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Via Electronic Mail

Sterling Highway MP 45-60 Project
Alaska Department of Transportation and Public Facilities
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**RE: Comments on the Sterling Highway Milepost 45 to 60 Project Draft
Supplemental Environmental Impact Statement**

To Whom It May Concern:

Defenders of Wildlife, joined by Audubon Alaska, Center for Biological Diversity, Cook Inletkeeper, Friends of Alaska National Wildlife Refuges, Kachemak Bay Conservation Society, National Wildlife Refuge Association, Sierra Club Alaska Chapter, and Wilderness Watch, on behalf of our committed members within the state of Alaska and millions of supporters nationwide, submit the following comments on the Sterling Highway Milepost 45 to 60 Project¹ Draft Supplemental Environmental Impact Statement (“DSEIS”).

I. INTRODUCTION

The Sterling Highway transects the Kenai Peninsula in south-central Alaska, connecting Anchorage with the ports of Homer, Soldotna, and Kenai. The highway traverses some of the most scenic and wild land in the country. From its junction with the Seward Highway near Turnagain Pass, the Sterling Highway bisects a portion of the Chugach National Forest, with inventoried roadless areas on both sides of the highway. At about mile 60, the highway enters the Kenai National Wildlife Refuge, passing just a few hundred feet from congressionally designated wilderness.

¹ *Hereinafter* referred to as the “Project,” “project,” or “Cooper Landing Bypass.”

Over its entire length, the Sterling Highway crosses important wildlife habitat and recreation areas. Brown bears, wolves, moose, lynx, and other wildlife move from their northern ranges near Turnagain Arm, to the main southern portions of the Kenai Peninsula through drainages and tributaries to the Kenai River, which the Sterling Highway crisscrosses from Kenai Lake to Skilak Lake. Wildlife movement through these corridors is important for genetic diversity on the Kenai.²

Outdoor recreation is also common on the highway's route through the national forest and national wildlife refuge. Each summer tens of thousands of fishermen congregate on the banks of the Kenai and Russian Rivers to fish for salmon. Hiking, mountain biking, skiing, and snowmachining trails depart from numerous trailheads located along the highway. Widely recognized as one of the nation's best hikes, and considered the "crown jewel" of the Chugach National Forest, the Resurrection Pass Trail departs from the highway, following Juneau Creek near the scenic Juneau Falls. The Sterling Highway is a remarkable road precisely because of its spectacular scenery and opportunities for remote recreation and wildlife viewing.

A. The Project

The Federal Highway Administration ("FHWA") and the Alaska Department of Transportation and Public Facilities ("DOT&PF") have proposed a highway improvement project for the Sterling Highway between mileposts 45 and 60. The original highway was constructed in 1950 as a gravel road from Cooper Landing to Homer. Over the past 65 years, new communities developed along the road and the highway was eventually paved to become a thoroughfare, connecting Anchorage with western Kenai Peninsula towns. Consequently, traffic increased beyond what the original designers of the gravel road could have imagined.

In the 1980s, the DOT&PF decided to make safety and engineering improvements to the highway. Most highway sections were soon reconstructed to widen and straighten shoulders and lanes, accommodating increased traffic and increased vehicle speeds. But the most challenging section from an environmental and engineering standpoint, from mileposts 37 to 60, remained unimproved. This section posed problems ranging from winding curves, sharp turns, narrow roadways, canyons, steep river banks, wildlife crossings, driveway entrances, multiple river crossings, and the community of Cooper Landing.

² See Sean Farley, Federal Aid Final Research Report: Ecological Studies of the Kenai Peninsula Brown Bear, Alaska Department of Fish & Game, Project 4.29 (2005) (available at www.adfg.alaska.gov/static/home/library/pdfs/wildlife/research_pdfs/brb-kenai05.pdf).

DOT&PF considered a number of new routes for the highway for mileposts 37 to 60, and produced a draft environmental impact statement (“EIS”) in 1982 and another draft EIS in 1994. The alternatives contained in those draft EISs were rejected “for engineering, environmental, financial, and traffic constraint reasons.”³

Because the primary difficulty in improving the section between mileposts 37 and 60 came from the Cooper Landing area (mileposts 45 to 60), DOT&PF split the project into two components: the lower Kenai section from mileposts 37 to 45 and the Cooper Landing section from mileposts 45 to 60.⁴ In 2001 DOT&PF completed an improvement project for the highway from mileposts 37 to 45, widening and straightening the roadway and shoulder, and adding passing lanes and pullouts.

In 2000 DOT&PF initiated a supplemental EIS for highway improvements to the section between mileposts 45 to 60.⁵ Planners identified multiple alternatives that would re-route the road away from the existing highway alignment. Each alternative was screened for engineering feasibility, and many of the alternatives required construction of multiple new bridges, including the proposed Juneau Creek Bridge, which would be “the longest span in Alaska.”⁶ DOT&PF estimated the costs for this megaproject range from \$250 to \$304 million.⁷

The current DSEIS identifies four alternatives that re-route the highway onto a new alignment (“build alternatives”) and one no build alternative.⁸ The no build alternative leaves the highway between mileposts 45 and 60 on its existing alignment and makes no safety upgrades other than regularly scheduled road maintenance.⁹ The highway from mileposts 45 to 60 would remain two lanes, with 11-foot driving lanes and 0–2-foot shoulders.¹⁰ A separate, existing project would be undertaken to improve safety on a curve at milepost 45.¹¹ For much of the fifteen mile section, the highway bisects the community of Cooper Landing

³ DOT&PF, Project History, www.sterlinghighway.net/history.html (last visited May 12, 2015).

⁴ *Id.*

⁵ “The current Supplemental EIS (SEIS) process for the highway between MP 45 and 60 was initiated in 2000, with the purpose of supplementing the 1994 Draft EIS for MP 37 to 60.” *Id.*

⁶ DOT&PF, STERLING HIGHWAY MP 45-60 DRAFT SEIS AND DRAFT SECTION 4(F) EVALUATION 2-30 (2015) [hereinafter *DSEIS*].

⁷ DOT&PF, Frequently Asked Questions, www.sterlinghighway.net/faqs.html (last visited May 12, 2015).

⁸ *See* DSEIS, 2-1 to 2-54.

⁹ *Id.* at 2-16.

¹⁰ *Id.*

¹¹ *Id.*

– driveways and road intersections are common; pedestrians, bicycles, and horseback tours use and cross the road; and the section has 35 to 45 mph speed limits.

