



DEPARTMENT OF THE ARMY
PACIFIC OCEAN DIVISION, U.S. ARMY CORPS OF ENGINEERS
573 BONNEY LOOP, BUILDING 525
FORT SHAFTER, HAWAII 96858-5440

August 18, 2023

Mr. Beau Epstein
IPOP, LLC
Post Office Box 2010
Nome, Alaska 99762
[REDACTED]

Dear Mr. Epstein:

After considering your administrative appeal and information received during the July 18–20, 2023, appeal conference, I have decided to exercise my authority at 33 C.F.R. § 325.8(c) to reopen and elevate review of your permit application, File Number POA-2018-00123.

The administrative appeal process has been terminated, and the Alaska District's initial permit decision is vacated. Enclosed is the memorandum notifying the District Engineer of my elevation decision and requesting transmittal of the permit application. I will be making the permit decision after a comprehensive review of the permit application file. The Pacific Ocean Division will assign a regulatory project manager to this matter, and they will contact you regarding the anticipated review and decision timeline. If my decision on the permit application is a permit denial or results in a declined permit, that permit denial or declined permit will be subject to an administrative appeal to the Chief of Engineers.

Any questions regarding this elevation decision should be directed to [REDACTED], South Pacific Division Regulatory Appeals Review Officer, who facilitated this appeal request on behalf of the Pacific Ocean Division. [REDACTED] can be reached at [REDACTED] or by email at [REDACTED]@usace.army.mil.

Sincerely,

Kirk E. Gibbs
Brigadier General, U.S. Army
Commanding

Encl

CF:
[REDACTED]



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CEPOD-PDC (27-10i)

18 August 2023

MEMORANDUM FOR District Engineer, Alaska District (CEPOA-Z), U.S. Army Corps of Engineers, 2204 3rd Street, Joint Base Elmendorf-Richardson, AK 99506-0898

SUBJECT: Elevation of Permit Application, File No. POA-2018-00123, IPOP, LLC

1. POD has reviewed IPOP, LLC's Request for Appeal and reasons for appealing the denial of the subject permit application. The Review Officer (RO) reviewed the administrative record and conducted an appeal conference and site visit on 18-20 July 2023. The appeal conference is summarized in the enclosed memorandum for the record (MFR).
2. Based on the RO's independent review and the enclosed MFR, I find that additional review of the subject application is warranted.
3. IPOP, LLC alleges POA's decision to deny the subject permit application was made in bad faith due to bias in favor of Alaska Native Corporations. I do not decide the merit of such allegations here. However, I take the integrity of our regulatory program very seriously, and even the appearance of bias is concerning.
4. I am exercising my authority at 33 C.F.R. § 325.8(c) to reopen and elevate review of this permit application. Pursuant to 33 C.F.R. § 331.3(a)(2), the administrative appeal process is terminated. POA's initial permit decision is vacated. To avoid any appearance of bias, POD will make the initial permit decision. By this memorandum, I request that the District Engineer forward IPOP, LLC's permit application to me for decision.
5. Should you have any questions, my point of contact for this action is [REDACTED], Regulatory Program Manager, at [REDACTED] or [REDACTED]@usace.army.mil.

Encl

KIRK E. GIBBS
Brigadier General, USA
Commanding

CF:
CEPOA-RD ([REDACTED])
CEPOA-RD ([REDACTED])
CEPOA-OC ([REDACTED])

MEMORANDUM FOR RECORD

SUBJECT: Conference for IPOP, LLC's Administrative Appeal of the Alaska District's Denial of a Permit under File Number POA-2018-00123

1. ADMINISTRATIVE INFORMATION

File Number: POA-2018-00123

Conference Dates: 18-20 July 2023
Location: Nome City Hall, Council Chambers
102 Division Street
Nome, Alaska

Site Visit Dates: 19-20 July 2023
Location: Nome-Council Highway
Safety Bridge to Bonanza Bridge
Mile markers 22-32

2. DIVISION ENGINEER REPRESENTATION

[REDACTED], Administrative Appeal Review Officer (RO)
[REDACTED], RO (assisting)
[REDACTED], Assistant Division Counsel, Pacific Ocean Division (POD)

3. PARTIES

a. Representing IPOP, LLC (Appellant)

[REDACTED], Counsel
[REDACTED], Lead Dredge Master
[REDACTED], Sr. Engineer
[REDACTED], Sr. Geologist
[REDACTED], Sr. Biologist

b. Representing the Alaska District (POA or the "District")

[REDACTED], Regulatory Project Manager (PM)
[REDACTED], Section Chief
[REDACTED], Supervisory Regulatory Project Manager
[REDACTED], Assistant District Counsel

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SUBJECT: Conference for IPOP, LLC's Administrative Appeal of the Alaska District's Denial of a Permit under File Number POA-2018-00123

4. FORMAT OF THE APPEAL CONFERENCE

The RO provided the agenda to the parties on 3 July 2023. A copy of the agenda is included as Appendix A to this memorandum for record (MFR). The appeal conference diverged from the agenda by starting with the clarifying questions, but for organizational purposes, this MFR follows the order of business shown in the agenda.

To facilitate an efficient appeal conference, the RO provided the parties with a series of questions to assist with clarifying aspects of the Administrative Record (AR). Those questions were transmitted with the agenda and are also attached as part of Appendix A to this MFR. The Appellant's written responses to those questions, with citations to the AR, were submitted on 14 July 2023 and are attached as Appendix B to this MFR. The District did not provide written responses to the questions or citations to relevant pages of the AR in advance of the appeal conference.

5. OPENING STATEMENTS

a. Review Officer

The RO explained that it is the policy of the Corps of Engineers to promote and maintain an administrative appeal process that is independent, objective, fair, prompt, and efficient. The RO explained the administrative appeal process and the RO's role in facilitating the appeal conference and assisting the Division Engineer in reaching a decision on the merits of the appeal. The RO stated that only issues identified in the AR by the date of the Notification of Appeal Process would be discussed. The RO further explained that the conference is an informal administrative meeting, not a legal forum, that the rules of evidence do not apply, and that there would be no cross-examination or questioning of other parties. The parties were asked to direct all comments, statements, and clarifications to the RO.

b. Appellant

The Appellant explained its position and described its frustration with the permitting process, noting that it had started the permit application process in 2017. The Appellant stated that since that time, it had been attempting to satisfy the District's numerous requests for additional information and data and that it found the District to be unresponsive to its requests for clarification or guidance. The Appellant stated its belief that the District disregarded the facts, unreasonably rejected the data provided by the Appellant, and relied on comments from the public and tribal interests regarding environmental conditions and resource utilization without validating them as fact. The Appellant voiced its belief that the District helped the Native Village of Solomon gather

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information to oppose the Appellant's project and identified records that it contends demonstrate that fact. The Appellant also identified other records demonstrating its belief that the District assisted project opponents in various ways. The Appellant voiced its concern that it was being treated differently than other permit applicants and stated that all it is asking for is a fair evaluation of its permit application.

c. Alaska District

The District stated that it is neither an opponent nor a proponent of any project and that there is a process that is followed to make permit decisions.

6. REASONS FOR APPEAL

a. Following are the reasons for appeal provided to the parties in the appeal conference agenda:

(1) Staff's unresponsiveness to the Appellant's proposals and evidence, and solicitude for project opponents;

(2) The Decision errs in describing the fundamental features of the Bonanza Channel and how they will be affected by suction dredge mining;

(3) The decision's arbitrary, capricious, and illegal assessment of the public interest;

(4) The decision's conclusion that IPOP's proposal is not the LEDPA [least environmentally damaging practicable alternative] is arbitrary, capricious, and contrary to law; and

(5) A permit should issue with minor modifications through permit conditions.

b. The RO asked the Appellant whether any of the reasons for appeal stated in the agenda required clarification. The Appellant replied that the reasons for appeal stated in the agenda are clear and accurate in that they capture the overarching themes of the appeal, although each reason has numerous more particular underlying contentions.

7. ADMINISTRATIVE RECORD

The RO asked the parties if the AR was complete. The Appellant stated that it could not find in the AR the data on submerged aquatic vegetation (SAV) identified in AR 31470 or an appendix to the essential fish habitat (EFH) assessment containing

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comments. The Appellant further stated that it had submitted additional records listed in Appendices 1 (previously supplied records) and 2 (additional records) to its written response to the RO's clarifying questions. Rather than go through each of the additional documents individually at the appeal conference, the RO requested that the District provide a spreadsheet identifying which records would be included in the AR and which records would not, specifying the reason for not including each excluded record. The spreadsheet submitted by the District on 28 July 2023, as modified by the Appellant to add a column explaining its disagreements, if any, with the District's rationale for excluding specific documents, is attached as Appendix C.

8. POINTS FOR CLARIFICATION

a. Subparagraphs c.(1) through c.(43) below set forth the questions provided to the parties in advance of the appeal conference. The written answers provided by the Appellant on 14 July 2023, with citations to the AR, are attached as Appendix B.

b. The District did not provide a written response answering the questions or providing citations to the AR in advance of the appeal conference. Before proceeding with the points for clarification, the RO asked the District whether they would be submitting their answers to the questions or citations to the AR in writing, and the District stated that they would not. The RO then proceeded with the points for clarification. Initially, in response to each question, the PM read a generic answer from a laptop, typically just describing the types of documents relied on, followed by a rapid reading of citations to the AR. This required the RO to interrupt the PM multiple times during each response so that he could be sure he had accurately captured the response and the citations to the AR. After several questions, it became clear that proceeding in this manner would potentially impact the timely completion of the appeal conference. Consequently, the RO requested that in its verbal responses, the District provide only substantive information that would help clarify the record and that it submit the AR citations to him in writing. The written responses submitted by the District on 28 July 2023 are attached as Appendix D.

c. The subparagraphs following each question below do not contain a verbatim transcript of the appeal conference. The answers and discussions are paraphrased, consolidated for clarity, and limited to clarifications of the facts established by the AR. Legal arguments have been omitted, and, with some exceptions, any District responses that involved listing citations to the AR do not include those AR citations. Instead, the RO will be relying largely on the District's written submission of the AR citations for each question (Appendix D).

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(1) **Question 1:** "Does the District have any local policy or Standard Operating Procedures related to aspects of its decision that were followed during its consideration of the Appellant's proposal (e.g., Public Interest Review (PIR), subsistence)? If so, please provide those documents?"

(a) The District has an Individual Permit Regulatory Handbook that outlines the steps to complete the permit process, but there is no specific local guidance on subsistence considerations.

(b) As a follow-up to this question, the District provided a printed copy of the District's Individual Permit Regulatory Handbook to the Appellant and committed to providing the electronic version of the Handbook to the RO and the Appellant following the appeal conference. The District provided the Handbook to the RO and the Appellant on 2 August 2023, and it is attached as Appendix E.

(2) **Question 2:** "RFA^[1] p. 6, states 'Staff was generally nonresponsive to the data (much of which has, tellingly, been entirely ignored and is not addressed in the decision document)'. For the Appellant, explain what data was provided [but] not addressed in the decision document. For the District, was the data submitted by the applicant considered in the permit decision, and if so how. If not, why and explain where that is documented in the record."

(a) In addition to relying on its written response, the Appellant emphasized that the most important data provided to the District but not addressed in the decision document were those related to SAV and associated species and their ability to quickly re-establish following disturbances. The Appellant distinguished between the types of SAV located in the project area in Bonanza Channel and those found in the deeper waters of Safety Sound, contrasting the specific life requirements of eelgrass and sago pondweed, and detailing the disturbance regime and functions of these ecosystems. According to the Appellant, the Bonanza Channel SAV is disturbed every year by the seasonal freeze-thaw cycle, which scours the substrate. It further claimed the Bonanza Channel does not provide conditions suitable to eelgrass because the system fluctuates between entirely fresh water to almost all seawater. The Appellant stated that the data it submitted demonstrates that the conditions and habitat in the Bonanza Channel are very different from those in Safety Sound.

