

DEPARTMENT OF THE ARMY

ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS REGULATORY DIVISION
P.O. BOX 6898
JBER, AK 99506-0898

August 20, 2024

Regulatory Division POA-2003-00502-M21

Steve Ribuffo Municipality of Anchorage, Port of Alaska 2000 Anchorage Port Road Anchorage, Alaska 99501

Dear Mr. Ribuffo:

This is in regard to your application for a Department of the Army (DA) permit; file number POA-2003-00502-M21, Knik Arm. Enclosed is a copy of a letter from the EPA dated August 16, 2024, and an email from Eklutna, Inc. dated July 19, 2024.

It is the policy of the DA to provide an applicant the opportunity to furnish a proposed resolution or rebuttal to all objections and other substantive comments before a final decision is made on a proposed project. In this regard, we would appreciate receiving any comments that you may have on this matter. In particular, we request that you address the following issues:

- 1. EPA's comment A. Evaluating the Potential Effects of the Discharges of Dredged or Fill Material.
- 2. EPA's comment B. Compensatory Mitigation.
- 3. NMFS general comment regarding Essential Fish Habitat.
- 4. Eklutna, Inc.'s request to be considered as a material source.

You may voluntarily elect to contact the EPA and Eklutna, Inc. in an attempt to resolve the matter but are not required to do so, since the DA alone is responsible for making the final decision on the application. However, you should be aware that all recommendations on projects proposed to be authorized by a permit must be given full consideration in making our public interest review determination, as required by law.

The concerns expressed by the EPA and Eklutna, Inc. appear to this office to be substantive. In order to complete the public interest review these concerns must be addressed. Please give your immediate attention to this matter in order to expedite the evaluation process of your permit application. It is recommended that you provide us with your comments on the matter within **30 days** of the date of this letter. Failure to do so could result in the denial of your permit unless there are substantive mitigating factors to preclude such a response.

Please contact me via email at Kerri.C.Hancock@usace.army.mil, by mail at the address above, by phone at (907) 753-2719, or toll free from within Alaska at (800) 478-2712, if you have questions. For more information about the Regulatory Program, please visit our website at www.poa.usace.army.mil/Missions/Regulatory.

Sincerely,

Kerri Hancock Project Manager

Enclosures



August 16, 2024

Ms. Kerri Hancock Project Manager U.S. Army Corps of Engineers Alaska District, Regulatory Division P.O. Box 6898 JBER, Alaska 99506

Dear Ms. Hancock:

The U.S. Environmental Protection Agency has reviewed the U.S. Army Corps of Engineers, Alaska District (Corps) Public Notice (PN) POA-2003-00502-M21 dated July 17, 2024, for compliance with the restrictions on discharge contained in the Clean Water Act (CWA) Section 404(b)(1) Guidelines. The PN describes a proposal by the Port of Alaska to remove existing infrastructure at the Port of Alaska and construct new general cargo terminals. The proposed dock expansion would impact waters of the U.S. (WOTUS) resulting from the excavation and disposal of 50,000 cubic yards (cy) of sediment at the Anchorage Harbor Open Water Dredged Material Placement Area, the placement of 121,100 cubic yards of gravel and armor rock in 7.3 acres of intertidal and subtidal waters, and the side casting of 1,000 cy of sediment over an additional 4 acres.

The EPA has reviewed the proposed discharges for compliance with the restrictions on discharge contained in the CWA Section 404(b)(1) Guidelines (Guidelines).² Compliance with the Guidelines must be demonstrated before proposed discharges of dredged or fill material may be permitted. In addition to the PN, the EPA has reviewed the Permit Application dated July 20, 2023;³ Cargo Terminals Replacement Project Appendix A: Project Description dated June, 2024;⁴ and Cargo Terminals Replacement Project Appendix C: Avoidance, Minimization, and Compensation Statement dated July, 2023.⁵ We appreciate being provided with the additional requested project materials.

