS.²⁸⁰ The 2020 application proposed building the road to Phase II, eliminating gravel mines without maintenance stations or communications towers, not locating gravel mines in Gates for the Northern route, and reducing the number of bridge crossings and

²⁷⁵ ANILCA § 201(4)(c)–(d) (making section 1104's process applicable to Gates).

²⁷⁶ NPS_0050256–57 (2015 application); *supra* n.15 (deeming incomplete).

²⁷⁷ NPS_0000155–78.

²⁷⁸ BLM_0000501–03.

²⁷⁹ NPS_0003853–58; NPS_0045976–46049; ACE_0008402–77.

²⁸⁰ ACE_0015738–64 (revised Corps permit application); BLM_0016844–45 (Corps describing changes in February revised permit application).

culverts.²⁸¹ AIDEA explained that it made the revisions to reduce impacts.²⁸² As a result, the Defendants considered very different projects with different impacts and the Corps permitted a project that was different from the project and rights-of-way approved by BLM and NPS.²⁸³

This violates Title XI. Title XI is the “single comprehensive statutory authority for the approval or disapproval of applications for” TSUs and directs “an orderly, continuous decisionmaking process.”²⁸⁴ It mandates a consolidated application and outlines the process to be followed very specifically.²⁸⁵ The Defendants failed to adhere to this mandatory process by considering and approving different versions of AIDEA’s application and, ultimately, the Ambler Road. This renders those approvals “without any force or effect.”²⁸⁶

²⁸¹ *Id.*; see also *supra* nn.48–60 and accompanying text (explaining differences in applications).

²⁸² ACE_0015765.

²⁸³ NPS_0009721 (NPS ROD explaining it did not receive the 2020 amended application and describing differences); BLM_0099827 (Corps email noting “[t]he Corps was always working off of a different set of plans than that which was submitted” to other agencies).

²⁸⁴ 16 U.S.C. § 3161; see also Attach. 2 at 2–3, H. REP. NO. 96-97, pt. II, at 91, 203 (Apr. 23, 1979) (explaining bill “resolves the procedural morass of existing law and establishes a coordinated transportation planning and approval process” and intent is to “consolidate and streamline the procedural requirements” for TSU applications).

²⁸⁵ 16 U.S.C. §§ 3162, 3164, 3166, 3167.

²⁸⁶ *Id.* § 3164(a).

B. NPS Failed to Incorporate Adequate Terms and Conditions Into the Right-of-Way.

NPS failed to include adequate terms and conditions in the right-of-way across Gates, violating Title XI. NPS failed to incorporate requirements designed to prevent damage to the environment, “including the minimum necessary width.”²⁸⁷ In the right-of-way, NPS indicated that AIDEA is still “in the pre-construction stage of the project, with field studies, engineering, and design to be undertaken next.”²⁸⁸ Because AIDEA had yet to identify the actual location of the road corridor, NPS authorized a “Conceptual Alignment,” which it defined as a 250- to 400-foot corridor.²⁸⁹ NPS indicated the constructed road corridor would be 100 feet wide and located somewhere within the Conceptual Alignment.²⁹⁰ NPS also authorized all three phases of the road,²⁹¹ despite AIDEA’s amended Corps application that removed Phase III to reduce impacts.²⁹²

NPS’s authorization of an extremely wide “conceptual” right-of-way corridor does not meet ANILCA’s requirement for the agency to issue rights-of-way for the minimum necessary width. As written, the right-of-way provides AIDEA with an open-ended pass to determine and modify the location of the road within a broad area and without the agency ensuring in advance that it has only authorized the minimum necessary width. It

²⁸⁷ *Id.* § 3167(a)(4).

²⁸⁸ NPS_0049697.

²⁸⁹ *Id.*; NPS_0009720.

²⁹⁰ NPS_0049697.

²⁹¹ NPS_0049698–99.