The first build alternative, the Cooper Creek Alternative, proposes a new highway alignment for approximately four road miles on the south side of the existing highway.¹² The Cooper Creek Alternative bypasses Cooper Landing to the south, requiring a new bridge over Cooper Creek.¹³ The four miles of new alignment would consist of up to four 12-foot driving lanes and 8-foot shoulders, at a grade of between 3 and 6 percent.¹⁴

The second build alternative, the G South Alternative, proposes a new alignment for approximately 5.5 road miles on the north side of the existing highway.¹⁵ The G South Alternative would construct a new bridge over the Kenai River and a new bridge over Juneau Creek. The new alignment would consist of two 12-foot driving lanes plus a passing lane and 8-foot shoulders.¹⁶ A new trailhead would be built for the Bean Creek Trail, and the existing Bean Creek Trail would be rerouted through an underpass under the new highway.¹⁷

The third build alternative, the Juneau Creek Alternative, proposes a new alignment for 9.5 road miles on the north side of the existing highway.¹⁸ The Juneau Creek Alternative would construct a new bridge, the Juneau Creek Bridge – which would be the longest span bridge in Alaska – and consist of 12-foot driving lanes plus passing and turning lanes and 8-foot shoulders.¹⁹ The Juneau Creek Alternative cuts through the congressionally designated Kenai Wilderness within the Kenai National Wildlife Refuge.²⁰ The DSEIS acknowledges that DOT&PF is “unlikely to select the Juneau Creek Alternative as the preferred alternative” because building a highway through designated wilderness requires congressional authorization.²¹

The fourth build alternative, the Juneau Creek Variant Alternative, modifies the Juneau Creek Alternative to avoid the Kenai Wilderness.²² The Juneau Creek Variant Alternative

¹² *Id.* at 2-20.

¹³ *Id.*

¹⁴ DSEIS at 2-20.

¹⁵ *Id.* at 2-25.

¹⁶ *See id.* at 2-17; 2-25.

¹⁷ *Id.* at 2-25.

¹⁸ *Id.* at 2-28.

¹⁹ *Id.* at 2-30; *see id.* at 2-17; 2-28.

²⁰ DSEIS at 2-28.

²¹ *Id.*

²² *Id.* at 2-32.

proposes a new alignment for 8.8 road miles on the north side of the existing highway.²³ A new bridge would be built and the new highway would consist of 12-foot driving lanes plus passing lanes and 8-foot shoulders.²⁴ The Juneau Creek Alternative would pass over existing Forest Service roads, requiring an overpass or underpass near Juneau Creek. A new pullout would be constructed north of the highway near Juneau Creek and a “large trailhead parking area would be constructed for the Resurrection Pass Trail.”²⁵

B. Summary of Our Comments

After a thorough review of the history of this project, the DSEIS, and supporting documents, we have serious concerns about the adequacy of the analysis and the proposed build alternatives’ effects on the environment. Although we think the goal of improving safety on the Sterling Highway, especially between mileposts 45 and 60 is laudable – and even necessary – the four build alternatives’ effects on wildlife, recreation, and scenic views are likely to be significant and any potential mitigation will be insufficient to justify a massive new highway megaproject immediately adjacent to congressionally designated wilderness and inventoried roadless areas.

In this letter, we have identified an alternative that satisfies the safety needs for the community and highway travelers within the existing alignment. Thus, there is no need to construct a new highway that will erect a deadly barrier to wildlife crossings, increase use and degrade quality of remote recreation, and obstruct scenic vistas of the beautiful mountains, valleys, and rivers of the Kenai Peninsula.

Our comments on the project can be summarized as follows:

- 1) The DSEIS and Section 4(f) evaluation fail to provide sufficient information for meaningful public comment because the FHWA and DOT&PF did not identify their preferred alternative, environmentally preferred alternative, and least harmful alternative.
- 2) The DSEIS establishes an unreasonably narrow purpose and need for the project, and fails to analyze a reasonable range of alternatives, including an alternative that makes safety upgrades to the existing highway alignment.

²³ *Id.*

²⁴ *Id.*; *see id.* at 2-17.

²⁵ *See id.* at 2-29.

- 3) The DSEIS provides an inadequate analysis of the effects on inventoried roadless areas within the Chugach National Forest. The DSEIS unreasonably minimizes effects on roadless areas by attempting to equate size of roadless areas with ecological importance; ignores fragmentation of habitat unique to roadless areas; fails to acknowledge likely preclusion of wilderness designation if any of the build alternatives are selected; and undermines the Chugach National Forests' legally required wilderness review process.
- 4) The DSEIS provides an inadequate analysis of the effects on wildlife, particularly moose and brown bears, which use the project area as a corridor connecting the northern and southern portions of the Kenai Peninsula. The DSEIS also refers to, but fails to disclose any detailed mitigation plans or measures that will be applied to each of the alternatives.
- 5) The DSEIS provides an inadequate analysis of the cumulative impacts of the proposed project, including a failure to consider imminent subdivision expansion, and previous highway improvements on the Kenai National Wildlife Refuge.
- 6) The Section 4(f) evaluation provides an inadequate analysis of the harms to each of the park, recreation area, and wildlife refuge land affected by the alternatives. Specifically, the evaluation fails to disclose the magnitude of impacts on wildlife and remote recreation for each alternative, fails to disclose what mitigation measures will be in place for each alternative, and fails to consider a reasonable alternative that makes safety upgrades within the existing alignment.

Given the inadequacies in the DSEIS and Section 4(f) evaluation, the FHWA and DOT&PF should reexamine the project and consider a new alternative that improves safety within the existing alignment. The DSEIS released by the FHWA and DOT&PF falls well short of the legal standards for analysis mandated by statute, federal regulations,²⁶ and Ninth Circuit case law.²⁷ The agencies should conduct a new review and provide a new opportunity for meaningful public comment in the form of a revised DSEIS that considers an alternative that makes improvements to the existing alignment.

If FHWA and DOT&PF decide to move forward with consideration of only the proposed alternatives, based on the information provided, it is our view that the environmentally

²⁶ See 40 C.F.R. Part 1500.; 23 C.F.R. Part 771.

²⁷ See, e.g., *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1982) (“This circuit employs a ‘rule of reason’ that asks whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” (quoting *Oregon Environmental Council v. Kunzmann*, 817 F.2d 484, 492 (9th Cir. 1987) (internal quotation marks omitted))).

preferable and least harmful alternative is the Cooper Creek Alternative. Under 49 U.S.C. § 1653(f)²⁸ and 36 C.F.R. § 294.12(b)(6),²⁹ the Cooper Creek Alternative must be selected in the record of decision for this project.