The EPA is providing the following comments to support the Corps in making a defensible permit decision. Based on information reviewed, it is not clear that the proposed discharges comply with Guidelines, and additional information is requested to demonstrate compliance. Specifically, additional

¹ US Army Corps of Engineers. 2024. Public Notice of Application for Permit, POA-2003-00502-M21, Knik Arm. July 17, 2024.

² 40 CFR Part 230.

³ Permit Application.

⁴ Cargo Terminals Replacement Project Appendix A: Project Description. Jacobs and HDR. June 2024.

⁵ Cargo Terminals Replacement Project. Appendix C: Avoidance, Minimization, and Compensation Statement. Jacobs and HDR. June 2024.

information may be required to characterize sediments in order to make a factual determination about the proposed in-water disposal of excavated sediments. Additionally, the EPA is concerned about the lack of proposed compensatory mitigation for the proposed discharges into 7.3 acres of WOTUS. The EPA is providing the following comments to support the Corps in making a defensible permit decision.

A. Evaluating the Potential Effects of the Discharges of Dredged or Fill Material

The Guidelines are the substantive environmental criteria used to evaluate proposed discharges of dredged or fill material. The Guidelines require that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge, that meets the project purpose, which has less adverse impacts on the aquatic ecosystem. The Guidelines require the Corps to make written factual determinations of the potential short-term or long-term effects of a proposed discharge on the physical, chemical, and biological components of the aquatic environment and "[s]uch factual determinations shall be used in § 230.12 in making findings of compliance or non-compliance with the restrictions in § 230.10."

The attachment to the permit application, Appendix C, describes the steps taken during project design to avoid, minimize, and compensate for impacts. Section 1 of Appendix C indicates that the project is water dependent and cannot avoid impacts to WOTUS and that space limitations prevent on-site upland disposal. Regarding off-site upland disposal, the applicant states, "To move that amount of material (50,000 cubic yards) to an offsite upland disposal site will require more than 4,000 dump truck loads. Offshore disposal will require approximately 16 barge loads, making this option much more efficient and less costly, and reducing air emissions from diesel engines."

The EPA is concerned contamination may exist in and around the project area and there is the potential for the proposed dredged sediments to harbor contamination. Additional information is needed regarding the physical and chemical characteristics of the sediment to be disposed of at the Anchorage Harbor Open Water Dredged Material Placement Area to demonstrate that this proposal complies with the Guidelines. Specifically, additional information is needed to make a contaminant determination as required under 40 CFR § 230.11(d). Depending on the contaminant toxicity levels identified in the sediment to be mobilized, other practicable measures may be required to demonstrate compliance with the Guidelines, specifically 40 CFR § 230.10(a).

In the past, the EPA has suggested the Corps' use the Seattle District Dredged Material Evaluation and Disposal Procedures User Manual (User Manual) for evaluating the suitability of dredged material for projects in Alaska. This manual was only recommended as regionally-specific interim guidance while the EPA, the Corps, and the Alaska Department of Environmental Conservation collaboratively developed the the Alaska Dredged Material Evaluation Framework (ADMEF), of which a draft was released in May 2024. The ADMEF provides a framework for assessing and characterizing dredged

⁶ 40 CFR § 230.10(a).

⁷ Cargo Terminals Replacement Project. Appendix C: Avoidance, Minimization, and Compensation Statement. Jacobs and HDR. June 2024. p. 1-1.

⁸ U.S. Army Corps of Engineers - Alaska District, U.S. Environmental Protection Agency - Region 10, and Alaska Department of Environmental Conservation. 2024. Draft Alaska Dredged Material Evaluation Framework (ADMEF). pp 143. Available at: https://www.poa.usace.army.mil/Portals/34/docs/operations/DraftAlaskaDredgedMaterialEvaluationFrameworkMay2024.pdf

material to determine its suitability for aquatic discharge and for ensuring that DA permits comply with the Guidelines. The EPA recommends the Corps use the ADMEF for clear and consistent regional guidance on projects that would dispose of dredged sediments in-water.