²⁹² ACE_0015753.

is unclear how NPS determined the Conceptual Alignment corridor was the minimum footprint or sufficient to protect resources when AIDEA has yet to do the field work to identify the road location and project design. The fact that the Corps only authorized Phase II of the project indicates that NPS should have also only authorized Phase II — and therefore potentially a narrower and less impactful right-of-way.²⁹³ NPS’s failure to incorporate requirements to minimize the footprint of the right-of-way and impacts on Gates is contrary to ANILCA.

NPS also failed to incorporate adequate terms more broadly into the right-of-way to control or prevent damage to the environment or ensure the right-of-way is compatible with the purposes of Gates “to the maximum extent feasible.”²⁹⁴ Gates’ purposes include maintaining wilderness values, providing for continuing recreation opportunities, and protecting habitat for fish and wildlife.²⁹⁵ Rather than incorporating adequate terms in the right-of-way, NPS included an open-ended provision for AIDEA to complete its plan of development for each phase, and provide information for at least 27 subject areas, at a later point in time.²⁹⁶ The right-of-way stated AIDEA would need to submit plans for construction, operation, maintenance, and termination of the right-of-way and related facilities for each road phase after right-of-way issuance.²⁹⁷ This illustrates AIDEA had

²⁹³ See 16 U.S.C. § 3161(c) (explaining intent “to minimize adverse impacts” of siting TSUs).

²⁹⁴ *Id.* § 3167.

²⁹⁵ ANILCA § 201(4)(a).

²⁹⁶ NPS_0049776.

²⁹⁷ *Id.*

yet to complete its project designs or gather baseline information for permafrost, stream crossings, asbestos, air quality, and more.²⁹⁸ The right-of-way also only requires AIDEA to “take reasonable efforts” to ensure facilities are built and operated in a way that protects scenic, cultural, fish, and wildlife values.²⁹⁹

Listing future plans and calling them “terms and conditions” does not satisfy ANILCA’s requirement that NPS include enforceable terms and conditions in its right-of-way for restoration and reclamation, to ensure activities will not violate air and water quality standards, or to ensure the protection of the environment and Gates’ purposes.³⁰⁰

IV. BLM VIOLATED FLPMA.

BLM’s right-of-way, JROD, and FEIS fail to meet the strict public interest, environmental protection, and application and review requirements of FLPMA. Under FLPMA, a right-of-way that “may have significant impact on the environment” requires submission of a comprehensive “plan of construction, operation, and rehabilitation.”³⁰¹ BLM’s FLPMA regulations contain strict application and approval requirements for rights-of-way. Prior to granting a right-of-way, the applicant must submit, and BLM must approve, a Plan of Development (POD) for the entire project.³⁰²

²⁹⁸ *Id.*; see *supra* Part I.A; cf. *Or. Nat. Desert Ass’n*, 840 F.3d at 571 (stating agency could not do analysis without baseline information).

²⁹⁹ NPS_0049773.

³⁰⁰ 16 U.S.C. § 3167.

³⁰¹ 43 U.S.C. § 1764(d).

³⁰² *Id.*; 43 C.F.R. §§ 2804.12, 2804.25(c).

BLM can only grant a right-of-way if it “will do no unnecessary damage to the environment.”³⁰³ The right-of-way is required to contain terms and conditions that will protect the public interest and meet a number of other requirements to protect resource users, fish and wildlife habitat, and the natural environment.³⁰⁴ These requirements apply to the right-of-way corridor and to the lands and resources outside the corridor that will be affected by the right-of-way.³⁰⁵

In addition, BLM must comply with FLPMA’s overarching requirement that BLM “take any action necessary to prevent unnecessary or undue degradation [UUD] of the [public] lands” when granting a right-of-way.³⁰⁶ FLPMA’s requirement to prevent UUD supplements requirements imposed by other laws.³⁰⁷

BLM failed to meet these strict requirements by: (1) failing to require or approve a complete POD before issuing the right-of-way; (2) failing to analyze the site-specific impacts of the project and its components to support its public interest determination; and (3) failing to prevent UUD by failing to analyze and ensure that the project complies with air quality standards. Accordingly, BLM’s findings that the Ambler Road and its components are in the public interest and comply with FLPMA are arbitrary and capricious.