(b) The District stated that all data submitted by the Appellant was considered in its decision and is referenced in the Statement of Findings (SOF). However, later in the appeal conference, the District acknowledged that it did not consider three studies that the Appellant submitted after the District received the Appellant's letter dated

¹ "RFA" refers to the Appellant's Request for Appeal.

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16 December 2021, which the District characterized as stating that the Appellant would not be providing any additional information in support of its permit application.

(3) **Question 3:** "RFA p. 7, the phrase 'claim jumping' and or 'regulatory claim jumping' is used. Explain what the use of these phrases means."

(a) The Appellant relied on its written response.

(b) In response to the Appellant's reference to a "contract" with the Native Village of Solomon, the District provided an explanation of the authority of the Corps' Civil Works program to enter into agreements to provide technical assistance to any State, Tribe, or Territory under the Planning Assistance to States (PAS) Program and provided an explanation distinguishing between work done by the District as part of its evaluation of permit applications and work done by its Civil Works Program.

(c) The District stated that the Regulatory staff's participation in meetings with the Native Village of Solomon was for tribal consultation purposes and that it did not have anything to do with the technical assistance provided under the Civil Works PAS Program. The District stated that Regulatory staff were not involved in the request or approval process for the PAS technical assistance, that the PAS report was issued after the Appellant's permit was denied, and that findings of the PAS report were not considered in the District's decision on the Appellant's permit application.

(d) However, the Appellant did identify in the record the PAS Scope of Work, documentation of a meeting attended by Regulatory staff that referred to the PAS technical assistance, and other records that it contends demonstrate that the Regulatory staff were involved with the PAS study during the permit evaluation process.

(4) **Question 4:** "RFA p. 7, The Appellant asserts the District assisted project opponents in preparation of an anti-IPOP website. Explain how the District assisted project opponents with this website."

(a) The Appellant relied on its written response.

(b) Referring to AR 31471, the District stated that it responded to a question from the public and that someone in opposition to the project posted its response to the Internet.

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(5) **Question 5:** "RFA p. 8, footnote 5 references an email, dated February 21, 2022. Where in the AR is this email?"

(a) The Appellant relied on its written response.

(b) The District stated that the email is not part of the AR because the Civil Works PAS technical assistance report was not provided to Regulatory nor considered during the permit evaluation process.

(6) **Question 6:** "AR p. 373, Field Report references a photo log. Where in the AR are these photos located?"

(a) The Appellant relied on its written response.

(b) The District cited AR pp. 684-693.

(7) **Question 7:** "The project proposal combined the two-phase case study with the full-scale operation mining plan. Why was the case study combined with the full-scale operation in one IP [(Individual Permit)] review?"

(a) The District stated that because the case study did not have independent utility from the full-scale mining operation, it had to be combined into a single IP review.

(b) The Appellant relied upon its written response and clarified that it proposed the case study after consideration of the public notice comments. The case study location between two islands was chosen because the environment is easier to control; the location has the least potential to impact navigation in the channel; the habitat was perceived to be less valuable in the eyes of the resource agencies; and it was within a portion of the area already proposed to be impacted for accessing the proposed project area.

(8) **Question 8:** "The AR includes multiple references to the production of a reality television show. What is the relevance of the television show to the project?"

(a) The Appellant explained that very early in its permit process there had been an IPOP partner interested in doing a television show about the mining project. That individual is no longer an IPOP partner. The corporate entity with the television show name is still associated with the proposed project, but the proposed project does not have any television show associated with it. The Appellant stated that it is a mining project.

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(b) The District stated that if the project had an associated television show, the project purpose and need would change from gold mining to a television show, and the range of alternatives evaluated under the 404(b)(1) Guidelines and NEPA would change. The District explained that any reference to the television show was to document the history of the permitting process and the District's thought process and to respond to public notice comments, but that the potential for a television show was not considered in making its decision.

(9) **Question 9:** "Where are the notes from the March 28, 2018 meeting referenced on page 14 of the AR?"

(a) The District stated that it could not locate any notes from the meeting.

(b) The Appellant stated that it has no record of any meeting occurring on that date.

(10) **Question 10:** "RFA p. 75, The Appellant asserts 'While Staff properly finds the issue outside the Corps' scope of review, Staff reproduces attacks on the economic viability of the project and even the presence of gold at the project, suggesting that Staff's decision making may have been rendered arbitrary and capricious by acceptance of further slanders from the project opponents. (Memo at 63)' (AR p. 67). It is not clear what this comment is referring to at 'Memo 63' (which is at AR p. 67). Clarify this comment."

(a) The Appellant relied on its written response.

(11) **Question 11:** "AR p. 30456, Was the online Nome Nugget public poll considered by the District? Why or why not? How was the poll related to POA's PN [(public notice)]?"

(a) The District stated that the online poll was included in a public notice comment, but that the comment was not considered because it was not substantive.

(12) **Question 12:** "The AR indicates that IPOP conducted fisheries surveys during the summer of 2021, May/June 2022, and July 2022. IPOP states that 'the purpose of the July 2022 sampling was conducted to further attempt to document fish presence at locations identified in the USACE Planning Assistance to States project with the Native Village of Solomon, 2022 Nearshore Fish Study Plan, Eastern Safety Sound'. Within Appendix 2 of the SOF (AR p. 142) the District states 'it finds it difficult to draw conclusions about fish presence in Bonanza Channel due to the limited sampling (two days in July and primarily near the shorelines)'. In making this conclusion, did the

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District consider all the sampling efforts conducted by IPOP or just the July 2022 effort? Did the District provide IPOP with any sampling protocols to follow?"

(a) The District initially stated that it considered all the data provided by the Appellant. However, later in the discussion, the District stated that it did not consider the three studies the Appellant submitted after the District received the Appellant's 16 December 2021 letter, which the District characterized as the Appellant stating that it would not be providing any additional information in support of its permit application.

(b) The District stated that it did not provide the Appellant with any sampling protocols. It provided public notice comments to the Appellant who then carried out the studies in response to public comments without coordination with the District.

(c) The Appellant stated that it carried out the studies to gather information to refute the assumptions of the District and the resource agencies and to address the District's contention that it did not have enough information to make a decision.

(13) **Question 13:** "AR p. 8, states the total project impacts are 192.5 acres; AR p. 88 specifies that those 192.5 acres are vegetated shallows; AR p. 90 the Statement of Findings (SOF) explains that mudflats will also be impacted by the proposal but does not include a measure of the impact area. Clarify the acreage of permanent and temporary impacts proposed in WOTUS [(waters of the United States)], separated by aquatic resource type and where this is documented in the AR. Explain the rationale supporting your methods to distinguish between temporary and permanent effects and point to where that information is documented in the AR?"

(a) The District did not clearly explain the basis for its categorization of aquatic resource types. The District stated that it considered the entire 192.5 acres as special aquatic sites, with the area being predominantly vegetated shallows, but also containing some mudflats. The District stated that it did not have enough data to distinguish between the different resource types.

(b) The District did not clearly explain the rationale supporting its methods to distinguish between temporary and permanent effects. The District stated that it views impacts and effects as synonymous. The District also indicated that although the SOF considers the conversion between aquatic resources to be a permanent impact, it did not consider aquatic resource conversion to result in a permanent loss of waters of the United States.

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(14) **Question 14:** "What information did the District rely upon to determine the functional importance of the special aquatic sites and where in the AR is this documented?"

(a) The District stated that it used information provided by the resource agencies, comments received from the public notice, tribal consultation, and the procedures in 33 CRF Part 330 and 40 CFR Part 230 to determine the functional importance of the special aquatic sites. The District did not include in its list of information the data gathered and submitted by the Appellant. However, during its review of the draft of this MFR, the District corrected its inadvertent omission and clarified that it did consider data submitted by the Appellant.

(15) **Question 15:** "AR p. 88, the District states, 'A permanent loss of waters of the U.S. is not anticipated if the reclamation proposal is successful; however, the result of the proposed reclamation would result in a conversion of waters type, with associated permanent impacts to the functions and values provided by the special aquatic sites.' Considering these statements regarding 'permanent loss' versus 'permanent impacts', how did you distinguish between permanent loss and permanent impact? What information did the District rely upon to evaluate the impacts on aquatic resource functions and where is that documented in the AR?"

(a) The District stated that permanent loss equates to a conversion from wetland to non-wetland resources, whereas permanent impacts only result from the conversion of one aquatic resource type to another. The District stated that to evaluate the impacts on aquatic resource functions, it relied upon the Appellant's reclamation plan, other submittals from the Appellant, and public notice comments. The District further referred the RO to its response to Question 13.

(b) The Appellant contended that the District rejected the reclamation plan because of an unsupported view that existing site conditions are pristine and that any change in existing conditions would produce a lower level of aquatic resource functions, rather than evaluating the functions and values of the changed environment after reclamation relative to the existing conditions.

(c) The District responded that it denied the permit application based on the proposed project not being the LEDPA and so it never made a determination about the adequacy of the reclamation plan.

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(16) **Question 16:** "AR pp. 10, 59, 91, 96, 102, within the SOF the District describes the project area as pristine. What criteria were evaluated to determine this area as pristine and identify what information within the AR supports the classification."

(a) The District stated that based on its best professional judgment, the AR supports this classification. The District then referenced a map of the Solomon area that the District said demonstrates that there was historic mining in the Solomon River but not the Bonanza River or Bonanza Channel.

(b) The Appellant stated its belief that the extent of historic placer mining in the Solomon River was so great that the suspended sediment flowed down and filled in the Bonanza Channel and made it shallower. The Appellant stated that it proposed to make a deeper channel within the Bonanza Channel to restore its historic contours and improve the function of the estuary and that the District rejected the proposal despite evidence contained in the Appellant's "2021 Desktop Study" (AR pp. 24737-41) and "Burnett's Geology Reports" (AR pp. 9176-87), which it believes document how upstream mining changed the project area and impacts associated with the construction of the Bonanza Channel Bridge. To support its contentions, the Appellant also pointed to its written response.

(17) **Question 17:** "AR p. 30, the SOF states 'The applicant did not propose any timing restrictions to minimize impacts to birds.' RFA p. 40 the Appellant states 'To the extent that Staff wished to mitigate risks that might rise to the level of actually killing a bird, Staff could have included a permit condition cautioning IPOP to avoid adverse impact on any bird nests in the vicinity of the camp—though flooding would probably destroy most of them anyway.' Was there a discussion of potential special conditions (timing, additional sound abatement measures, etc.) that could have reduced the project's impacts on birds? If so, where is this contained within the AR?"

(a) The District stated that there was no discussion specific to special conditions because the project was denied based on it not being the LEDPA. The District said there is sufficient documentation in the AR to demonstrate that impacts to birds are a concern.

(b) The Appellant noted that its request was denied due to the adverse public interest determination regarding recreation, which refers primarily to birding and impacts to birds, a focus acknowledged by the District at the appeal conference. The Appellant stated that it responded to the public notice comments about the impacts to birds, but that the District did not consider its submittals or communicate what changes could be made to allow for issuance of a permit.

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(18) **Question 18:** "AR p. 33, The District states 'The Corps does not agree with the applicant that temperature would be a limiting factor for salmonids migrating in Bonanza Channel because the Corps does not have enough information about the temperatures in the channel over and at different depths.' Did the District specify a certain methodology or a set of parameters to follow for collecting this data? After reviewing the report did the District discuss with IPOP additional information needed? Where is this documented in the AR?"

(a) The District stated that it did not specify a methodology for collecting the data. The District stated that the Appellant's data were difficult to interpret and that additional information concerning temperature and depth was requested. The District stated that the temperature data provided by the Appellant are within the range of what is supportive to fish.