The ADMEF outlines how the tiered analysis provides the information needed to make a factual determination about the placement of dredged material as required by the Guidelines. There are four tiers of evaluation: 1. Site Evaluation and History, 2. Chemical Testing, 3. Biological Testing, and 4. Special Studies. Every project is subject to a Tier 1 Evaluation, which may be the only tier required for a suitability determination, or it may indicate further evaluation by the next tiers. The decision of whether or not to proceed to the next tier is the project proponent's decision and the option of disposing of material in an upland location instead of testing for an in-water discharge is always available. Information revealed by the four-tiered approach to characterize sediment for discharge into WOTUS may be used to refine the additional measures that may be required to demonstrate the discharges are the least environmentally damaging practicable alternative (LEDPA). The Guidelines indicate that the Corps is only able to issue a CWA Section 404 permit for the LEDPA.

The project materials reviewed by the EPA did not include enough information to satisfy a Tier 1 evaluation of the 50,000 cy of silt that the applicant is proposing to dredge and dispose of in the Anchorage Harbor Open Water Disposal Site. A full list of the components of a Tier 1 evaluation is provided in Section 4 of the ADMEF. Based on a review of the available information, the EPA recommends pursuing a Tier 2 evaluation rather than a Tier 1 analysis given the numerous recent spills reported in ADEC's Prevention Preparedness and Response Spills Database. ¹² The EPA understands that the Port of Alaska has collected sediment samples from the project area and that they are currently undergoing laboratory analysis. ¹³ The EPA recommends that the Corps evaluate the results of the sediment sampling using the guidance provided in the ADMEF in order to make a defensible permit decision. Without the opportunity to review a sampling and analysis plan for the sediments, it is unclear to the EPA if the current sampling efforts will be sufficient to inform the Corps' factual determination. Depending on what information gaps remain, additional chemical samples or further tiers of sediment characterization may still be needed.

If the sediments evaluated in this proposal are be found to not be suitable for in-water disposal, the applicant should identify an alternative upland disposal site for the dredged material. The EPA believes finding an alternative upland disposal site is prudent because, even if the 50,000 cy subject to evaluation as part of this project are found to be suitable for in-water disposal, continued maintenance dredging, redevelopment, and expansion at the Port of Alaska may require an upland disposal option in the future if contamination is detected in sediments at a later time.

⁹ ADMEF. p. 1-1.

¹⁰ ADMEF. p. 3-3.

¹¹ Provided that it complies with the other portions of the Guidelines.

¹² Alaska Department of Environmental Conservation. (n.d.). PPR Spills Database. Accessed August 16, 2024. Available at: <a href="https://dec.alaska.gov/Applications/SPAR/PublicMVC/PERP/SpillSearch?SPage=1&PageSize=10&SpillLocation=416&SpillDateFrom=01%2F01%2F0001%2000%3A00%3A00&SpillDateTo=08%2F07%2F2024%2000%3A00%3A00&SpillLocation=2&SpillRegion=18&SpillSubarea=4&SpillSearchButton=Search

¹³ Kerri Hancock, USACE. E-mail communication. August 7, 2024.

B. Compensatory Mitigation

Demonstrating compliance with the Guidelines at 40 CFR § 230.10(d) necessitates identifying and implementing appropriate steps to avoid, minimize, and compensate for any remaining unavoidable impacts associated with discharges subject to the Guidelines, as outlined in the 1990 Memorandum of Agreement regarding Mitigation between the EPA and the Department of Army. These steps form a mandatory mitigation sequence that must be followed in order, and no step may be substituted for another. This sequence was reaffirmed in the 2008 Final Rule on Compensatory Mitigation. ¹⁴ Furthermore, the Guidelines at 40 CFR § 230.93(f)(1) specify that "the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions... If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used." There is no threshold below which compensatory mitigation is not required.