³⁰³ 43 U.S.C. § 1764(a).

³⁰⁴ *Id.* § 1765.

³⁰⁵ *Id.* § 1765(b).

³⁰⁶ *Id.* § 1732(b); 43 C.F.R. §§ 2801.2(b), 2805.11(a)(5).

³⁰⁷ *Ctr. for Biological Diversity v. Dep’t of Interior*, 623 F.3d 633, 644 (9th Cir. 2010).

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A. BLM Approved the Right-of-Way Grant Without Required Plans.

BLM issued its right-of-way despite the fact tht AIDEA has yet to submit a complete POD. The JROD states AIDEA would “refine” the POD and the “POD would be reviewed and approved by the BLM and made part of the [right-of-way] Grant to AIDEA.”³⁰⁸ That never happened; the right-of-way was issued without a complete POD. The right-of-way details 26 subject areas — such as permafrost, stream crossings, asbestos, ARD, dust control, air quality, and more — that had yet to be addressed in a POD and where AIDEA needed to submit plans addressing those issues.³⁰⁹ Those future plans “will describe in detail the construction, operation, maintenance, and termination of the right-of-way and its associated improvements and facilities.”³¹⁰

That is exactly the information required to be in the POD prior to issuance of the right-of-way.³¹¹ The right-of-way also acknowledges that AIDEA has yet to apply for many of the facilities directly related to the road and right-of-way, including gravel mines and project components.³¹² These necessary project components needed to be part of the complete POD. BLM’s failure to require the submission of a complete POD prior to issuing the right-of-way violates FLPMA.³¹³

³⁰⁸ BLM_0016785; BLM_0016453.

³⁰⁹ BLM_0102328–29.

³¹⁰ BLM_0102328.

³¹¹ 43 U.S.C. § 1764(d).

³¹² BLM_0102329–30 .

³¹³ 43 U.S.C. § 1764(d).

B. BLM Failed to Analyze the Site-Specific Conditions and Impacts from Project Components.

BLM's deferral of review of the the project's gravel mines and other necessary components violates its substantive responsibilities under FLPMA. FLPMA requires that BLM "protect the public interest in the lands traversed by the right-of-way or adjacent thereto."³¹⁴ Yet BLM approved the right-of-way without analysis of the environmental baseline and project impacts.

In *Center for Biological Diversity v. Department of the Interior*, the Ninth Circuit held that BLM's failure to review the potential impacts from its decision renders its "public interest" and other FLPMA findings arbitrary and capricious.³¹⁵ The Court invalidated BLM's finding that a land exchange with a mining company was "in the 'public interest'" because BLM failed to adequately review the impacts that would result from the exchange.³¹⁶ "Without an accurate picture of the environmental consequences of the [project], the BLM cannot determine if the 'public interest will be well served by [approving it].'"³¹⁷

The same holds true here. BLM cannot legitimately conclude that the impacts from over 40 gravel mines, airstrips, access roads, and other components necessary for the Ambler Road are in the "public interest" and "minimize damage to scenic and esthetic

³¹⁴ *Id.* § 1765(b); 43 C.F.R. § 2801.2(a).

³¹⁵ 623 F.3d 633, 647 (9th Cir. 2010).

³¹⁶ *Id.*

³¹⁷ *Id.*

values and fish and wildlife habitat and otherwise protect the environment”³¹⁸ when BLM has never seen the complete plans for this infrastructure. Nor has BLM analyzed the site-specific impacts or obtained baseline information related to these project components.³¹⁹ Moreover, BLM lacked information to conclude that the road itself, particularly its phased construction approach, would serve the public interest.³²⁰ BLM’s issuance of the right-of-way while failing to adequately analyze impacts violates FLPMA.