(b) The Appellant relied on its written response and stated that the depth-related information requested was previously provided to the District, citing the spreadsheet at AR p. 24122. The Appellant explained that whenever a request was satisfied, the District would request more information, and that, over time, the request changed from temperature and depth data to a sieve analysis and data on benthic organisms. The Appellant stated that the AR documents temperatures unsuitable to salmonids, ice-ground fast conditions prohibitive of fish schooling, and an expert opinion that the temperatures of the channel are suboptimal to fisheries.

(19) **Question 19:** "RFA p. 18, the Appellant states "IPOP's Certified Professional Geologist provided a detailed analysis of the gold related aspects of the Bonanza Channel and surrounding areas that is, in substance, entirely ignored by Staff". For the Appellant, which report are you referencing and where is this report in the AR? For the District, did you review this report? If so, where in the AR is your analysis of the report documented and how was this analysis considered in the SOF?"

(a) The Appellant relied on its written response.

(b) The District stated that it considered a different report and that its analysis of that report is in the SOF. After the appeal conference, the District clarified that it had considered the mineral resource report provided by the Appellant but that the Appellant's reference is to a duplicate copy in the AR.

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(20) **Question 20:** "What rationale did the Appellant provide to support locating the 24-acre study area outside of the general mine area? Where is this rationale located within the AR?"

(a) The Appellant cited AR p. 8244 and explained that at the time, it understood the District's concerns to be impacts to the Bonanza Channel, so it identified an area that avoided the channel. The Appellant stated that the location is sheltered between two islands, making conditions easier to control; would minimize disruptions to boat traffic; contains less SAV; and would be dredged to access the proposed project site anyway.

(21) **Question 21:** "There is disagreement between the District and Appellant regarding the proposed mining reclamation plan. How did the District consider the proposed mining reclamation plan regarding it being viewed as mitigation and/or impacts? Where is this rationale located in the AR?"

(a) The District stated that it did not view the reclamation plan as mitigation but as impacts resulting from the disposal of dredged material into areas not proposed for mining. The District also referred to its prior responses to questions 13 and 15.

(22) **Question 22:** "Was there a dialogue between the District and Appellant regarding less damaging alternatives and if so where is that dialogue documented in the AR?"

(a) The District stated that it communicated denial considerations to the Appellant in March 2022 and had a meeting about the LEDPA, identifying the primary issue as being disposal alternatives because the case study proposed by the Appellant would result in more impacts. The District stated that it consulted with POA's Operations Branch and determined that pumping the dredged material to Norton Sound for disposal is the LEDPA. After the appeal conference, the District clarified that more than one option was available that would be less environmentally damaging than what was proposed by the Appellant and that the pumping option would be a practicable alternative.

(b) The Appellant stated that there was never any meaningful discussion of alternatives. The Appellant thought the LEDPA issue was resolved by the District's letter dated 27 January 2022, which stated that no mitigation would be required. Because mitigation is not considered until after the LEDPA is determined, the Appellant took the letter to mean that its proposed project was the LEDPA. The Appellant stated that it did not have an opportunity to fully respond to the District's assertion that pumping the dredged material to Norton Sound for disposal is practicable.

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(c) The RO asked when the District determined that the permit was headed toward denial and when that was communicated to the Appellant. The District stated that its receipt of the Appellant's letter dated 16 December 2021, which the District characterized as indicating that the Appellant would not be providing any more information, was the point at which it saw the permit heading toward denial. The District could not recall when this was communicated to the Appellant.

(d) The RO asked whether the District engaged the Appellant so that negative impacts could be mitigated. The District answered that it cannot dictate what an applicant can do or be prescriptive with respect to mitigation measures. The Appellant stated that it was not given the opportunity to respond to the bases for the permit denial.

(23) **Question 23:** "AR, p. 10, 'Safety Sound is one of the few publicly accessible locations on the Refuge for viewing wildlife.' Specify how many publicly accessible locations for wildlife viewing are available."

(a) The District stated that there are limited publicly accessible locations for birding and that the proposed man camp and access point would eliminate one of the only accessible areas for birding from the public road system along Safety Sound and the Bonanza Channel.

(b) The Appellant stated that the District is equating the proposed project site to Safety Sound in its entirety and that there is nothing in the AR regarding birding at the specific site proposed for mining. The Appellant noted that there are numerous locations around Safety Sound and the Nome area for birding.

(24) **Question 24:** "AR p. 67, in the SOF, the discussion of alternatives states 'All information submitted by the applicant, including information found in letters submitted September 17, 2021 (case study as an alternative to full-scale mining); September 27, 2021 (a court case); and November 30, 2021 (general disagreements) has been considered during the alternative analysis; this is not a complete list.' Provide a complete list of information considered during the alternatives analysis and identify the respective location in the AR."

(a) The District referred to its response to Question 22 and committed to follow up with a complete list in a written response.

(25) **Question 25:** "AR p. 91, the District states, 'The project may have major effects to recreational fishers as during the project, portions of the Bonanza Channel would be closed off by the turbidity curtains and unavailable for use by the public.' Did

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the District determine this to be a short-term or long-term effect, and how did they conclude the effect is major and not minor? Where is this documented in the AR?"

(a) The District stated that it determined that the action would be neither short-term nor long-term and did not explain how it concluded that the effects are major. During its review of the draft of this MFR, the District clarified that its determination was based on its consideration of public notice comments and comments from the National Marine Fisheries Service.

(b) The RO asked if the District communicated to the Appellant the major concerns with the recreation PIR factor before the denial of the permit. The District responded that there was no discussion with the Appellant regarding the District's concerns with the recreation PIR factor and that the District forwarded the substantive public notice comments to the Appellant for its consideration.

(26) **Question 26:** "What is the geographic scope you identified for recreation PIR Factor and where is that explained in the AR? How much of that area is available or not available for recreation and where is that documented in the AR?"

(a) The District stated that the geographic scope for the recreation PIR factor was assessed at the local level, *i.e.*, Nome and the surrounding areas, but that it also determined that there would be a negative effect at the national level due to impacts to the refuge. The District stated that since these geographic scopes are not delineated, there is not an assessment of how much of that area would be available for recreation.

(27) **Question 27:** "AR p. 109, The District states 'The Corps has determined that the beneficial effects would be more than minimal but temporary as the applicant has provided their economic benefit estimate of the proposed project.' Where is the estimate located in the AR? Explain how the estimate was used to support the beneficial-effect determinations made in the PIR. What is the District's rationale for beneficial effects being temporary?"

(a) The District stated that the beneficial effects would be temporary because of the six-year lifespan of the project.

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(28) **Question 28:** "AR P. 109, What rationale was used to support the statement in relation to Public and Private Use that 'Corps has conservatively determined that the detrimental effects would be more than minimal and permanent?'"

(a) The District stated that the Appellant had offered insufficient measures of avoidance and minimization because its proposed project would change the geomorphology of the Bonanza Channel.

(29) **Question 29:** "AR p. 2572, the District's letter to IPOP states 'We have not received geotechnical information regarding presence, location, and depth of gold. We do not have sufficient geotechnical information to conduct an alternatives analysis of your project, as is required by the National Environmental Policy Act or the Clean Water Act under the 404(b)(1) Guidelines.' In the SOF (AR, p. 21), however, the District states 'the Corps is deferring to the applicant in assuming wide distribution of gold throughout the 32 claims for the Alternatives Analysis.' What information did the Appellant provide to the District regarding presence, location, and gold depth? What documents did the District consider to support its alternatives analysis and where are they located in the AR?"

(a) The District stated that it needed additional information on the distribution of gold to identify potential measures to avoid and minimize impacts to aquatic resources, but that the Appellant wanted to move forward without gathering additional data, so the District made assumptions when making the permit decision. The District said that the Appellant went through the Nationwide Permitting process multiple times for the collection of additional data, but that no additional data was collected or provided beyond the initial 13 cores which were combined into one sample. The District referred the RO to its response to questions 22 and 24 for documents it considered to support its alternatives analysis.

(b) The Appellant referred to its written response and stated that its geotechnical analysis identified the ancient beach line and other data sufficient to respond to each of the District's questions.

(30) **Question 30:** "AR p. 103, within the SOF the Districts evaluation for the Land Use PIR factor included discussion of the 1979 Settlement Agreement. The District states 'The Corps cannot enforce provisions of the Agreement since the Corps is not party to it; however, the Corps has considered the information in evaluating the proposed project.' How did the District consider this agreement and how was it factored into the decision of the project?"

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(a) The District stated that it did not consider the 1979 Settlement Agreement in making the permit decision, but that the Settlement Agreement did inform the District of the importance of services and values provided by the area. The District stated that it also balanced other land-use considerations, including mineral development. During its review of the draft of this MFR, the District clarified that it considered the reasons why the land was set aside in the agreement, but that the District could not enforce the provisions of the agreement.

(b) The Appellant referred to its written response, stated that there is nothing in the Agreement that states the land will be set aside for conservation purposes only, and cited 30 CFR 324(j)(2) [sic] to explain that the District must defer to state land-use determinations. The Appellant stated that the designation from the State is for multiple uses that are not exclusive of one or another and that mining can be carried out without interfering with conservation and recreation purposes.

(31) **Question 31:** "AR p. 103, regarding the navigation PIR factor the District states 'The channel itself is utilized by small boats as its depth does not support large boats.' The District concludes with the statement 'The reduction in area for watercraft, as shallow littoral disposal sites are filled per the applicant's reclamation proposal, would be detrimental to navigation after the conclusion of the project because the proposed project would reduce the width of available water area for boats that currently use the area.' Did the District consider the potential benefits of a deeper channel for current boats and for larger boats because of the deeper channel?"

(a) The District said it did not consider the benefits of a deeper channel because the deeper channel would not connect to the deeper areas of Safety Sound and would be of limited usefulness to boaters.

(b) The Appellant stated that it never received buy-in on the creation of the deeper channel. The Appellant cited page 85 of the AR, stating that the District states there would be a major impact on current patterns and water circulation. The Appellant stated that it is inconsistent to reason that the change would not have a beneficial effect on recreation but would have a negative effect on water circulation and salinity.

(32) **Question 32:** "AR p. 105, regarding the recreation PIR factor. Did the District weigh the potential benefits a deeper channel, as proposed in IPOP's reclamation plan, would have on recreation opportunities? If so, where is it located in the AR?"

(a) The District referred to its response to question 31.

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(33) **Question 33:** "RFA p. 95, states that 'the gold mining, as proposed, is for shallow water gold recovery using equipment specially designed to operate in shallow water environments...A basic project purpose that includes all types of mining for gold, rather than shallow water dredge mining...improperly forces the applicant to rebut the premise that practicable alternatives that do not involve special aquatic sites are presumed to be available.' Please explain how the District concluded it was appropriate to expand the project purpose to different types of gold mining, even though the Appellant had already invested in shallow water equipment. Where is this documented in the AR?"

(a) The District stated that previous investments cannot preclude the consideration of alternatives and that the Appellant had not overcome its rebuttable presumption of other practicable alternatives. The District stated that the practicability of ocean mining is still valid and available to the Appellant because portions of its existing mine claims are on ocean waters.

(b) The Appellant stated that it is committed to extracting the gold from where it is located in the least damaging way possible and that there is nothing in the record that addresses the question of practicability of ocean mining or shows that it is associated with fewer environmental impacts.

(34) **Question 34:** "AR p. 71, the District refutes the Appellant's statement in the LEDPA analysis that mining in the ocean offshore is not comparable to mining in the Bonanza Channel, stating no data to substantiate their claim that offshore mining was not comparable was supplied to the Corps." For the Appellant, do you believe this is a true statement? If not, what data did you supply to the District and where is it in the AR? For the District, was other information used to determine that the ocean offshore mining was comparable to the Bonanza channel. If so, where is this in the AR?"

(a) The Appellant referred to its written response and stated that it never received a chance to fully rebut the practicability of ocean dredging because, by 10 November 2021, the District had already agreed that it and other offsite alternatives were impracticable. During its review of the draft of this MFR, the Appellant provided a citation to AR pp. 24336-37 as support for its statement.