The 7.3-acre area proposed for excavation and fill with gravel may include mudflats. The Guidelines classify mudflats as "special aquatic sites" that are important to protect for the functions and values they provide of providing foraging areas, nursery areas, and capacity to dissapate storm run off. ¹⁵ The proposed activity would directly impact some of these functions, and avoidance and minimization measures would not be sufficient to prevent the loss or reductions in functions and values.

The Port of Alaska has not proposed any compensatory mitigation for the proposed discharges into 7.3 acres of WOTUS stating that, "Due to the described avoidance and minimization measures, and the CTR Project not impacting wetlands, the Port does not propose compensatory mitigation for impacts to waters of the U.S. at this time. If USACE determines that compensatory mitigation is required, then the Port will purchase credits from an approved mitigation bank or in-lieu fee sponsor." ¹⁶

The Guidelines and 2008 Final Rule on Compensatory Mitigation are clear that compensatory mitigation is applicable for impacts to all types WOTUS from discharges authorized by DA permits.¹⁷ The Guidelines require that compensation be provided if it is practicable to provide.¹⁸ The applicant's mitigation statement does not clearly demonstrate that it would be impracticable to fully compensate for the functional impacts lost as a result of the proposed project. The applicant should seek mitigation credits from an approved mitigation bank or in-lieu fee program as proposed in their compensatory mitigation statement. If no in-kind credits are available, permittee responsible mitigation may still be required. A final mitigation plan must be approved prior to issuance of an individual permit and must be incorporated into the permit by reference. The final mitigation plan must include the items described in paragraphs (c)(2) through (c)(14) of 40 C.F.R. § 230.94(c)(1)(i). Any final mitigation plan associated with a CWA Section 404 permit, should a permit be issued, must comply with the joint EPA-Corps Final Rule on Compensatory Mitigation for Losses of Aquatic Resources. The EPA would appreciate receiving a copy of any mitigation plan that the applicant provides to offset the unavoidable losses resulting from the proposed discharges.

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¹⁴ 33 C.F.R. Parts 325 and 332 and 40 C.F.R. Part 230.

^{15 40} CFR § 230.42.

¹⁶ Cargo Terminals Replacement Project. Appendix C: Avoidance, Minimization, and Compensation Statement. Jacobs and HDR. June 2024, p. 3-1.

¹⁷ 33 C.F.R. Parts 325 and 332 and 40 C.F.R. Part 230. P. 19596.

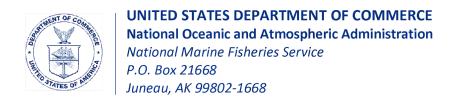
¹⁸ 40 CFR § 230.93(f)(1).

The EPA appreciates the opportunity to provide comments on the proposed Cargo Terminals Replacement Project. We look forward to working with the District as necessary to address the issues raised in this letter, including questions about the draft ADMEF, sediment characterization, or compensatory mitigation. Should you have any questions or require further information, please do not hesitate to contact me at (206) 553-0285 or by email at jensen.amy@epa.gov, or you may contact Sarah Burgess at (206) 553-6698 or by email at burgess.sarah@epa.gov.

Sincerely,

Amy Jensen Regional Wetland Coordinator

cc: Charleen Buncic, U.S. Fish and Wildlife Service, charleen_buncic@fws.gov Seanbob Kelly, U.S. National Marine Fisheries Service, seanbob.kelly@noaa.gov



August 1, 2024

Colonel Jeffrey Palazzini, District Commander U.S. Army Corps of Engineers Regulatory Division P.O. BOX 6898 JBER, AK 99506-0898

Re: Port of Alaska Improvements, POA-2003-00502-M21; NMFS ECO Reference No. INQ-2024-00189

Dear Colonel Jeffery Palazzini:

The National Marine Fisheries Service has reviewed the Public Notice of Application for Permit provided on July 17, 2024 regarding the above referenced project. The purpose of this project is to replace Port of Alaska's aging docks and related infrastructure before it fails, to: improve operational safety and efficiency; accommodate modern shipping operations; and improve resiliency to survive extreme seismic events and sustain ongoing cargo operations. The proposed scope of work includes the removal of existing infrastructure and the construction of newly configured general cargo terminals including ground improvement for shoreline stabilization, shoreline expansion and protection. As noted in your letter, you are currently gathering information regarding potential impacts and fishery and habitat resources in the project area of Anchorage Harbor. We offer the following comments regarding the proposed project.

Essential Fish Habitat Consultation Process

Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and the Fish and Wildlife Coordination Act require Federal agencies to consult with us on all actions that may adversely affect essential fish habitat (EFH) and other aquatic resources. The EFH consultation process is guided by the regulation at 50 CFR 600 Subpart K, which mandates the preparation of EFH assessments and outlines each agency's obligations. For any Federal action that may adversely affect EFH, Federal agencies must provide us with a written assessment of the effects of that action on EFH. The assessment must contain (50 CFR 600.920(e)):

- 1. A description of the action;
- 2. An analysis of the potential adverse effects of the action on EFH and the managed species;
- 3. The Federal agency's conclusions regarding the effects of the action on EFH; and
- 4. Proposed mitigation, if applicable.



If appropriate, the assessment should also contain additional information, including:

- 1. The results of an on-site inspection to evaluate the habitat and the site specific effects of the project;
- 2. The views of recognized experts on the habitat or species that may be affected;
- 3. A review of pertinent literature and related information;
- 4. An analysis of alternatives to the action. Such analysis should include alternatives that could avoid or minimize adverse effects on EFH: and
- 5. Other relevant information.

The level of detail in an EFH assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action. For example, the assessment may be brief for relatively simple actions involving minor adverse effects on EFH. Actions that may pose a more serious threat to EFH warrant a correspondingly detailed EFH assessment. If an EFH assessment is contained in another document, it must include all of the required information and be clearly identified as an EFH assessment.

General Comments

We have been in discussions on Port of Alaska improvement projects since 2005. The industrial area is already heavily impacted. We have no conservation recommendations that would mitigate impacts further. However, we do have concerns associated with acoustic impacts from proposed demolition and construction on Pacific salmon and suggest you consider timing windows to mitigate adverse impacts. Moreover, your EFH assessment should describe proposed measures to ensure contaminated sediments, oil spills, and invasive species introductions do not further impact EFH near the project.

Our *Impacts to Essential Fish Habitat from Non-Fishing Activities in Alaska* (Limpinsel et al. 2023) provides information and potential conservation recommendations for your consideration including the following sections: 3.4.4 Urban and Suburban Development; 5.4.1 Dredging; 5.4.2 Materials Disposal and Filling Activities; 5.4.3 Disposal of Dredged Material; 5.4.4 Discharge of Fill Material; 5.4.5 Vessel Operations, Transportation, and Navigation; 5.4.6 Invasive Species; 5.4.7 Pile Installation and Removal; 5.4.8 Pile Driving; 5.4.9 Pile Removal; 5.4.10 Overwater Structures; and, 5.4.11 Flood Control/Shoreline Protection. Conservation recommendations we previously provided to minimize adverse effects to EFH for similar projects in the past have included construction timing windows, minimize pile driving noise, use of locally sourced clean fill and riprap, sediment testing, and the development of an oil spill response plan. Final conservation recommendations will be provided based on your EFH assessment and conclusion of effects. Also consider the following EFH resources while determining effects of your proposed project: a one-page EFH Fact Sheet and our Regional website, where you can find FAQs.

Questions regarding these comments should be directed to Seanbob Kelly at seanbob.kelly@noaa.gov.