II. THE DSEIS AND SECTION 4(F) EVALUATION UNDERMINE MEANINGFUL PUBLIC COMMENT BY FAILING TO DISCLOSE THE PREFERRED AND LEAST HARMFUL ALTERNATIVE

A. The National Environmental Policy Act

The National Environmental Policy Act (“NEPA”) requires the FHWA to complete a rigorous review of the environmental effects of this federally-funded highway project.³⁰ The environmental review must demonstrate that the FHWA considered and provided a full explanation of potential environmental effects, including a comprehensive analysis of all reasonable alternatives, a fair and objective accounting of cumulative impacts, and a thorough description of measures to mitigate harm.³¹

Federal regulations also require the FHWA to identify a preferred alternative, if it has one,³² and to include a discussion of “appropriate mitigation measures not already included in the proposed action or alternatives.”³³ The purpose of those disclosures is to provide the public with a “clear basis for choice among options.”³⁴ Moreover, in any record of decision (ROD), FHWA is required to identify an “environmentally preferable” alternative.³⁵

Unfortunately, FHWA and DOT&PF failed to identify either preferred or environmentally preferred alternatives in the DSEIS.³⁶ The failure to include the agency’s thoughts on which alternative is most likely to be selected and which alternative is least environmentally harmful has deprived the public of meaningful opportunity to comment on the proposed project. Because the alternatives involve drastically different types and degrees of environmental

²⁸ See *infra* Part VII.

²⁹ See *infra* Part IV.

³⁰ See NEPA, 42 U.S.C. §§ 4321–4370h (2012).

³¹ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989); *Flint Ridge Development Co. v. Scenic Rivers Ass’n*, 426 U.S. 776, 778 (1976).

³² 40 C.F.R. § 1502.14(e).

³³ 40 C.F.R. § 1502.14(f).

³⁴ 40 C.F.R. § 1502.13.

³⁵ 40 C.F.R. § 1505.2(b).

³⁶ DSEIS at 2-35 (“At this time, neither DOT&PF nor FHWA has identified a preferred alternative.”).

effects, the DSEIS has made it difficult to compare alternatives, essentially shifting the burden on the public to make the case for which alternative is the environmentally preferable alternative. Without a clear indication of which alternative the FHWA is most likely to select or which alternative FHWA believes is the environmentally preferred alternative, the effects of the project cannot be fairly assessed by the public.

B. Section 4(f) Evaluation

In addition to NEPA requirements, FHWA must prepare a Section 4(f) evaluation under the Department of Transportation Act of 1966.³⁷ The Section 4(f) evaluation is required to determine whether a federal highway project that uses “a public park, recreation area, or wildlife and waterfowl refuge” includes “all possible planning to minimize harm” and that “there is no prudent and feasible alternative to using the land.”³⁸ In order for the project to be approved, FHWA must conclude “that as a matter of sound engineering it would not be feasible to build the highway along any other route.”³⁹ Thus, the FHWA must select the “least harmful” alternative.

But like the DSEIS’s demur on a preferred alternative, FHWA has not disclosed which alternative it believes will cause the least overall harm.⁴⁰ Once again, the agency has shifted the burden on the public to discern, compare, and weigh each alternative’s harmful effects.

Federal law requires that Section 4(f) evaluations begin as early in the planning process as possible.⁴¹ “The potential use of land from a Section 4(f) property shall be evaluated as early as practicable . . . when alternatives to the proposed action are under study.”⁴² Because this project, with similar alternatives, has been under study since at least 1982, it is perplexing that the FHWA has not had time to decide what it considers to be the least harmful alternative. The Section 4(f) evaluation purports that the FHWA “is hopeful that input from the public and appropriate agencies with jurisdiction . . . will prove helpful and assist decision makers in making a formal finding of least overall harm in the Final Section 4(f) Evaluation and SEIS.”⁴³ But the FHWA should have all of the information it requires, since

³⁷ See 49 U.S.C. § 1653(f).

³⁸ *Id.* at § 1563(f)(1)–(2).

³⁹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411–12 (1971).

⁴⁰ DSEIS at 4-126 (“Neither DOT&PF nor FHWA has identified a preferred alternative, and FHWA has drawn no conclusion regarding least overall harm at this time.”).

⁴¹ See *Defenders of Wildlife v. North Carolina Department of Transportation*, 762 F.3d 374, 400 (4th Cir. 2014); *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 373 (D.C. Cir. 1999).

⁴² 23 C.F.R. § 774.9(a).

⁴³ DSEIS at 4-126, 4-127.

at least the 1982 and 1994 EISs, when the public and agencies commented on similar proposed alternatives. By waiting to make its Section 4(f) determination in the final SEIS, the FHWA has given the appearance that its decision will be based on discretionary factors, such as which alternative the public favors. And that kind of determination would be improper under Section 4(f), which permits of no discretion and requires FHWA to select the least harmful alternative.⁴⁴

As a draft evaluation put out for public comment, the FHWA should have issued its draft decision or at least provided some indication of which alternative it considered was least harmful. Despite providing an analysis of some environmental effects and describing the factors it will use in making the determination, the ultimate decision and how the FHWA ends up weighing each of the factors are both important to the public, and the public should be given a meaningful opportunity to comment on both.⁴⁵ Unlike NEPA's procedural requirements, Section 4(f) provides a substantive mandate: select the least harmful alternative. In order to provide meaningful comment, the public ought to know where the agency stands on the substantive determination. Thus, by not disclosing its determination of least harmful alternative (even in draft form), the FHWA has undermined the public's ability to provide meaningful comments on the Section 4(f) evaluation.

III. THE DSEIS DEFINED AN UNREASONABLY NARROW PURPOSE AND NEED AND FAILED TO ANALYZE A REASONABLE RANGE OF ALTERNATIVES

NEPA requires all agencies to analyze and consider all reasonable alternatives to a proposed action.⁴⁶ In the DSEIS, FHWA was required to “[r]igorously explore and objectively evaluate all reasonable alternatives.”⁴⁷ In defining reasonable alternatives, FHWA's regulations recognize that “[a]lternative courses of action” should be evaluated by balancing “the need for safe and efficient transportation . . . the social, economic, and environmental impacts of the proposed transportation improvement . . . and . . . national, State, and local environmental protection goals.”⁴⁸

Unfortunately, the DSEIS does not fairly comply with those statutory and regulatory requirements. The DSEIS adopts a narrow purpose and need: to upgrade the Sterling

⁴⁴ *Overton Park*, 401 U.S. at 411–13.

⁴⁵ *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 708 (10th Cir. 2009) (“A public comment period is beneficial only to the extent the public has meaningful information on which to comment.”).

⁴⁶ 42 U.S.C. § 4331(2) (2012).

⁴⁷ 40 C.F.R. § 1504.12.

⁴⁸ 23 C.F.R. § 771.105(b).

Highway to “new” highway alignment standards. That purpose eliminates all consideration of safety upgrades within the existing alignment. The DSEIS fails to consider alternatives that satisfy safety and efficiency goals by improving the existing highway alignment and preserving wildlife, recreation, and scenery in the Kenai.