C. BLM Failed to Ensure All Air Quality Standards Would Be Met.

As detailed above, BLM has yet to quantify the air pollution emissions from the road and project components.³²¹ UUD is defined, in part, as “[f]ail[ing] to comply with ... Federal and state laws related to environmental protection,”³²² and includes “applicable Federal and state air quality standards.”³²³ Therefore, under FLPMA’s “prevent UUD” standard, BLM cannot grant a right-of-way without ensuring all environmental standards are met, including air quality standards.

BLM acknowledged that it must ensure compliance with applicable air quality standards. In response to public comments that the FEIS did not analyze whether the project will comply with the NAAQS, BLM stated that, “[u]nder a potential mitigation

³¹⁸ 43 U.S.C. § 1765(a)(ii), (b)(vi).

³¹⁹ *Supra* Parts I.A–I.B.1.

³²⁰ *Supra* Part I.B.2.

³²¹ *Supra* Part I.B.3.

³²² 43 C.F.R. § 3809.5. Although that definition is contained in BLM’s hardrock mining regulations, that is the only place BLM has defined UUD.

³²³ 43 C.F.R. § 3809.420(b)(4) (performance standards under UUD).

measure, AIDEA would develop a monitoring plan for approval by [BLM] to demonstrate compliance with ... federal and state environmental laws and regulations.”³²⁴ Yet as detailed above, the FEIS does not analyze whether the project will comply with the NAAQS.³²⁵ A future monitoring plan that measures project emissions cannot substitute for BLM’s FLPMA duty to ensure that the project will comply with NAAQS when granting a right-of-way.

BLM’s “permit first, monitor later” plan for ensuring compliance with air pollution standards fails to ensure it has prevented UUD and fails to support BLM’s finding that the project is in the public interest.³²⁶

V. THE COURT SHOULD VACATE THE DEFENDANTS’ DECISIONS.

Vacatur is the presumptive remedy under the APA,³²⁷ which mandates that when agency action violates the law, “[t]he reviewing court shall ... hold unlawful and set aside [the] agency action.”³²⁸ The Court should apply the presumptive remedy here. There will be no environmental harm or disruptive consequences from vacating the decisions; instead, vacatur will ensure protection of the Ambler region.³²⁹ Additionally, the legal violations go to the core purposes of the statutes and the heart of the agencies’

³²⁴ BLM_0016572.

³²⁵ *Supra* Part I.B.3.

³²⁶ *Ctr. for Biological Diversity*, 623 F.3d at 647 (lack of supporting analysis renders BLM’s public interest determination arbitrary and capricious).

³²⁷ *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018).

³²⁸ 5 U.S.C. § 706(2).

³²⁹ *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015).

decisions.³³⁰ Accordingly, vacatur is warranted.³³¹ The agencies also violated Title XI, which voids actions taken without compliance with its procedures.³³²

CONCLUSION

This Court should grant Plaintiffs' Motion for Summary Judgment, and vacate and declare void the JROD, FEIS, 404 permit, rights-of-way, and related documents.

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³³⁰ 40 C.F.R. § 1500.1 (NEPA); 33 U.S.C. § 1251(a) & 40 C.F.R. § 230.1 (CWA); 43 U.S.C. § 1764 (FLPMA); 16 U.S.C. §§ 3161, 3167 (ANILCA Title XI).

³³¹ *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *see also Pollinator Stewardship Council*, 806 F.3d at 532 (noting "limited circumstances" of remand without vacatur).

³³² 16 U.S.C. § 3164(a); *Friends of Alaska Nat'l Wildlife Refuges*, 463 F. Supp. 3d at 1027 (decision violating Title XI has "no force or effect").

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 13,966 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits requested in Plaintiffs' Unopposed Motion to File Overlength Brief (ECF No. 100).

s/ Suzanne Bostrom
Suzanne Bostrom

CERTIFICATE OF SERVICE

I certify that on December 1, 2021, I caused a copy of the PLAINTIFFS' OPENING BRIEF FOR SUMMARY JUDGMENT to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system.

s/ Suzanne Bostrom
Suzanne Bostrom