(b) The District said that it had discussed with the Appellant the alternative of ocean mining under RGP 4. The District said that offsite alternatives outside the Appellant's mine claims were dismissed as impracticable, but that it had not eliminated ocean mining and mining in other areas within the Appellant's claims as alternatives.

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(35) **Question 35:** "Specify which plant and animal species were determined to be important to subsistence, how they were determined to be affected by the proposal, and where the consideration and evaluation of subsistence are supported in the AR."

(a) The District stated that tomcod, salmon, and birds are important for subsistence in the project area and that these resources would be temporarily impacted by noise disturbance and changes to available habitat due to dredging. The District said that its consideration and evaluation of subsistence was conducted during its consideration of environmental justice.

(36) **Question 36:** "Specify which subsistence activities the District determined would be impacted as a result of the proposed project and explain the standard used to weigh the importance of these activities in the District's decision and where this is supported in the AR?"

(a) The District referred to its previous response. When asked whether it had any additional analysis to help clarify the AR with respect to subsistence uses of resources in the proposed project area, the District stated that it did not and that its answers to questions 37 and 38 below would rely on its response to question 35 and the AR. Consequently, the RO moved on to question 39.

(37) **Question 37:** "Are there subsistence opportunities unique to the project location that would not be available outside of the project location? Is this evaluated in the AR, and if so, where?"

(a) In response to question 36, the District indicated that it did not have any additional information to clarify the AR with respect to subsistence uses of resources in or outside of the proposed project area, so the RO did not ask for any additional clarifying information on this question at the appeal conference. The District had the opportunity to respond to this question in its written response submitted on 28 July 2023 and attached as Appendix D.

(38) **Question 38:** "How did the District consider and weigh subsistence when evaluating the Recreation PIR factor? Where is this located in the AR?"

(a) In response to question 36, the District indicated that it did not have any additional information to clarify the AR with respect to subsistence uses of resources in the proposed project area, so the RO did not ask for any additional clarifying information on this question at the appeal conference. The District had the opportunity to respond to this question in its written response submitted on 28 July 2023 and attached as Appendix D.

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(39) **Question 39:** "AR pp. 30328 – 30332, contains a string of emails referencing a meeting between District staff and the Solomon Native Corporation. Where in the AR are the notes or MFR documenting the meeting?"

(a) The District stated that the MFR for the meeting that occurred on 12 January 2022 is at AR 27003-27006.

(40) **Question 40:** "AR p. 30328, contains an email from the President of the Solomon Native Corporation requesting consultation with the District. Is it the District's position that this 'consultation' is a meeting that it would have with another adjacent landowner or as Government-to-Government consultation with a Federally Recognized Tribe?"

(a) The District explained that it did not consider the consultation with the Solomon Native Corporation as Government-to-Government consultation or as an interaction with a neighboring landowner, citing Public Law 108-99 as a binding requirement for the District to consult with Alaska Native Corporations. The District stated that Alaska Native Corporations are not tribes but that the Alaska Native Claims Settlement Act (ANCSA) created a complicated, nuanced relationship with Alaska Native Corporations that has no counterpart in the lower 48. The District explained that consultation typically occurs at the staff level whereas Government-to-Government consultation is conducted by the District Commander.

(b) The Appellant relied on its written response and voiced its concern that the District gave weight to tribal concerns that are anti-competitive, rather than protective of tribal resources.

(41) **Question 41:** "RFA p. 56 states 'Subsistence harvest is the subject of detailed government permitting and reporting, as well as analysis and reporting by Native Alaskan groups. In 2019, IPOP pulled lists of subsistence harvest permits and found no evidence of Bonanza Channel use and requested that the Corps host a meeting with Alaska Native representatives to identify possible issues. For the Appellant, did you provide the District those lists of subsistence harvest permits? Is this in the AR and if so, where? For the District, were lists of subsistence harvest permits considered? If so, where is this in the AR? Did the District refuse to hold the requested meeting? Did the District document their decision on the meeting request and if so, where is this in the AR?"

(a) The Appellant stated that the original list submitted in 2019 was not included in the record but that a different list that it provided to the District in 2020 is more recent and is duplicated throughout the AR.

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(b) The District did not identify a record of the meeting requested by the Appellant in the AR and stated that they do not facilitate meetings between applicants and members of the public or others. The District stated that they did hold a virtual public meeting with approximately 80-100 participants. The District stated that Traditional Ecological Knowledge is rarely written down and that an absence of recorded subsistence at the project area does not mean that it is not occurring, adding that the project would interrupt kayak and canoe traffic.

(42) **Question 42:** "AR p. 100, The District states in the SOF 'The proposed project is anticipated to have a negative impact on community cohesion'. Identify where this is documented in the AR and where this statement is supported in the SOF.

(a) The District referred to its response to question 35. The District explained that community cohesion was considered part of the Public Interest Review factor for economics. The District stated that it had considered subsistence values and services to be valuable to local tradition and heritage, explaining that subsistence is part of the local cultural identity, and that success of harvesting plants and animals is critical to the community's way of life.

9. SITE VISIT

The conference attendees drove to the project area and surrounding areas two times for approximately 6 hours total. The site visit was held for the RO to see the conditions of the project area and immediately surrounding the project area. The second visit included a trip by boat to the area where the Appellant had conducted test dredging, no sign of which remained visible.

During the site visit, the District indicated it did not consider impacts on navigation of the proposed LEDPA, which would require the use of approximately two miles of pipe and booster stations to pump sediment out of the Bonanza Channel and over the barrier island onto nearshore areas. The Appellant stated that, based on aerial photos in the record (*e.g.*, AR p. 19207), the nearshore areas also constitute vegetated shallows. The District disagreed that these areas constitute vegetated shallows but was unable to point to any regulatory guidance that would distinguish any shallow vegetated areas in the ocean from any shallow vegetated areas in an estuary.

During the site visit, no signage for the Alaska Maritime National Wildlife Refuge was observed, and other than property ownership, no difference between the areas the Appellant proposes to utilize and other areas in the Bonanza Channel was observed. The Appellant brought a map showing ownership along the Nome-Council Highway

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(other versions of which appear in the AR). The Highway was generally free of any traffic and provided multiple access locations to Refuge property.

No birdwatchers or subsistence hunters were observed at the Bonanza Channel. No boat traffic was observed in the Bonanza Channel. When the site visit proceeded past the Bonanza Channel Bridge to the site where the Village of Solomon, a Federally recognized tribe, seeks to reestablish its village, District staff acknowledged to the Appellant that birds are abundant throughout Alaska.

10. CONCLUDING REMARKS

a. Alaska District

The District stated that the Corps has a process to follow, and it is neither a proponent nor an opponent of any project. The District stated that this action was not treated any different than any other and that despite what had been said over the course of the past two days, the District had no ulterior motive.

b. Appellant

The Appellant provided closing remarks that echoed its opening remarks and amplified the grievances contained in its RFA.

c. Review Officer

The RO went over the information that the District and Appellant committed to providing during and after the conference and asked that outstanding information be provided by 28 July 2023.

11. POST-CONFERENCE ACTIVITIES

On 2 August 2023, a copy of the draft version of this MFR was forwarded to all attendees for review and comment by 4 August 2023. The RO received the last set of comments on 8 August 2023. All comments provided were considered while finalizing this MFR.

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POINTS FOR CLARIFICATION

I. Staff’s unresponsiveness to IPOP proposals and evidence, and solicitude for project proponents. RFA pp. 10-16

II.G. Staff’s Rejection of IPOP’s Reclamation Plan is Arbitrary and Capricious. RFA pp.45-55

II.I. The Decision’s Reasoning About Environmental Impacts Is Arbitrary and Capricious in Light of Comparable Corps Decisions. RFA pp. 63-71

1. Does the District have any local policy or Standard Operating Procedures related to aspects of its decision that were followed during its consideration of the Appellant’s proposal (e.g., Public Interest Review, alternatives analysis, subsistence)? If so, please provide those documents.
2. RFA p. 6, states “Staff was generally nonresponsive to the data (much of which has, tellingly, been entirely ignored and is not addressed in the decision document)”. For the Appellant, explain what data was provided not addressed in the decision document. For the District, was the data submitted by the applicant considered in the permit decision, if so, how? If not, why and explain where that is documented in the record.
3. RFA p. 7, the phrase “claim jumping” and or “regulatory claim jumping” is used. Explain what the use of these phrases means.
4. RFA p. 7, The Appellant asserts the District assisted project opponents in preparation of an anti-IPOP website. Explain how the District assisted project opponents with this website.
5. RFA p. 8, footnote 5 references an email, dated February 21, 2022. Where in the AR is this email?
6. AR p. 373, Field Report references a photo log. Where in the AR are these photos located?
7. The project proposal combined the two-phase case study with the full-scale operation mining plan. Why was the case study combined with the full-scale operation in one IP review?
8. The AR includes multiple references to the production of a reality television show. What is the relevance of the television show to the project?
9. Where are the notes from the March 28, 2018 meeting referenced on p. 14 of the AR?
10. RFA p. 75, The Appellant asserts “While Staff properly finds the issue outside the Corps’ scope of review, Staff reproduces attacks on the economic viability of the project and even the presence of gold at the project, suggesting that Staff’s decision making may have been rendered arbitrary and capricious by acceptance of further slanders from the project opponents. (Memo at 63)” (AR p. 67). It is not clear what this comment is referring to at “Memo 63” (which is at AR p. 67). Clarify this comment.
11. AR p. 30456, Was the online Nome Nugget public poll considered by the District? Why or why not? How was the poll related to POA’s PN?

II. The decision errs in describing the fundamental features of the Bonanza Channel and how they will be affected by suction dredge mining. RFA pp. 16-45

12. The AR indicates that IPOP conducted fisheries surveys during the summer of 2021, May/June 2022, and July 2022. IPOP states that “the purpose of the July 2022 sampling was conducted to further attempt to document fish presence at locations identified in the USACE Planning Assistance to

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States project with the Native Village of Solomon, 2022 Nearshore Fish Study Plan, Eastern Safety Sound”. Within the Appendix 2 of the SOF (AR p. 142) the District states “it finds it difficult to draw conclusions about fish presence in Bonanza Channel due to the limited sampling (two days in July and primarily near the shorelines)”. In making this conclusion, did the District consider all the sampling efforts conducted by IPOP or just the July 2022 effort? Did the District provide IPOP with any sampling protocols to follow?

13. AR p. 8, states the total project impacts are 192.5 acres; AR p. 88 specifies that those 192.5 acres are vegetated shallows; AR p. 90 the Statement of Findings (SOF) explains that mudflats will also be impacted by the proposal but does not include a measure of the impact area. Clarify the acreage of impacts proposed in WOTUS, separated by aquatic resource type and where this is documented in the AR. Explain the rationale supporting your methods to distinguish between temporary and permanent effects to WOTUS and point to where that information is documented in the AR.
14. What information did the District rely upon to determine the functional importance of the special aquatic sites and where in the AR is this documented?
15. AR p. 88, the District states, “A permanent loss of waters of the U.S. is not anticipated if the reclamation proposal is successful; however, the result of the proposed reclamation would result in a conversion of waters type, with associated permanent impacts to the functions and values provided by the special aquatic sites.” Considering these statements regarding “permanent loss” versus “permanent impacts”, how did you distinguish between permanent loss and permanent impact. What information did the District rely upon to evaluate the impacts on aquatic resource functions and where is that documented in the AR?
16. AR pp. 10, 59, 91, 96, 102, within the SOF the District describes the project area as pristine. What criteria were evaluated to determine this area as pristine and identify what information within the AR supports the classification?
17. AR p. 30, the SOF states “The applicant did not propose any timing restrictions to minimize impacts to birds.” RFA p. 40 the Appellant states “To the extent that Staff wished to mitigate risks that might rise to the level of actually killing a bird, Staff could have included a permit condition cautioning IPOP to avoid adverse impact on any bird nests in the vicinity of the camp—though flooding would probably destroy most of them anyway.” Was there a discussion of potential special conditions (timing, additional sound abatement measures, etc.) that could have reduced the project’s impacts upon birds? If so, where is this contained within the AR?
18. AR p. 33, The District states “The Corps does not agree with the applicant that temperature would be a limiting factor for salmonids migrating in Bonanza Channel because the Corps does not have enough information about the temperatures in the channel over and at different depths.” Did the District specify a certain methodology or a set of parameters to follow for collecting this data? After reviewing the report did the District discuss with IPOP additional information needed? Where is this documented in the AR?