A. The Purpose and Need Was Unreasonably Narrow

The DSEIS purpose and need statement identifies three criteria for the project: 1) reduce highway congestion, 2) meet current highway design standards, and 3) improve highway safety.⁴⁹ The DSEIS further defines “current highway design standards” as “current design standards for a rural principal arterial road,”⁵⁰ and elaborates that the FHWA considers the need for the project as upgrading the highway to comply with engineering standards for a “full reconstruction or construction on a new alignment.”⁵¹ But that purpose is unreasonably narrow because the highway can be improved within its existing alignment using different standards for “rehabilitation” projects. By narrowly and arbitrarily defining the purpose of the project, FHWA eliminated consideration of upgrades within the existing alignment.

Although agencies have significant discretion in defining the purpose and need of a project, they are not permitted to narrowly define purpose and need statements to avoid consideration of reasonable alternatives. “A purpose and need statement will fail if it unreasonably narrows the agency’s consideration of alternatives so the outcome is preordained.”⁵² An agency that has the power to consider other alternatives must do so.⁵³

“An agency may not define the objectives of its actions in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.”⁵⁴

⁴⁹ DSEIS at 1-5.

⁵⁰ *Id.*

⁵¹ *Id.* at 2-10.

⁵² *Alaska Survival v. Surface Transportation Board*, 705 F.3d 1073, 1084 (9th Cir. 2013) (citing *National Parks Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1070 (9th Cir. 2010)).

⁵³ See *Carmel-By-the-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997) (“[A]n agency cannot define its objectives in unreasonably narrow terms.”); *City of New York v. U.S. Department of Transportation*, 715 F.2d 732, 743 (2d Cir. 1983) (“[A]n agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered.”).

⁵⁴ *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).

In the DSEIS, the FHWA defined the purpose and need in unreasonably narrow terms, excluding any alternatives that make improvements to the existing highway alignment. Although it is probably true that improvements meeting “full reconstruction or construction on a new alignment” standards cannot be accomplished within the existing alignment, this does not preclude any improvements from being made.

The DSEIS acknowledges there are two standards for highway upgrades: 1) new alignments and 2) rehabilitation within existing alignments.⁵⁵ “[T]he standards for the two types of improvement [are] not equal; the standards for a [rehabilitation] project were (and still are) different than those for full reconstruction or construction on a new alignment.”⁵⁶ The engineering requirements and standards for rehabilitation (within existing alignment) are less rigorous than for new alignments.⁵⁷

The DSEIS does not explain why it chose a purpose and need that requires use of the more rigorous new highway alignment standards.⁵⁸ The failure to explain a reason for selecting new highway alignment standards when other standards were available and compatible within the existing alignment makes the purpose and need arbitrary. It also gives the appearance that the FHWA narrowly tailored the purpose and need to exclude alternatives that upgrade the highway within the existing alignment.

A reasonable reading of the purpose and need statement, “meet current highway design standards” leads to the conclusion that the purpose can be accomplished using the rehabilitation standards on the existing alignment. Chapter 1060 in the *Alaska Preconstruction Manual* for highway design provides engineering standards for road rehabilitation projects within existing alignments.⁵⁹ Those standards can be met for the Sterling Highway section between mileposts 45 and 60 within the existing alignment,⁶⁰ and provide for safe, “current” highway upgrades. The DSEIS does not explain why the Chapter 1060 highway rehabilitation standards are insufficient for this project. The *Alaska Preconstruction Manual*

⁵⁵ DSEIS at 2-10. See DOT&PF, ALASKA PRECONSTRUCTION MANUAL (2005); AMERICAN ASSOCIATION OF STATE HIGHWAY AND TRANSPORTATION OFFICIALS (AASHTO), A POLICY ON GEOMETRIC DESIGN OF HIGHWAYS AND STREETS, 4TH ED. (2004).

⁵⁶ DSEIS at 2-10.

⁵⁷ See DOT&PF, *supra* note 55; AASHTO, *supra* note 55.

⁵⁸ See DSEIS at 1-5, 2-10.

⁵⁹ See DOT&PF, *supra* note 55, at Chapter 1060.

⁶⁰ See DSEIS at 2-11; DOT&PF & FHWA, STERLING HIGHWAY MP 37-60 DRAFT ENVIRONMENTAL IMPACT STATEMENT AND SECTION 4(F) EVALUATION (1994) [hereinafter *1994 EIS*].

recognizes that highways like the Sterling Highway that were built in the 1950s as a gravel road can be upgraded to modern standards but should not be expected to be engineered to the same standards as a new highway alignment.

The DSEIS should have considered upgrades to the existing alignment as an alternative along with alternatives that use new alignments. The DSEIS should have recognized that those alternatives require different engineering standards, but both standards provide for safe, “current” highway improvement. By requiring alternatives to meet only the new highway alignment standard, the DSEIS unreasonably excluded alternatives that make upgrades to the existing alignment.

B. The DSEIS Failed to Analyze a Reasonable Range of Alternatives

As a result of the unreasonably narrow purpose and need, the DSEIS failed to analyze a reasonable range of alternatives.⁶¹ Specifically, the DSEIS failed to consider an alternative that would make improvements within the existing alignment. The purpose and need for the project can be met by using a modified alternative that makes improvements to the existing alignment.

NEPA requires agencies to analyze a reasonable range of alternatives.⁶² “The touchstone for our inquiry is whether the EIS’s selection and discussion of alternatives fosters informed decision-making and informed public participation.”⁶³ Although agencies have discretion in selecting the alternatives for analysis, the range of alternatives cannot merely ignore a reasonable middle-ground option.⁶⁴ “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.”⁶⁵

For this project, a reasonable middle ground exists between the two types of alternatives considered (no build and new alignment). The DSEIS should have considered making upgrades to the existing alignment.

⁶¹ See DSEIS at 2-10 to 2-35.

⁶² *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 815 (9th Cir. 1987), *rev’d in part*, 490 U.S. 332 (1989) (reversed in parts not affecting the Ninth Circuit’s alternatives analysis).

⁶³ *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

⁶⁴ *Id.* at 768 (“While nothing in NEPA prohibits the Forest Service from ultimately implementing a proposal that allocates more acreage to Nonwilderness than to Wilderness, it is troubling that the Forest Service saw fit to consider from the outset only those alternatives leading to that end result.”).

⁶⁵ *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 575 (9th Cir. 1998).