Sincerely,

Catherine Coon Assistant Regional Administrator Habitat Conservation

cc: Kerri Hancock, USACE, <u>kerri.c.hancock@usace.army.mil</u>
Mathew LaCroix, EPA, <u>LaCroix.Matthew@epa.gov</u>

References

Limpinsel, D., S. McDermott, C. Felkley, E. Ammann, S. Coxe, G.A. Harrington, S. Kelly, J.L. Pirtle, L. Shaw, and M. Zaleski. 2023. Impacts to Essential Fish Habitat from Non-Fishing Activities in Alaska: EFH 5-year review from 2018-2023. National Marine Fisheries Service, Alaska Region, Juneau, Alaska. U.S. Dep. Commerce, NOAA Tech. Memo. NMFS-F/AKR-30. doi: 10.25923/9z4h-n860.

From: Kyle Foster

To: Hancock, Kerri CIV USARMY CEPOA (USA); Info; Kyle Smith

Cc: Allen, Jeremy M CIV USARMY CEPOA (USA); O"Donnell, Sean M CIV USARMY CEPOA (USA)

Subject: [Non-DoD Source] RE: POA-2003-00502-M21, Knik Arm, Port of Alaska, Eklutna Inc. Coordination

Date: Friday, July 19, 2024 10:54:38 AM

Dear Ms. Hancock,

I hope this message finds you well. I am writing in reference to the permit application for the replacement of cargo terminal infrastructure at the Port of Alaska, currently under review by the U.S. Army Corps of Engineers.

Given that the project site is located on lands that were originally Eklutna lands, we respectfully request special consideration for our alluvial gravel, hard rock, and non-organic fill sites. It is our belief that any material removed from this area should be replaced with material sourced from the indigenous area to preserve the cultural significance of the land.

The land in and around the Ship Creek area has been used for generations by the Eklutna people for fish harvesting and other vital purposes. This historical and cultural connection makes it imperative that Eklutna land be used in the construction and development of this area. Specifically, we would like to propose that aggregate from the current Eagle River area be used for this purpose.

Eklutna, Inc. possesses the necessary capabilities and materials to supply high-quality fill that would honor the cultural importance of our heritage. Utilizing Eklutna material for this project will ensure that the land maintains its historical and cultural integrity.

We would greatly appreciate any consideration you could give to this matter. Ensuring the use of culturally significant materials from Eklutna would not only support the project's logistical needs but also uphold the cultural heritage of the area.

Thank you for your attention to this request. We look forward to your response and hope to collaborate closely to maintain the cultural importance of this land.

Kind regards,

Kyle Foster CEO, Eklutna, Inc.

Kyle Foster

Chief Executive Officer Eklutna, Inc.

P 907.696.2828 ext 608

Email: kfoster@eklutnainc.com

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Together, with integrity, we build our company to grow profits and opportunities for all shareholders

From: Hancock, Kerri CIV USARMY CEPOA (USA) < Kerri.C. Hancock@usace.army.mil>

Sent: Thursday, July 18, 2024 7:57 PM

To: Info <info@eklutnainc.com>; Kyle Foster <kfoster@eklutnainc.com>; Kyle Smith <ksmith@eklutnainc.com>

Cc: Allen, Jeremy M CIV USARMY CEPOA (USA) < Jeremy.M.Allen@usace.army.mil> **Subject:** POA-2003-00502-M21, Knik Arm, Port of Alaska, Eklutna Inc. Coordination

Good afternoon President Curry,

We are reaching out to you today in regard to POA-2003-00502-M21, Port of Alaska Cargo Terminals Replacement Project. Please see the attached Public Notice describing the proposed work.

The Alaska District values our relationship with Eklutna Inc., and we hope your community and families are well. Please do not hesitate to contact me with any concerns or questions.

Respectfully, Kerri

Kerri Hancock

Project Manager South Section, Alaska District U.S. Army Corps of Engineers kerri.c.hancock@usace.army.mil

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