III. The decision’s arbitrary, capricious, and illegal assessment of the public interest. RFA pp. 72-89

IV. The decision’s conclusion that IPOP’s proposal is not the LEDPA is arbitrary, capricious, and contrary to law. RFA pp. 90-109

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19. RFA p. 18, the Appellant states “IPOP’s Certified Professional Geologist provided a detailed analysis of the gold-related aspects of the Bonanza Channel and surrounding areas that is, in substance, entirely ignored by Staff”. For the Appellant, which report are you referencing and where is this report in the AR? For the District, did you review this report? If so, where in the AR is your analysis of the report documented and how was this analysis considered in the SOF?
20. What rationale did the Appellant provide to support locating the 24-acre study area outside of the general mine area? Where is this rationale located within the AR?
21. There is disagreement between the District and Appellant regarding the proposed mining reclamation plan. How did the District consider the proposed mining reclamation plan regarding it being viewed as mitigation and/or impacts? Where is this rationale located in the AR?
22. Was there a dialogue between the District and Appellant regarding less damaging alternatives and if so where is that dialogue documented in the AR?
23. AR, p. 10, “Safety Sound is one of the few publicly accessible locations on the Refuge for viewing wildlife.” Specify how many publicly accessible locations for wildlife viewing are available.
24. AR p. 67, in the SOF, the discussion of alternatives states, “All information submitted by the applicant, including information found in letters submitted September 17, 2021 (case study as an alternative to full-scale 5mining); September 27, 2021 (a court case); and November 30, 2021 (general disagreements) has been considered during the alternative analysis; this is not a complete list.” Provide a complete list of information considered during the alternatives analysis and identify the respective location in the AR.
25. AR p. 91, the Districts states “The project may have major effects to recreational fishers as during the project, portions of the Bonanza Channel would be closed off by the turbidity curtains and unavailable for use by the public.” Did the District determine this to be a short-term or long-term effect, and how did they conclude the effect is major and not minor? Where is this documented in the AR?
26. What is the geographic scope you identified for recreation PIR Factor and where is that explained in the AR? How much of that area is available or not available for recreation and where is that documented in the AR?
27. AR p. 109, The District states “The Corps has determined that the beneficial effects would be more than minimal but temporary as the applicant has provided their economic benefit estimate of the proposed project.” Where is the estimate located in the AR? Explain how the estimate was used to support the beneficial-effect determinations made in the PIR. What is the District’s rationale for beneficial effects being temporary?
28. AR P. 109, What rationale was used to support the statement in relation to Public and Private Use that the “Corps has conservatively determined that the detrimental effects would be more than minimal and permanent”?
29. AR p. 2572, the District’s letter to IPOP states, "We have not received geotechnical information regarding presence, location and depth of gold. We do not have sufficient geotechnical information to conduct an alternatives analysis of your project, as is required by the National Environmental Policy Act or the Clean Water Act under the 404(b)(1) Guidelines." In the SOF (AR, p. 21), however, the District states “the Corps is deferring to the applicant in assuming wide distribution of gold throughout the 32 claims for the Alternatives Analysis.” Why did the District require additional data

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if it was deferring to an assumption? What information did the Appellant provide to the District regarding presence, location, and gold depth? What documents did the District consider to support their alternatives analysis and where are they located in the AR?

30. AR p. 103, within the SOF the District's evaluation for the Land Use PIR factor included discussion of a 1979 Settlement Agreement. The District states, "The Corps cannot enforce provisions of the Agreement since the Corps is not party to it; however, the Corps has considered the information in evaluating the proposed project." How did the District consider this agreement and how was it factored into the decision of the project?
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32. AR p. 105, regarding the recreation PIR factor, did the District weigh the potential benefits a deeper channel, as proposed in IPOP's reclamation plan, would have on recreation opportunities? If so, where is it located in the AR?
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34. AR p. 71, the District refutes the Appellant's statement in the LEDPA analysis that mining in the ocean offshore is not comparable to mining in the Bonanza Channel, stating no data to substantiate their claim that offshore mining was not comparable was supplied to the Corps." For the Appellant, do you believe this is a true statement? If not, what data did you supply to the District and where is it in the AR? For the District, was other information used to determine that the ocean offshore mining was comparable to the Bonanza channel? If so, where is this in the AR?

II.H. The Decision Arbitrarily Overstates Impacts to Subsistence Harvest by Alaska Natives. RFA pp. 56-62

35. Specify which plant and animal species were determined to be important to subsistence, how they were determined to be affected by the proposal, and where the consideration and evaluation of subsistence is supported in the AR.
36. Specify which subsistence activities the District determined would be impacted as a result of the proposed project and explain the standard used to weight the importance of these activities in the District's decision and where this is supported in the AR.
37. Are there subsistence opportunities unique to the project location that would not be available outside of the project location? Is this evaluated in the AR, if so, where?

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38. How did the District consider and weigh subsistence when evaluating the Recreation PIR Factor?
Where is this located in the AR?
39. AR pp. 30328 – 30332, contains a string of emails referencing a meeting between District staff and the Solomon Native Corporation. Where in the AR are the notes or MFR documenting this meeting?
40. AR p. 30328, contains an email from the President of the Solomon Native Corporation requesting consultation with the District. Is it the District's position that this "consultation" is a meeting that it would have with another adjacent landowner or as Government-to-Government consultation with a Federally Recognized Tribe?
41. RFA p. 56 states, "Subsistence harvest is the subject of detailed government permitting and reporting, as well as analysis and reporting by Native Alaskan groups. In 2019, IPOP pulled lists of subsistence harvest permits and found no evidence of Bonanza Channel use and requested that the Corps host a meeting with Alaska Native representatives to identify possible issues". For the Appellant, did you provide the District those lists of subsistence harvest permits? Is this in the AR and if so, where? For the District, were lists of subsistence harvest permits considered? If so, where is this in the AR? Did the District refuse to hold the requested meeting? Did the District document its decision on the meeting request and if so, where is this in the AR?
42. AR p. 100, The District states in the SOF "The proposed project is anticipated to have a negative impact on community cohesion". Identify where this is documented in the AR and where this statement is supported in the SOF?

IPOP LLC RESPONSES TO QUESTIONS FOR APPEAL CONFERENCE

IPOP hereby requests a copy of whatever answers to the Reviewing Officer's questions may be provided by the Alaska District. IPOP's responses follow, along with two lists of the remaining items IPOP is advancing for inclusion in the AR (Appendix 1 listing those previously supplied, but rejected by the District, and Appendix 2 representing additional documents not previously provided).

- 1. Does the District have any local policy or Standard Operating Procedures related to aspects of its decision that were followed during its consideration of the Appellant's proposal (e.g., Public Interest Review, alternatives analysis, subsistence)? If so, please provide those documents.**

We would appreciate a copy of any documents provided by the District in response to this question, and believe they should be added to the AR. We have cited a number of such documents in the Request for Appeal (RFA) and have listed some of them in Appendix 2 hereto, which consists of additional documents IPOP believes should be added to complete the AR, but which have not previously been provided during the appeal process.

- 2. RFA p. 6, states "Staff was generally nonresponsive to the data (much of which has, tellingly, been entirely ignored and is not addressed in the decision document)". For the Appellant, explain what data was provided not addressed in the decision document. For the District, was the data submitted by the applicant considered in the permit decision, if so, how? If not, why and explain where that is documented in the record.**

Our statement that "until the permit decision, Staff was generally unresponsive to the data" (Annotated RFA at 6) referred primarily to the fact that the primary substantive response made to the multiple scientific studies conducted for IPOP was Appendix 2 to the Decision Document. Very little feedback was provided during the application process itself that would have permitted IPOP to address the District's concerns. More importantly, many of the fundamental scientific points were never addressed by the District concerning the nature of the site and the flora and fauna present there, including, for example:

- Staff did not and could not refute the extensive scientific information provided concerning the invasive and rapidly colonizing nature of the submerged aquatic vegetation (SAV) (*e.g.*, AR28678-80), important in assessing the ephemeral nature of effects produced during dredging. Hence staff inability to respond to the request for any scientific data to contradict the studies cited by IPOP (*see* AR27015 (making request)).
- Staff ignored the substantial governmental studies concerning subsistence harvest (*e.g.*, those cited at AR28258), which demonstrated no subsistence harvest in the area to be mined by IPOP, instead crediting the false statements purchased by the opponents with cash prizes (as assisted by ████████).
- Staff ignored the extensive scientific information concerning the general unsuitability of the Channel for salmon habitat (*e.g.*, AR24755-56), including high temperatures, excessive dissolved oxygen levels, lack of cover and other factors, instead crediting anecdotal reports of fish

presence as being of significance in accessing habitat-related effects (*see also* response to Question No. 18).

- Staff ignored the scientific evidence concerning weather conditions severely limiting the functionality of the Bonanza Channel for fish and wildlife habitat, including enormous variability in wind and precipitation that would often flood out and/or completely submerge potential nesting habitat or dry out potential fish habitat (e.g., AR24749-51) and freezing conditions and resulting ice scour limiting any perennial vegetative growth.¹
- Staff ignored corroboration of the generally poor nature of the habitat (“oligotrophic”) through total organic carbon sampling (AR24065-66; AR24405).
- Staff ignored the extensive scientific presentation of the geological and mining history in favor of regurgitating the opponent’s false claims that IPOP would despoil a “pristine” area (*see also* response to Question No. 16).
- Staff ignored the extensive scientific presentation concerning water flows in the Bonanza Channel, based on measurements of water flow rate and salinity, among other things (e.g., AR24729-47), that showed insufficient energy for sediment transport that could spread localized impacts of the project—an effect mitigated in any event by use of a silt curtain.
- Staff ignored the scientific evidence supporting the Reclamation plan, arbitrarily refusing to consider any positive changes to ecological functions and values associated with changes in Channel bathymetry. Among the evidence ignored was the evidence concerning bird feeding habits and general principles of wetlands restoration as documented in National Resource Conservation Service guidelines (AR30105-09).
- Staff generally ignored the entire concept of adaptive management as applicable to the project and particularly the Reclamation Plan.

3. RFA p. 7, the phrase “claim jumping” and or “regulatory claim jumping” is used. Explain what the use of these phrases means.

“Claim jumping” refers to the action of a competing miner in unlawfully seizing a competitor’s mining claim. A growing body of evidence, summarized in the RFA and documented within the AR, suggests that a primary motive on the part of local opponents of the project is to ultimately re-acquire control of the mineral resources present in this area. As IPOP has explained, the “regulatory claim jumping” arises because

“project opponents with competing mining interests (including 69,000 acres adjacent to IPOP’s claims and over two million acres on the Seward Peninsula) are misusing the regulatory process through a blizzard of false representations about the impacts of IPOP’s project. These interests learned about IPOP’s valuable gold discoveries and technology through permitting process outreach; some of them have approached IPOP demanding cash payments; others have been observed with gold dredging equipment in the Bonanza Channel; and the word around the town

¹ Elsewhere, the Alaska District easily recognizes that such habitat is “highly ephemeral” due to “ice gouging” (AR28753 (concerning Nome Harbor dredging)).

of Nome is that these interests . . . seek to drive IPOP out and obtain IPOP's equipment and mining claims for themselves." (AR30129)

Repeated false statements to District officials are themselves unlawful (e.g., 18 U.S.C. § 1001), and constitute a misuse of the regulatory process. The District's extraordinary decision to fund a \$511,000 study in opposition to the project, which IPOP regards as also illegal, implicates the Corps in this "regulatory claim jumping".