1. Improving the existing alignment is a reasonable alternative

The middle ground alternative that FHWA should have considered is described best in terms of the 3R Alternative that was analyzed in the 1994 EIS.⁶⁶ The 3R Alternative would have made road and safety improvements to the Sterling Highway section from mileposts 45 to 60 within the existing alignment. The 3R Alternative “would have a total 36-foot width: two 12-foot lanes and two 6-foot shoulders” and a 12-foot passing lane with a 4-foot shoulder where needed.⁶⁷ Additionally, a “separated pedestrian pathway would be provided between MP 55 and MP 45.”⁶⁸ “Vehicle pull offs would be provided as appropriate.”⁶⁹

The 1994 EIS described the 3R Alternative as a “viable build alternative.”⁷⁰ Obviously, the widened roadways and shoulders contribute to safety improvements, which the 1994 EIS acknowledged: “The extended safety pathway would provide additional access and safety along the highway for residents and visitors and connect the community with heavily used recreation areas.”⁷¹

A modified version of the 3R Alternative is a reasonable alternative for this project.⁷² The 3R Alternative’s improvements to the roadway, separated pathway, and passing lanes all contribute to safety, easing congestion, and improving highway design standards. Additional features that the DSEIS should have considered to improve safety within the existing alignment include signage, rumble strips, flashing lights, speed signs and notifications, and other common highway safety modifications.

Importantly, a modified 3R Alternative (or some other middle ground that uses the existing alignment) would be 60% identical to the Cooper Creek and G South build alternatives.⁷³ The Cooper Creek and G South Alternatives’ new alignments rejoin the existing alignment at or near mile 51.3 and 51.9, respectively; the only new alignments that will be created are from milepost 45 to 51.3.⁷⁴ From milepost 51.3 to 60, the existing alignment is used for both alternatives. If the Cooper Creek and G South Alternatives satisfy the purpose and need to improve “current highway design standards,” than an alternative that uses the existing

⁶⁶ See DSEIS at 2-11; 1994 EIS at II.D and IV.F.

⁶⁷ 1994 EIS at II.D.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 1994 EIS at IV.F.

⁷² See 1994 EIS at II.D.

⁷³ See DSEIS at 2-21; 2-26; 2-39.

⁷⁴ *Id.*

alignment for the remaining 40% of the section is also reasonable and should have been analyzed.

2. Improving the existing alignment should have been analyzed

The DSEIS provides only one logical reason for rejecting the 3R Alternative or any other middle ground alternative that uses the existing alignment: failure to meet the highway design standards for principal rural highways on new alignments.⁷⁵ But that purpose and need for the project is unreasonably narrow.⁷⁶ The DSEIS should have analyzed a middle ground alternative's ability to meet the reasonable purposes and needs of this project, which it likely does.

First, the 3R Alternative or other alternative that uses the existing alignment can make improvements to traffic congestion. As the 1994 EIS for the 3R Alternative recognized, "Highway improvements would enhance safety conditions and alleviate traffic congestion. . . . Traffic congestion would be reduced by the addition of passing and left-turn lanes."⁷⁷

Although the DSEIS claims that the 3R Alternative would not alleviate traffic congestion today, given increases in traffic volume since 1994, the DSEIS did not actually evaluate how much the 3R Alternative would still address congestion.⁷⁸ The DSEIS admitted it did not fully evaluate the 3R Alternative: "A Traffic Analysis Assessment (HDR 2001a) for the current SEIS and the Evaluation Criteria and Alternatives Analysis (HDR 2003a) addressed the 3R Alternative but did not pass it through the alternatives screening process because, by definition, it did not meet the SEIS purpose and need."⁷⁹ And, "passage of time and increases in traffic have led DOT&PF to determine that fully meeting rural principal arterial standards for roadway geometry is important."⁸⁰ Those statements imply that FHWA does not know how much the 3R Alternative could alleviate traffic congestion. But we can infer from the 1994 EIS that at least some significant improvements to traffic congestion would be made.⁸¹

Second, the 3R Alternative or other alternative that uses the existing alignment can make improvements to highway safety. The 1994 EIS for the 3R Alternative recognized that

⁷⁵ DSEIS at 2-11 ("[B]y definition, [the 3R Alternative] did not meet the SEIS purpose and need.").

⁷⁶ See *supra* Part III.A.

⁷⁷ 1994 EIS at II.D.

⁷⁸ See DSEIS at 2-11.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See 1994 EIS at 11.D ("Highway improvements would . . . alleviate traffic congestion.").

“widened shoulders would provide for vehicular emergency pull-off. Widened slopes would provide a greater vehicle recovery zone. Rumble strips for alerting drivers would be added to the shoulders.”⁸² Those safety improvements could all be made using the existing alignment.

The DSEIS claims that the 3R Alternative would still be unsafe because it “would have realigned only one particularly unsafe curve without meeting full geometric standards.”⁸³ But once again, the DSEIS is confusing new alignment standards with rehabilitation standards. The existing alignment can be improved to meet the *Alaska Preconstruction Manual’s* engineering standards for existing highway alignments.⁸⁴ Moreover, 60% of the existing alignment is capable of being improved to meet new alignment standards. Only 40% of the section between mileposts 45 and 60 would meet the reduced rehabilitation highway standards.⁸⁵

Importantly, according to the DSEIS traffic analysis, the most dangerous sections of the highway are after milepost 51.3.⁸⁶ The Cooper Creek Alternative rejoins the existing alignment at or about milepost 51.3, and that alternative is considered to meet the purpose and need.⁸⁷ Thus, using the existing alignment for the entire project would address the most significant safety concerns in an identical way as the build alternatives.

The DSEIS should have analyzed an alternative that uses the existing alignment for the entire section between mileposts 45 and 60. The 3R Alternative or another middle ground between the no build and build alternatives is a reasonable alternative given the purpose and need for the project. Using the existing alignment also has the advantage of minimizing effects on recreation, wildlife, and scenery. An alternative using the existing alignment would likely be the environmentally preferable alternative, and be the least harmful alternative for Section 4(f) properties and inventoried roadless areas.

C. Irretrievable Commitment of Resources

It appears that the FHWA and DOT&PF have adopted a preordained conclusion that the project will use a new alignment to avoid the community of Cooper Landing. In the past 20 years, improvements were made to the roadway in Cooper Landing. But contrary to some

⁸² 1994 EIS at II.D.

⁸³ DSEIS at 2-11.

⁸⁴ See DOT&PF, *supra* note 55, at Chapter 1060.

⁸⁵ See DSEIS at 2-21; 2-26; 2-39.

⁸⁶ DSEIS at Appendix A, 1-12.

⁸⁷ See DSEIS at 2-21; 2-26; 2-39.

federal requirements, safety and accessibility improvements were not made to the Sterling Highway. One of the justifications given at the time was that meeting federal requirements for the road was unnecessary because a new alignment would be built imminently. This demonstrates an impermissible and undisclosed irretrievable commitment of resources.

IV. Roadless rule

All four build alternatives cross inventoried roadless areas within the Chugach National Forest.⁸⁸ The Cooper Creek Alternative requires building 0.1 mile of road on 3.8 acres within the Kenai Lake Inventoried Roadless Area (IRA).⁸⁹ The G South, Juneau Creek, and Juneau Creek Variant Alternatives require building between 1.1 and 3.3 miles of road on up to 127.5 acres of the Resurrection IRA.⁹⁰ NEPA requires the FHWA to disclose the effects of this project on those IRAs, and the Roadless Area Conservation Rule requires the approval of the Secretary of Agriculture.⁹¹ Unfortunately, the current DSEIS fails to adequately analyze the effects on roadless areas and is an insufficient basis for secretarial approval.

In 2001 the Forest Service adopted the Roadless Area Conservation Rule, generally referred to as the roadless rule.⁹² The rule was designed to protect large, intact landscapes remaining on national forests throughout the country.⁹³ Over 58 million acres of national forests within inventoried roadless areas received permanent protections from development.⁹⁴ The rule prohibited “road construction, reconstruction, and timber harvest” in roadless areas because those activities “have the greatest likelihood of altering and fragmenting landscapes, resulting in immediate, long-term loss of roadless area values and characteristics.”⁹⁵

The rule included seven narrow exceptions for road building within roadless areas.⁹⁶ Exception 12(b)(6) provides that

“a road may be constructed in an inventoried roadless area if . . .
[t]he Secretary of Agriculture determines that a Federal Aid

⁸⁸ *Id.* at 3-29 to 3-55.

⁸⁹ *Id.* at 3-52.

⁹⁰ *Id.* at 3-53 to 3-55.

⁹¹ 36 C.F.R. § 294.12(b)(6).

⁹² *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3244 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

⁹³ *Id.*

⁹⁴ *Id.* at 3245.

⁹⁵ *Id.* at 3244.

⁹⁶ 36 C.F.R. § 294.12(b).

Highway project, authorized pursuant to Title 23 of the U.S. Code, is in the public interest or is consistent with the purposes for which the land was reserved or acquired and *no other reasonable and prudent alternative exists.*”⁹⁷

Exception 12(b)(6) was intended to be narrow and used only where absolutely necessary. The rule’s record of decision explained that the Forest Service,

“decided to adopt the Federal Aid Highway exception to allow road construction based on social considerations and Federal-state relationships. The Department believes that this exception will have a very limited application, and the Secretary of Agriculture retains the discretion to approve or deny authorization when warranted (23 U.S.C. 317).”⁹⁸

The Forest Service specifically considered the Chugach National Forest and the Cooper Landing Bypass project when adopting 12(b)(6):⁹⁹

“The analysis in the FEIS identified only one application of this exception in the next five years for a proposed 5.5-mile State highway relocation project on the Chugach National Forest in Alaska.”¹⁰⁰

“Estimates indicate that few miles of road construction would be expected for Federal Aid Highway projects over the next 5 years in inventoried roadless areas. There is no reason to anticipate a substantial increase in the future. Only one 6-mile project is currently planned on the Chugach National Forest.”¹⁰¹

But just because the Forest Service contemplated the Cooper Landing Bypass in the record of decision for the roadless rule does not mean that secretarial approval is a foregone conclusion. In its roadless rule analysis, the Forest Service acknowledged that the Cooper

⁹⁷ 36 C.F.R. § 294.12(b)(6) (emphasis added).

⁹⁸ 66 Fed. Reg. 3244, 3264.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ U.S. FOREST SERVICE, FINAL ENVIRONMENTAL IMPACT STATEMENT, ROADLESS AREA CONSERVATION RULE, 3-68 (2001).

Landing Bypass project “may have local effects on the characteristics and values associated with the affected inventoried roadless area.”¹⁰² A full and fair analysis of those “local effects” is required before the Secretary of Agriculture can authorize the 12(b)(6) exception for this project. Additionally, NEPA requires a full disclosure of the alternatives’ effects on the roadless areas. The DSEIS’s terse and incomplete analysis of the effects on roadless areas falls short of the requirements of both the 12(b)(6) exception and NEPA.

First, the DSEIS failed to consider a reasonable and prudent alternative that makes improvements to the highway within the existing alignment.¹⁰³ An alternative that makes safety upgrades within the existing alignment can satisfy the purpose and need of the project without requiring road construction within either IRA. The availability of a reasonable and prudent alternative, such as the 3R Alternative, precludes the application of the 12(b)(6) exception.

Second, the DSEIS unreasonably minimized effects on IRAs by consistently referring to the affected areas as “very small.”¹⁰⁴ For each of the affected IRAs, the DSEIS provides the acreage impacted in terms of a percentage of the overall IRA acreage.¹⁰⁵ For example, the description of the Cooper Creek Alternative’s effects on the Kenai Lake IRA state that “3.8 acres of 213,200 total acres (0.002%)” will be incorporated into the right-of-way. The DSEIS then says that “[t]he portion of the IRA impacted under this alternative is a small, isolated part that is effectively a ‘donut hole’ . . . It already is an isolated parcel that would no longer qualify as ‘roadless’ by size.”¹⁰⁶ Thus, the description of the effects on IRAs consistently minimizes impacts by saying the IRAs are too small to matter. Such statements are misleading because even small IRAs serve important ecological and social functions. Instead of minimizing the size of the impacted area, DSEIS should focus on the ecological and social effects of road building in IRAs.

Third, the DSEIS failed to analyze the effects of fragmentation of IRAs on the Kenai Peninsula.¹⁰⁷ There is simply no discussion of fragmentation of IRAs or the importance of connectivity between IRAs to maintain ecological and social functions. Because preventing “fragmenting landscapes” was one of the main purposes of the roadless rule,¹⁰⁸ the DSEIS should have acknowledged the effects of cutting off a portion of an IRA with a highway.

¹⁰² *Id.*

¹⁰³ DSEIS, at 3-29 to 3-55.

¹⁰⁴ *Id.* at 3-52.

¹⁰⁵ *Id.* at 3-52 to 3-55.

¹⁰⁶ *Id.* at 3-52.

¹⁰⁷ *Id.* at 3-53 to 3-55.

¹⁰⁸ 66 Fed. Reg. 3244, 3244.