We will discuss more details of the "regulatory claim jumping" at the conference, as well as the District's refusal to complete the AR to include materials relevant to the "regulatory claim jumping" strategy of IPOP's Alaska Native Corporation opponents. We had supplied, for example, a May 21, 2021 letter from IPOP to ██████████ which the District refused to include in the AR14 supplement. It shows, among other things, that BSNC has had no problem fostering development on its own claims on the south side of the Seward Peninsula—one of which, the Bluff, is apparently in close proximity to enormous bird colonies. That letter also reports on the prior execution of the "regulatory claim jumping" strategy by BSNC involving the shutdown of the Rock Creek Mine.

We understand that the District refused to consent to inclusion of the May 21, 2021 letter and other items on the ground that they were "either duplicative or not relevant to its decision". The Reviewing Officer's question concerning "regulatory claim jumping" demonstrates the relevance of the background information IPOP supplied during the application process to support its claims of extraordinary and unlawful conduct on the part of project opponents in collaboration with employees of the District.

Attached hereto as Appendix 1 is a listing of additional documents the District has refused to add to the AR, with very brief notes as their relevance. As to claims of duplication, ██████████ has larded the AR with literally many thousands of pages of entirely duplicative material, making it unmanageable, and unless the District can demonstrate that the documents listed in Appendix 1 are already in the record (unlikely but possible given the incomplete indexing), an argument that the document should be excluded as similar to other material should not be permitted. IPOP cited most of these materials in the RFA because it deemed them highly relevant to the appeal, and they should be in the AR.

4. RFA p. 7, The Appellant asserts the District assisted project opponents in preparation of an anti-IPOP website. Explain how the District assisted project opponents with this website.

Project Manager ██████████ edited materials that were to appear on the website, as demonstrated in an August 26, 2020 e-mail exchange—she suggests that opponents engage in "storytelling" in opposition to the project. (AR31471.) Quotes from ██████████ were then posted by project opponents on the Anti-IPOP Facebook site (e.g., AR5849-50) and again in interviews with the Nome Nugget and KNOM Radio station. ██████████ provided her direct phone line to the website operators so she could, in substance, conduct an anti-IPOP survey from her desk at the Alaska District. After ██████████ "retired" from the project (IPOP believes the reasons for this are improperly omitted from

the AR), ██████ took over her role, and her name and phone number began to appear on the anti-IPOP website. (AR5860).²

IPOP notes that the federal judge who reviewed this and other extraordinary history of the Alaska District’s misconduct with respect to the application process was moved to

“remind the Corps in general, and more specifically the District and Division Engineers overseeing this permitting process, that their positions—like my own—are ones of public trust. We work for the American people. The officers and employees of the Corps have a duty, mandated by Congress and funded by the taxpayers, to administer this important part of the Clean Water Act. Regardless of what the Corps ultimately decides with respect to issuing the requested permits, both the Plaintiffs and the public at large have the right to expect timely decisions by the Corps. By unnecessarily delaying any decision, the Corps is, in a very real way, abrogating its duty to administer this part of the Clean Water Act and failing in the execution of its important mission. And although the Corps has some discretion in how it accomplishes its mission, the factors that it may consider in issuing permits are limited to those authorized by law. The officers and employees of the Corps must perform their duty in accordance with law and without fear or favor.

Abell v. U.S. Army Corps of Engineers, No. 6:23-CF-00114, at 5 n.3 (W.D. La. 2023).

5. RFA p. 8, footnote 5 references an email, dated February 21, 2022. Where in the AR is this email?

We had supplied the annotated version of the AR to address this question in advance, and as indicated in that document, the February 21, 2022 e-mail may be found at AR31084. The e-mail is from a NOAA official reporting on an “ask” by the Village of Solomon; the reference to “their claims” is arguably ambiguous, but in the context of the 1979 Settlement Agreement and the entire body of circumstantial evidence referenced in response to Question No. 3,³ may fairly be interpreted to confirm this “Tribe’s” general sense of ownership of claims it does not own.

The important issue here is the extraordinary misconduct of the Alaska District in misusing federal funds for a \$511,000 study whose primary if not only purpose was to oppose IPOP’s application. It is clear that at some level, the federal officials are all regarding the Bonanza Channel as Alaska Native land, not land of the State of Alaska, which the State of Alaska is entitled to designate for mineral development, and from which the State of Alaska is intended reap the economic benefits of such development for the benefit of *all* Alaska residents. It is understandable that the ANCs would rather reap the benefits directly, but incomprehensible that the Alaska District actively misuses taxpayer funds to facilitate the “regulatory claim jumping”.

² The record also contains numerous communications with ██████ working actively with a local reporter to solicit opposition to the project (AR5764-67); she brags to the Alaska Native Corporation opponents of her work with local media (AR5202-03).

³ For example, the Village of Solomon Spring/Summer newsletter states, with regard to the Solomon Native Corporation (SNC): “Though the Tribe are not landowners, the Corporation feels strongly working collaboratively with the Tribe on one particular issue which is trespassing. A mining company called IPOP has submitted proposed gold mining in the Bonanza Channel . . .” (AR29984). The local Alaska Native interests plainly regard the Bonanza Channel as their property notwithstanding the 1979 Settlement Agreement.

6. AR p. 373, Field Report references a photo log. Where in the AR are these photos located?

AR685-93; *see also* AR685 (list of photos).

7. The project proposal combined the two-phase case study with the full-scale operation mining plan. Why was the case study combined with the full-scale operation in one IP review?

IPOP regards this question as primarily directed at the Alaska District. At all relevant times, IPOP sought whatever permissions could be obtained to get in the water and begin work. IPOP thought that the case study would provide valuable feedback on questions the answers to which could not actually be known without full scale dredging activity. IPOP assumed that the Corps might approve the case study with or without approval of the longer five-year operations, or even approve the longer-term work conditional upon the results of the case study.

By way of background, the case study concept was developed as a “proposal for discussion” in response to fish and wildlife agency comments that, among other things, information developed from the summer 2020 test dredging with a 6” dredge was not sufficient. The proposal was initially presented in a November 10, 2020 written communication to these agencies and the Corps (AR8224-27). IPOP sought an “all hands” meeting, which request was ignored. There followed December 10 & 11, 2020 conferences with the Corps (*see* AR8312-13, AR8319-20 (District summaries of meetings)), at which time it was suggested that the proposal be treated as an amendment to the pending application, which might potentially avoid the need for additional public notice. IPOP then delivered a highly detailed amendment on February 1, 2021 (AR8986-9010), and the Alaska District determined to issue the public notice anyway.

From IPOP’s perspective, the case study made sense as “Phase I” of an overall application plan because much of the area was going to be disturbed in any event by the dredging of the access channel, and it made sense to mine areas where dredged materials would be deposited to minimize the disturbance of the gold-bearing sediments distributed throughout the Channel.

At all relevant times, Alaska District staff has understood that gold mining would proceed during the case study, a point emphasized in a December 17, 2021 meeting with the Regulatory Division head, [REDACTED]. (Strikingly, as far as we can tell, the Alaska District prepared no record of this meeting or excluded it from the AR; a passing reference appears in [REDACTED]’s e-mail of AR24932.) IPOP has the impression that after the District in substance overrode [REDACTED]’s decision with respect to the project, and he was even transferred out of the District, a systematic effort was made to remove documents referring to him from the AR—an example of which showing his attempt to rein in staff appears in Appendix 1 (10/29/19 e-mail listed in Appendix 1).

8. The AR includes multiple references to the production of a reality television show. What is the relevance of the television show to the project?

There is no reality television show. It was an early idea that was associated with a particular individual, [REDACTED] (*see* AR259) who died early on in the process; IPOP has not advanced the idea since then. The relevance of the television show, if any, is that staff’s resurrection of it in the decision document stands as further proof of the improper bias that corrupted this entire application process.

9. Where are the notes from the March 28, 2018 meeting referenced on p. 14 of the AR?

IPOP has contacted [REDACTED], its former representative who would have attended such a meeting of it, and he has no record of such a meeting even occurring.

10. RFA p. 75, The Appellant asserts “While Staff properly finds the issue outside the Corps’ scope of review, Staff reproduces attacks on the economic viability of the project and even the presence of gold at the project, suggesting that Staff’s decision making may have been rendered arbitrary and capricious by acceptance of further slanders from the project opponents. (Memo at 63)” (AR p. 67). It is not clear what this comment is referring to at “Memo 63” (which is at AR p. 67). Clarify this comment.

The “Memo at 63” reference referred to electronic page 63 of the decision document (AR64), and more specifically to the “number of commenters” who “expressed concern with . . . the lack of gold within the mining claims”.

11. AR p. 30456, Was the online Nome Nugget public poll considered by the District? Why or why not? How was the poll related to POA’s PN?

With regard to the online poll, though it was presented repeatedly to the District, as far as IPOP knows, the District ignored it, preferring to advance the narrative of the project opponents. A screenshot of the actual poll itself, taken on September 30, 2020 appears at AR7683. The poll was directly related to the PN insofar as the PN issued on July 31, 2020 and the poll was posted in response to the PN. The initial comment period had closed August 31, 2020 (see, e.g., AR4897), but was extended to September 15, 2020 (AR5689), and extended again to September 30, 2020 based on the project opponent Kawerak, Inc.’s claims of slow mailing of the materials it had already received by e-mail (see AR7249)—one of the many usual decisions made to advance the interests of project opponents.

12. The AR indicates that IPOP conducted fisheries surveys during the summer of 2021, May/June 2022, and July 2022. IPOP states that “the purpose of the July 2022 sampling was conducted to further attempt to document fish presence at locations identified in the USACE Planning Assistance to States project with the Native Village of Solomon, 2022 Nearshore Fish Study Plan, Eastern Safety Sound”. Within the Appendix 2 of the SOF (AR p. 142) the District states “it finds it difficult to draw conclusions about fish presence in Bonanza Channel due to the limited sampling (two days in July and primarily near the shorelines)”. In making this conclusion, did the District consider all the sampling efforts conducted by IPOP or just the July 2022 effort? Did the District provide IPOP with any sampling protocols to follow?

The District did not provide IPOP with any fish sampling protocols, but more importantly, and the entire question of “fish *presence*” misses the point. Because of the Channel’s connection to both the Bonanza River and Safety Sound, it is entirely possible that fish may stray into the Channel, but there are no spawning grounds for anadromous fish⁴ and no evidence that they would rear in shallow, excessively warm waters with no cover whatsoever from bird predation for nearly the entire year.

⁴ One of the “regulatory claim jumping” schemes involved a sudden amendment of the State of Alaska Anadromous Water Catalog in response to IPOP’s interest in mining (see, e.g., AR2156 (Project Manager [REDACTED] boasts to Alaska Native opponents that “as of June 1[, 2019], Bonanza Channel is considered an anadromous water in the state catalogue”); see also AR2530 (opponent [REDACTED] tells [REDACTED] he seeking an additional

In a context where the Corps is actively working throughout Alaska and elsewhere to dredge the mouths of rivers with large salmon runs, with no silt curtains and essentially no mitigation measures—a focus on fish “presence” in the Channel is further evidence of the District’s extraordinary bias against the project.

13. AR p. 8, states the total project impacts are 192.5 acres; AR p. 88 specifies that those 192.5 acres are vegetated shallows; AR p. 90 the Statement of Findings (SOF) explains that mudflats will also be impacted by the proposal but does not include a measure of the impact area. Clarify the acreage of impacts proposed in WOTUS, separated by aquatic resource type and where this is documented in the AR. Explain the rationale supporting your methods to distinguish between temporary and permanent effects to WOTUS and point to where that information is documented in the AR.