Fourth, the DSEIS did not discuss the effects of increased recreational use of roadless areas that will likely result from the project.¹⁰⁹ The build alternatives intend to reconstruct trailheads and increase parking, making accessibility to the Kenai Lake and Resurrection IRAs easier.¹¹⁰ Increased access and recreational use has the potential to degrade the quality and character of the IRAs. Remote recreation was a key reason behind the roadless area, but the DSEIS only evaluated “primitive” and other classes of “dispersed recreation.”¹¹¹ It is not clear that “remote recreation” is the same, and in any event, the DSEIS did not discuss likely impacts caused by increased use of remote portions of the IRAs.¹¹²

Fifth, the DSEIS ignored the Chugach National Forest’s wilderness evaluation and roadless area inventory from the 2002 forest plan final EIS.¹¹³ The roadless inventory offers a detailed analysis of the Kenai and Resurrection IRAs.¹¹⁴ According to the Forest Service, the Kenai Lake IRA has a “very high degree of natural integrity.”¹¹⁵ The Chugach forest plan specifically rejected alternatives that would allow road construction in the Kenai Lake IRA because “as new roads are constructed, the roadless character and primitive recreation opportunities on these lands would be lost.”¹¹⁶ For the Resurrection IRA, the Forest Service concluded that “[m]ost of the area appears unmodified,” despite “[m]inor inclusions [sic] such as the recreation cabins and trails are evident when one is close to them.”¹¹⁷ The DSEIS for this project failed to address the Forest Service’s roadless inventory and address how the project would affect important qualities of IRAs identified in 2002.

Sixth, the DSEIS incorrectly asserted that no public drinking water would be affected.¹¹⁸ Preserving drinking water in remote watersheds was an important reason for implementing the roadless rule. Public testimony indicated that rural residents near Cooper Landing use Juneau Creek for drinking water. The potential effects on that drinking water use were not analyzed anywhere in the DSEIS.

¹⁰⁹ DSEIS, at 3-53 to 3-52.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ U.S. FOREST SERVICE, FINAL ENVIRONMENTAL IMPACT STATEMENT, CHUGACH NATIONAL FOREST PLAN REVISION, APPENDIX C (2002).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ DSEIS, at 3-53 to 3-52.

Seventh, the DSEIS concluded that the alternatives would have no anticipated impact to wildlife “diversity.”¹¹⁹ But there are no wildlife mitigation measures, such as underpasses or wildlife bridges, discussed anywhere in the DSEIS.¹²⁰ Wildlife frequently move between the Kenai Lake and Resurrection IRAs, forcing animals to cross the Sterling Highway. The DSEIS did not analyze the effects of any measures to mitigate impacts of a new highway with increased speeds on those wildlife crossings.

V. THE DSEIS INADEQUATELY ANALYZED THE EFFECTS ON WILDLIFE AND WETLANDS

A. Wildlife

Highway crossings in the Kenai are one of the most serious and significant sources of wildlife fatalities. Combined with loss of habitat and increased presence of human recreation, this project has the potential to seriously threaten wildlife populations in the Kenai. At least 26 mammal species are expected to be affected by the project, including moose, wolverine, Dall sheep, black and brown bears, and lynx. Unfortunately, the DSEIS provided a terse and inadequate analysis of those potential effects, and failed to identify concrete and specific mitigation measures for each of the alternatives.

Although the DSEIS acknowledged that vehicle collisions are a major source of mortality for Kenai, the analysis did not disclose the possibility that increased vehicle speeds on the new highway alignment will lead to increased mortality. The DSEIS should have considered likely new speed limits on the new alignments and disclosed likely increases in mortality.

And despite acknowledging that the new highway alignment will cause habitat fragmentation by creating a new barrier to wildlife movement, the DSEIS fails to provide a meaningful discussion of how the fragmentation will affect moose and brown bear populations. Possible effects include changed movement behavior, increased vehicle collisions, noise disturbances, and increased human-wildlife interactions.

Finally, the DSEIS failed to provide an adequate discussion of potential mitigation to the effects on wildlife. There is nebulous mention of some type of wildlife crossings, but no detail is provided. Other wildlife mitigation measures that should have been discussed include wildlife over/under passes, wildlife crossing signs, and fencing. The DSEIS should

¹¹⁹ *Id.*

¹²⁰ *Id.*

have disclosed what mitigation measures are guaranteed to happen with each alternative, and how those mitigation measures will reduce the project's effects on wildlife.

B. Wetlands and Water

The project is likely to have significant effects on wetlands in the Kenai River watershed. Destruction of wetlands for each of the proposed new road alignments will likely effect the Kenai River, decreasing the ecological filtration capabilities. No mitigation measures for wetland functions within the project area have been proposed. Any mitigation efforts in the final EIS should be within the project area, if possible, in order to replace lost ecological functions within the area.

Other long-term problems for wetlands and aquatic environments posed by the project include increased siltation and runoff. Additional impervious surfaces from any new alignment will lead to increased road runoff. A new road alignment will also require new culverts and new bridges, all of which pose significant threats to ecological integrity within the project area.

The DSEIS claims that one of the environmental advantages of the build alternatives is that the highway is moved away from the Kenai River, decreasing the likelihood and severity of a potential spill. Ironically, the DSEIS admits that building a new highway alignment through the build alternatives will create similar problems. The DSEIS claims that “[e]ach build alternative would move the majority of vehicle traffic away from the Kenai River . . . This would reduce the risk of spills and general runoff pollution reaching the river.” That statement is almost immediately contradicted by the evidence and conclusion that more paved surfaces will only increase runoff: “All build alternatives would result in an increase in storm water runoff because the project area would have more paved surfaces.”

The contradictory conclusions and failure to include any wetland or runoff mitigation measures demonstrates that the DSEIS did not adequately consider and disclose the project's effects on wetlands and water resources.

VI. THE DSEIS INADEQUATELY ANALYZED THE PROJECT'S CUMULATIVE IMPACTS

NEPA requires the DSEIS to discuss and analyze the project's cumulative impacts. The cumulative impacts analysis should be searching, including all reasonably foreseeable projects that could have impacts on the project area. Unfortunately, the DSEIS for this project did

not rise to the standards required by NEPA and expected by the public. The cumulative impacts chapter of the DSEIS failed to adequately analyze likely future impacts by additional road construction projects, subdivisions, and increased use of forest roads for access.

The DSEIS failed to disclose and analyze potential effects of other road construction and maintenance projects in the Kenai. Possible plans for paving existing roads could lead to increased traffic and increased vehicle collisions for wildlife. Any other road paving projects planned within the project area should have been analyzed.

The DSEIS also fails to discuss plans for subdivision development within the project area. The state and local governments have plans to allow development of residential lots to occur within the project area, possibly using the new highway alignments as a primary access route. Despite assurances from DOT&PF that access to those new developments would be to the existing highway alignment, there is no binding commitment to make that happen. DOT&PF committed to preventing development along the Sterling Highway Homer Bypass when it was built in the 1970s. Today that route is heavily developed. This is consistent with roadside development throughout the nation. Historical record will show that in most cases, roadside development is virtually inevitable. The DSEIS should have acknowledged that possible outcome and analyzed the cumulative effects of the likely residential subdivisions within the project area.

VII. THE SECTION 4(F) ANALYSIS FAILED TO ANALYZE EFFECTS ON RECREATION, WILDLIFE, AND SCENERY

Because the project proposes to use recreation areas, historical sites, and a national wildlife refuge, the FHWA must comply with Section 4(f) of the Department of Transportation (“DOT”) Act of 1966.¹²¹ Under the DOT Act, FHWA may approve a highway project “requiring the use of publically owned land of a public park, recreation area, or wildlife refuge . . . or land of an historic site,” only if two conditions are met:

“(1) there is no prudent and feasible alternative to using the land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.”¹²²

¹²¹ 49 U.S.C. § 1653(f) (2012).

¹²² *Id.*

Federal regulations make it clear that the FHWA may only approve the alternative that “[c]auses the least overall harm in light of the statute’s preservation purpose.”¹²³ FHWA policy specifies that the preservation purpose “is to avoid, and where avoidance is not feasible and prudent, minimize the use of significant public parks, recreation areas, wildlife and waterfowl refuges and historic sites.”¹²⁴ Ultimately, the “goal is to identify alternatives that would not use any section 4(f) property.”¹²⁵

The U.S. Supreme Court has made it clear that the Department of Transportation Act presents a general bar to projects that use public parks, recreation areas, and wildlife refuges.¹²⁶ Only in most extreme and unusual cases will the Section 4(f) exemption be found appropriate.¹²⁷ “For this exemption to apply the Secretary [of Transportation] must find that as a matter of sound engineering it would not be feasible to build the highway along any other route.”¹²⁸

In *Overton Park*, the Court also made it clear that the Section 4(f) determination of “least harmful” alternative is substantive and not subject to discretionary factors beyond harm to the land.¹²⁹ The Court rejected arguments from the Department of Transportation that Section 4(f) required the agency to engage in a “wide-ranging balance of competing interests.”¹³⁰ Thus, the substantive decision of which alternative is least harmful should be made by the FHWA after considering only the effects on the Section 4(f) properties themselves.

For this project, the Section 4(f) evaluation is flawed because the FHWA failed to analyze a reasonable alternative that minimizes use of Section 4(f) properties by upgrading the highway within the existing alignment. The DSEIS failed to consider an alternative that minimizes use of Section 4(f) properties by using the existing alignment. Safety and engineering upgrades can be made using the existing alignment. An alternative that uses the existing alignment would be the least harmful to Section 4(f) lands.

¹²³ 23 C.F.R. § 774.3(c).

¹²⁴ FHWA, SECTION 4(F) POLICY PAPER, 11 (2012).

¹²⁵ *Id.* at 13.

¹²⁶ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

¹²⁷ *Id.* at 410 (“This language is a plain and explicit bar to the use of federal funds for construction of highways through parks – only the most unusual situations are exempted.”).

¹²⁸ *Id.* at 411.

¹²⁹ *Id.*

¹³⁰ *Id.*

Furthermore, the Section 4(f) evaluation failed to consider likely effects on remote recreation within the project area. Both the Juneau Creek and Juneau Creek Variant Alternatives require a new bridge that will truncate the southern end of the Resurrection Pass National Recreational Trail by 3.4 miles. The road and bridge over Juneau Creek Canyon would badly degrade the Juneau Falls Recreation Area and introduce unacceptable noise levels to both Resurrection Pass Trail and Bean Creek Trail. Far from mitigating this, the project build alternatives propose to add a falls overlook and pedestrian walkway, exacerbating the disruption. The Forest Service's suggestion to build more infrastructure at the Iditarod National Historic Trail near the Snow River is unsatisfactory because it fails to address the problems at Resurrection Creek and the proposal changes the nature of recreation from remote backcountry to front-country.¹³¹

The DSEIS acknowledges that the three northern build alternatives will have significant effects on remote recreation. "The recreation area would function differently than it does today, but would serve an important recreation function within the Chugach National Forest as a highway-related recreation area instead of a backcountry recreation area."¹³² But remote recreation areas and highway-related recreation areas serve very different users and types of recreation. Remote recreation opportunities are fewer in number and less likely to be accessible from highways. Eliminating or changing an accessible backcountry recreation area is a significant effect on the Section 4(f) land.

The effects of noise on remote recreation and wildlife also received only cursory attention in the Section 4(f) evaluation. The analysis contained inadequate noise studies and predictions to anticipate effects on remote recreation areas and wildlife habitat. The evaluation put no effort to monitor and predict impacts to the Resurrection Pass area beyond Juneau Falls. And the evaluation did not indicate any measures to mitigate noise and visual impacts from the build alternatives. The project area occupies a beautiful travel corridor that enjoys a relatively low level of noise considering the amount of development along the existing highway alignment. All build alternatives will result in impairment of the viewshed and significant increase in noise levels.

Constructive uses of surrounding park and recreation lands were also not considered in the Section 4(f) evaluation. Potential constructive uses of the Kenai National Wildlife Refuge outside of the project area include increased visitation, decreased wildlife habitat, and increased noise disturbances. The constructive use to the neighboring designated wilderness areas are particularly concerning because these areas were specifically designed to offer

¹³¹ See DSEIS, at 4-115 to 116.

¹³² *Id.* at 4-108.

remote recreation in primitive settings. Increasing highway speeds nearby will impact the wilderness character of these lands. The final Section 4(f) evaluation should consider constructive uses to neighboring wilderness and national park lands.

Most importantly, the Section 4(f) analysis failed to include mitigation measures for effects on wildlife and recreation. The inclusion of mitigation measures is a legally required aspect of the Section 4(f) analysis and should have been included in the draft to allow for public comment. Mitigation measures should be considered to minimize impacts on recreation in the Juneau Creek and Resurrection Trail areas.

Because the effects to wildlife and recreation are less significant on the south side of the highway, we conclude that of the four build alternatives analyzed, the Cooper Creek Alternative is the least harmful. For one thing, the Cooper Creek Alternative is shorter and avoids the highly popular Resurrection Pass Trail. The Cooper Creek Alternative also stays away from important wildlife habitat on the north side of the Kenai River. But there would still be harmful impacts to Section 4(f) lands on the south side of the river. Bear and moose habitat would be affected, and recreational resources like the Cooper Landing Boat Launch and Day Use Area, Stetson Creek Trail, and Cooper Lake Dam Road and Powerline Trail would be negatively impacted by the Cooper Creek Alternative. The final Section 4(f) evaluation should consider every possible way to mitigate damage to those resources if the Cooper Creek Alternative is selected.

VIII. CONCLUSION

The FHWA should reconsider the Cooper Landing Bypass project as it is currently designed. A new alternative that improves safety, congestion, and highway standards within the existing alignment should be considered and a new draft EIS released for public comment.

Given the information in the DSEIS and Section 4(f) evaluation, the least harmful alternative is the Cooper Creek Alternative. However, based on the foregoing analysis, selecting any of the build alternatives without considering a reasonable alternative that makes improvements to the existing alignment would be invalid under the legal requirements of Section 4(f) and the roadless rule.

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