It is unclear to whom this question is directed. There is a good deal of bathymetric information in AR, which identifies the shallower areas associated with mudflats (0-6” deep), but the configuration changes from year to year and even season to season from wind, wave and ice effects. The site visit will confirm significant changes to the topography of the access area and other portions of the mining area from overwash from Norton Sound (there was a large storm in late 2022). All of these effects make the Alaska District staff’s insistence upon attempting to restore precise pre-project bathymetry irrational. As the longer-term aerial photographs of the Channel make clear, there are ongoing changes over decades (*see also* Response to Question No. 16).

The final version of the Reclamation Plan contains a great deal of documentation concerning the particular acreages to be disturbed and their description. (See, e.g., Table 8-1 (AR28572), Table 9-1 (AR28581), Table 9-2 (AR28582), & Figure 9-5 (AR28587).

14. What information did the District rely upon to determine the functional importance of the special aquatic sites and where in the AR is this documented?

We are unaware of what information the District utilized to “determine the functional importance of the special aquatic sites” and as far as IPOP is concerned, the only ecological function that might rise to regulatory significance is the production of pondweed for waterfowl consumption. Given the tiny proportion of disturbed area, and the quick re-establishment of the SAV, we think it is misleading to describe the matter as one of functional *importance* for regulatory purposes. As we have emphasized, Alaska regulators in other contexts routinely take into account the relevant insignificance by size of particular project sites in any assessment of functional importance.

15. AR p. 88, the District states, “A permanent loss of waters of the U.S. is not anticipated if the reclamation proposal is successful; however, the result of the proposed reclamation would result in a conversion of waters type, with associated permanent impacts to the functions and values provided by the special aquatic sites.” Considering these statements regarding “permanent loss” versus “permanent impacts”, how did you distinguish between permanent

anadromous listings to block eastern mining claim development)). IPOP later forced a correction of that designation to remove any reference to spawning. (AR4892 (IPOP demands scientific backup); AR3021 (ADFG representative admits possible error); AR10480 (noting correction).)

loss and permanent impact. What information did the District rely upon to evaluate the impacts on aquatic resource functions and where is that documented in the AR?

We are unaware of any authority that permits staff to hold conversion from one type of “special aquatic area” to another against the applicant on the ground of associated “permanent impacts to the functions and values provided by the special aquatic sites”. In a conversion, one set of functions and values is replaced by another, but staff has no basis for regarding the replacements as being of lower value. In fact, as noted in the RFA, the Reclamation Plan was intended to promote staff’s apparent “wish list” as to ecological functions and values to the extent consistent with the scope of the project (Annotated RFA at 47-48), creating higher value.

We are also unaware of whether or how the District distinguished between “permanent loss” and “permanent impact” and do not believe that the record supports a finding of either. As IPOP has attempted to explain to District staff on multiple occasions, the most likely outcome of dredging and redepositing the dredged materials is that, but for depth maintained in the access channel, the areas involved will eventually return to pre-project elevations and functions. In the event that there is some “bulking” of dredged materials, high elevations would, as demonstrated in the Reclamation Plan, be associated with improvements in the delivery of ecological functions.

16. AR pp. 10, 59, 91, 96, 102, within the SOF the District describes the project area as pristine. What criteria were evaluated to determine this area as pristine and identify what information within the AR supports the classification?

IPOP believes this question to be directed to District staff, which has at all times ignored the historical evidence of extensive dredging on the Solomon River (*e.g.*, AR9177), the resulting release of sedimentation, and the silting-in of the Channel as compared to historical maps. As demonstrated in the 2021 Field Survey and Desktop Study, the construction of the Safety Sound and Bonanza Channel bridges also had significant impacts. (AR24737-41.) Staff’s irrational insistence that the area is “pristine” blinded staff to the obvious benefits of deepening the channel and restoring historical ecological functioning.

17. AR p. 30, the SOF states “The applicant did not propose any timing restrictions to minimize impacts to birds.” RFA p. 40 the Appellant states “To the extent that Staff wished to mitigate risks that might rise to the level of actually killing a bird, Staff could have included a permit condition cautioning IPOP to avoid adverse impact on any bird nests in the vicinity of the camp—though flooding would probably destroy most of them anyway.” Was there a discussion of potential special conditions (timing, additional sound abatement measures, etc.) that could have reduced the project’s impacts upon birds? If so, where is this contained within the AR?

As best IPOP can recall, no representative of IPOP ever received any invitation to discuss permit conditions to minimize (essentially non-existent) impacts on birds. IPOP continues to regard the notion of timing restrictions to minimize impacts on birds as abusive in this context, because the Corps operates large suction dredges all over Alaska (and the country) and knows that absent special circumstances (absent here and in most Corps dredging), there are no adverse impacts on birds of any regulatory significance. Indeed, they frequently are attracted to dredging sites to feed. (*See also* AR9088-90 (scientific analysis of noise and bird impacts).)

18. AR p. 33, The District states “The Corps does not agree with the applicant that temperature would be a limiting factor for salmonids migrating in Bonanza Channel because the Corps does not have enough information about the temperatures in the channel over and at different depths.” Did the District specify a certain methodology or a set of parameters to follow for collecting this data? After reviewing the report did the District discuss with IPOP additional information needed? Where is this documented in the AR?

Staff never raised its concerns about temperature data with IPOP prior to issuing its decision. Had staff done so, IPOP would have demonstrated that in deeper areas (probe and connector were 12” long), temperature data was collected at three depths: top foot, mid-water column, and bottom. The data was included in the data spreadsheet provided to staff (*e.g.*, AR24122), and no thermoclines were identified in it. But rather than consider and discuss the data in any useful way, staff and/or the attorneys who wrote the decision documents just ritualistically invoked a “not enough information” formula for permit denial.

More importantly, Question No. 18 question misses the larger point that even if there were isolated pockets of cooler water in the very deepest parts of the Channel, the area remains entirely unsuitable for anadromous and other cold-water fish during the summer operations period (*see, e.g.*, AR9111-13). Staff cannot explain why fish would leave the cold water of the river while migrating to the sea to swim across excessively warm shoals into what is in substance a warm temperature desert even if they could find an isolated low-temperature oasis. Isolated cold-water pockets, even if they exist, are simply not a fact of practical regulatory significance.

IPOP also notes that the general unsuitability of the habitat is supported by the fish sampling results—juvenile salmonids are never detected in numbers consistent with any use of the Channel as a rearing nursery. That is why staff was forced to admit, in response to a FOIA request, that it had no scientific evidence whatsoever that juvenile salmon were rearing in the Channel (AR28751).

19. RFA p. 18, the Appellant states “IPOP’s Certified Professional Geologist provided a detailed analysis of the gold-related aspects of the Bonanza Channel and surrounding areas that is, in substance, entirely ignored by Staff”. For the Appellant, which report are you referencing and where is this report in the AR? For the District, did you review this report? If so, where in the AR is your analysis of the report documented and how was this analysis considered in the SOF?

The detailed analyses of the gold-related aspects of the Bonanza Channel included assay results documented in extraordinary detail at AR905-60, continued with further submissions at AR3541-44 and included a detailed analysis presented as part of the LEDPA dispute at AR9176-87.

20. What rationale did the Appellant provide to support locating the 24-acre study area outside of the general mine area? Where is this rationale located within the AR?

It is not correct to identify the case study area as “outside of the general mine area” insofar as IPOP owns the mining claims covering this area, and it had been slated for dredging (and material processing) at all relevant times as dredging proceeded to construct the access channel to the north. That being said, the rationale for identifying this particular area as the case study area can be found in

the initial proposal: to provide “more controlled circumstances, in an area with less SAV and away from the deeper main channel” (AR8224)

21. There is disagreement between the District and Appellant regarding the proposed mining reclamation plan. How did the District consider the proposed mining reclamation plan regarding it being viewed as mitigation and/or impacts? Where is this rationale located in the AR?

While this question is directed to the District, IPOP notes that the District cannot be regarded as considering the reclamation plan as providing “compensatory mitigation” in light of the letter from the Chief of the Regulatory Branch determining that no compensatory mitigation was required. (AR27347-49.) Staff should also explain how, in light of that determination, it was reasonable and lawful to impose numerous reclamation planning requirements imported from the compensatory mitigation regulations (40 C.F.R. Part 230, Subpart J) in a context where no such requirements have been imposed on other Alaska mining projects (and other projects).

22. Was there a dialogue between the District and Appellant regarding less damaging alternatives and if so where is that dialogue documented in the AR?

There was little “dialogue” concerning LEDPA. For several years, the Alaska District staff simply asserted that the project was not the LEDPA because, in substance, gold might simply be mined somewhere else—a position IPOP repeatedly rejected. (See AR2938-39 (11/5/19 submission to [REDACTED] [REDACTED])

A meeting was held on November 19, 2020, in which the Corps reiterated this position. (See AR8265-66 (Corps notes of this meeting.) IPOP provided a detailed written response on December 9, 2020. (AR8270-72), but the Corps reiterated most of its positions yet again (AR8722-29).

Eventually, on February 1, 2021, IPOP delivered its most comprehensive refutation of the Corps’ initial position, a twelve-page, single-spaced review of the entire area’s geology, mining history and current mining opportunities (AR9176-87; *see also* AR9092-99 (additional LEDPA analysis in response to comments)). Staff eventually shifted to seeking further alternatives minimizing mining at the site, which IPOP explained by letter of August 30, 2021 made no sense in light of the applicant’s purpose. (AR23076-77)

IPOP pressed ongoing requests for a meeting concerning alternatives at which some dialog might take place, in response to which [REDACTED] sought a “case study alternatives analysis” (AR23378)—a position that made no sense to IPOP, for the case study had been developed as an alternative to the initial five-year plan. This produced more written exchanges. (See, *e.g.*, AR23743-44; AR23870-71)

Eventually, in a telephonic meeting on November 10, 2021, [REDACTED] reported that she was “still not convinced that your proposed reclamation plan is going to be the LEDPA”—a position that made no sense to IPOP. The Alaska District’s notes of this meeting may be found at AR24336-37—*importantly, they state that “we found the offsite alternatives sufficient” in the sense that they were not LEDPAs—a position later reversed without explanation in the decision document.*

At the November 10th meeting, ██████ suggested that IPOP provide more detail on several alternatives in IPOP’s alternatives analysis, and IPOP did so. These included a November 30th letter (AR24456-57) to which no response was received; extensive materials delivered on December 15, 2021 (AR24785-836 & AR24918-24), including an updated Reclamation Plan. ██████ did subsequently demand extraordinary detail in the Reclamation Plan on February 9, 2022 (AR27899-900), IPOP provided a revised plan on February 24, 2022 (AR28003-71); a meeting was held on March 8, 2021 concerning the plan (*see* AR28122-24);⁵ and IPOP provided yet another revised plan as well as revised alternatives analyses on March 31st (AR28528-634)—specifically requesting a meeting “to discuss these transmittals once the Corps has had a chance to review” (AR28528).

IPOP sought the meeting again on April 11th (AR29328), but was told by ██████ that “we do not have any questions regarding those documents” (AR29330). In substance, Alaska District staff simply broke off communication on the subject and then developed the alternatives set forth in the decision document, representing arbitrary changes in position without factual support, and about which no “dialog” ever occurred.

23. AR, p. 10, “Safety Sound is one of the few publicly accessible locations on the Refuge for viewing wildlife.” Specify how many publicly accessible locations for wildlife viewing are available.

IPOP does not propose to operate in Safety Sound, and at all relevant times, staff has improperly conflated Safety Sound with the Bonanza Channel. What staff appears to be referring to is a bird viewing platform on land owned by the Alaska Maritime National Wildlife Refuge near the Safety Sound bridge, miles away from the mining site.

In fact, the entire Refuge is “publicly accessible,” as explained in the “Visit Us” page maintained by the Refuge: “Tour boats, ferries, planes, cruise ships, or your own boat can transport you to parts of the refuge.” (<https://www.fws.gov/refuge/alaska-maritime/visit-us>.) The page also reports two Visitor Centers in Homer, Alaska and Adak, Alaska. There is no Visitor Center in Nome and the Safety Sound site is sufficiently insignificant in the overall context of the Refuge *that it is not even mentioned on the page*.

More importantly, IPOP believes a focus on whether lands *in the Refuge* are publicly accessible is the wrong focus of the analysis for public interest and asks the RO to consider the enormous variety of birding options available in Alaska generally and in the Nome area in particular, as extensively documented in the *Visitor Guide* (AR25021-188). IPOP strongly recommends detailed review of this document to put the comparative insignificance of this particular site into perspective. We are not talking about areas where a formally designated wildlife refuge provides the only opportunity for local city or suburban residents to experience Nature—we are talking about an enormous area that is nearly all a refuge for wildlife whether it carries that legal designation or not.

24. AR p. 67, in the SOF, the discussion of alternatives states, “All information submitted by the applicant, including information found in letters submitted September 17, 2021 (case study as an alternative to full-scale 5mining); September 27, 2021 (a court case); and November 30, 2021 (general disagreements) has been considered during the alternative analysis; this is not a

⁵ The record contains a good deal of material documenting the unique, harassing and discriminatory approach taken with respect to the Reclamation Plan (AR28196-254; AR28450-53).

complete list.” Provide a complete list of information considered during the alternatives analysis and identify the respective location in the AR.

We assume this question is directed to Alaska District staff. Beyond the three submissions listed, IPOP provided information in the many, many submissions listed in response to Question No. 22. Again, the Regional Regulatory Chief necessarily found that the proposed operations were a LEDPA subject to the development of a satisfactory reclamation plan (because the decision that no compensatory mitigation was required can only be made after project itself—not the reclamation—is determined to be the LEDPA for mining the gold).

25. AR p. 91, the District states “The project may have major effects to recreational fishers as during the project, portions of the Bonanza Channel would be closed off by the turbidity curtains and unavailable for use by the public.” Did the District determine this to be a short-term or long-term effect, and how did they conclude the effect is major and not minor? Where is this documented in the AR?

Where, as here, a decision document states only that a project “may have” particular effects, IPOP believes it is improper to ask staff (not even the decision maker) to bolster that language into some sort of finding that the project *would have* particular effects. The regulatory requirement here is to balance “reasonably foreseeable” benefits and detriments (33 C.F.R. § 320.4(a)(1)).

It is obvious that there could actually not be any effects on “recreational fishers” during the project, because *no one is doing any recreational fishing in the Channel* because it is too shallow and there is in substance nothing to catch. Simply put, nearly all migratory salmon are concentrated in the river up which they migrate, and it would be idiotic to fish for them in the Channel.

The nearest recreational fishing of any significance occurs at the Bonanza River Bridge, miles away from the mining area—hence staff’s stretch to suggest that it is just possible that people standing on the Bridge could see the mining equipment. Calling that a “major effect” on recreational fishers is just dishonest, hence the weasel wording of the finding, and shows the extraordinary and illegal bias present here.

26. What is the geographic scope you identified for recreation PIR Factor and where is that explained in the AR? How much of that area is available or not available for recreation and where is that documented in the AR?

IPOP regards this question as directed at the District, and IPOP writes only to state that inasmuch as the decision document does not contain any geographical scope for the recreation PIR, staff should not be permitted to bolster the obviously defective decision with determinations nowhere set forth in the AR.

The important point is not that people from Nome may sometimes use areas in the vicinity of Safety Sound to recreate; it is that the specific area to be mined by IPOP has nothing to be harvested except waterfowl flying overhead and throughout the area. Removing and redepositing Channel sediment has no important effect on bird hunting or any other subsistence opportunity.

27. AR p. 109, The District states “The Corps has determined that the beneficial effects would be more than minimal but temporary as the applicant has provided their economic benefit

estimate of the proposed project.” Where is the estimate located in the AR? Explain how the estimate was used to support the beneficial-effect determinations made in the PIR. What is the District’s rationale for beneficial effects being temporary?

Economic benefit estimates may be found in §§ 1.3 & 1.5 of the 2020 Narrative (AR3494-96), as supplemented by IPOP’s February 8, 2021 submission providing additional detail in response to comments (AR9109-10; AR9331-32 (duplicate)).

28. AR P. 109, What rationale was used to support the statement in relation to Public and Private Use that the “Corps has conservatively determined that the detrimental effects would be more than minimal and permanent”?

IPOP believe it is obvious that any “detrimental effects on the public and private use” on the Bonanza Channel would be minimal and temporary.

29. AR p. 2572, the District’s letter to IPOP states, “We have not received geotechnical information regarding presence, location and depth of gold. We do not have sufficient geotechnical information to conduct an alternatives analysis of your project, as is required by the National Environmental Policy Act or the Clean Water Act under the 404(b)(1) Guidelines.” In the SOF (AR, p. 21), however, the District states “the Corps is deferring to the applicant in assuming wide distribution of gold throughout the 32 claims for the Alternatives Analysis.” Why did the District require additional data if it was deferring to an assumption? What information did the Appellant provide to the District regarding presence, location, and gold depth? What documents did the District consider to support their alternatives analysis and where are they located in the AR?

The geological information provided by IPOP to Alaska District staff (see Response to Question No. 19) fully documents the presence and location of gold and make it obvious that there is a wide distribution of gold throughout IPOP’s 32 claims. IPOP believes that the Corps should have deferred to such analysis, and that the demands for further gold core sampling, followed by extraordinary obstruction of such sampling activities, were part and parcel of staff’s collusion with project opponents—to the point of supplying them with the core samples and other confidential business information of IPOP to facilitate the “regulatory claim jumping”. [AR907, AR960]

As far as we can tell, the reason for the Corps’ statement that it would defer to a claim of “wide distribution throughout the 32 claims” was to support the bogus LEDPA analysis—arguing that gold was present outside the barrier island sufficient to make mining the small ocean portions of some IPOP claims a LEDPA.

30. AR p. 103, within the SOF the District’s evaluation for the Land Use PIR factor included discussion of a 1979 Settlement Agreement. The District states, “The Corps cannot enforce provisions of the Agreement since the Corps is not party to it; however, the Corps has considered the information in evaluating the proposed project.” How did the District consider this agreement and how was it factored into the decision of the project?

IPOP looks forward to the District’s explanation of how and why it accepted the opponents’ mischaracterization of the 1979 Settlement Agreement, and believes that staff should also have been required to explain how staff could violate Corps regulations by disregarding Alaska State designations of

this land as subject to mineral development. More specifically, 33 C.F.R. § 320.4(j)(2) requires the District to defer to the State of Alaska's determination to foster mineral development in the Bonanza Channel absent "significant issues of overriding national importance"—a finding that could not possibly be made here.

31. AR p. 103, regarding the navigation PIR factor, the District states, "The channel itself is utilized by small boats as its depth does not support large boats." The District concludes with the statement "The reduction in area for watercraft, as shallow littoral disposal sites are filled per the applicant's reclamation proposal, would be detrimental to navigation after the conclusion of the project because the proposed project would reduce the width of available water area for boats that currently use the area." Did the District consider the potential benefits to boaters/watercraft that may be provided by a deeper channel?

While this question is directed at the District, IPOP notes that at all relevant times, staff has irrationally ignored all benefits of the access channel, not merely for potential benefits to boaters and watercraft, but also the ecological benefits of providing a deeper area beyond ice scour range where more complex assemblages of organisms can develop. Again, any consideration of this and other issues should have been documented in the AR to be admissible in the appeal conference.

32. AR p. 105, regarding the recreation PIR factor, did the District weigh the potential benefits a deeper channel, as proposed in IPOP's reclamation plan, would have on recreation opportunities? If so, where is it located in the AR?

See response to Question No. 31.

33. RFA p. 95, states that, "the gold mining, as proposed, is for shallow water gold recovery using equipment specially designed to operate in shallow water environments...A basic project purpose that includes all types of mining for gold, rather than shallow water dredge mining...improperly forces the applicant to rebut the premise that practicable alternatives that do not involve special aquatic sites are presumed to be available." Please explain how the District concluded it was appropriate to expand the project purpose to different types of gold mining, even though the Appellant had already invested in shallow water equipment. Where is this documented in the AR?

IPOP regards this question as directed at the District, and notes that Alaska District staff illegally insisted at all relevant times that the scope of its alternatives analysis could not be constrained by Appellant's project objectives, but instead consisted of some sort of assessment of whether gold could be mined anywhere nearby, by any means—other than the location Appellant where found it, and for which Appellant specially fabricated the equipment.

34. AR p. 71, the District refutes [we prefer "disputes"] the Appellant's statement in the LEDPA analysis that mining in the ocean offshore is not comparable to mining in the Bonanza Channel, stating no data to substantiate their claim that offshore mining was not comparable was supplied to the Corps." For the Appellant, do you believe this is a true statement? If not, what data did you supply to the District and where is it in the AR? For the District, was other information used to determine that the ocean offshore mining was comparable to the Bonanza channel? If so, where is this in the AR?

IPOP denies that it supplied no “data” to substantiate the claim that offshore mining is not comparable. IPOP specifically advanced offshore mining as a considered alternative (“LOC-002”) early in the process (AR3608), and no scientific study to documentation concerning the differences between offshore mining and mining with the Channel was ever sought by staff. As noted above, staff arbitrarily reversed its position as to whether mining in the ocean was a LEDPA.

Common sense, or administrative notice of obvious and indisputable facts, is an ample substitute for “data” in this context. The gold is coming off the land, trapped behind the barrier island, where gold concentrations are substantially higher than offshore. It is blindingly obvious that ocean operations are subject to much higher waves and tidal influences, and IPOP amply explained that it had no experience with such operations and regarded them as substantially more dangerous and expensive.

35. Specify which plant and animal species were determined to be important to subsistence, how they were determined to be affected by the proposal, and where the consideration and evaluation of subsistence is supported in the AR.

We assume this question was directed at the Corps. IPOP has amply documented that the area to be mined is of very limited use (and no specific use) for subsistence purposes, because the only subsistence food actually located where IPOP will mine is transient waterfowl amply supplied throughout the entire Safety Sound/Bonanza Channel complex.

36. Specify which subsistence activities the District determined would be impacted as a result of the proposed project and explain the standard used to weight the importance of these activities in the District’s decision and where this is supported in the AR.

IPOP again notes that it is improper for staff to make additional determinations, such as specifying particular subsistence activities to be impacted, that were not previously made in connection with the decision and appearing in the AR. IPOP has documented repeatedly, through multiple scientific studies, that there is no subsistence fishing in the areas proposed to be mined (e.g., AR28258), there seems no longer any dispute that marine mammals (which constitute the bulk of subsistence food by weight) are present, and there is only hunting of waterfowl in the fall, which will not suffer any appreciable adverse effect from the mining.

37. Are there subsistence opportunities unique to the project location that would not be available outside of the project location? Is this evaluated in the AR, if so, where?

The answer to this question is “of course not”. From a subsistence perspective, there is nothing that distinguishes the particular portion of the Bonanza Channel to be mined from any other portion of the huge Safety Sound/Bonanza Channel complex. E.g., AR7626 (“the entire sound is ringed by fantastic berry picking opportunities”). For this reason, the Alaska District backhandedly acknowledged in Appendix 5 to the decision document that other subsistence locations are “assumed to be available”. (AR31309.)

IPOP repeatedly pointed out to the District that subsistence opportunities are prevalent throughout the Nome area—a point the Corps has even made in other decision documents not afflicted with a staggering bias against the applicant (e.g., AR31613 (Nome dredging study reports that “it is important to note the interconnectedness of the community with subsistence resources outside of the area”)). Indeed, local subsistence fishers prefer other, more productive areas. (AR28258 (survey

research by project opponent Kawerak, Inc. shows that Alaska Natives prefer to fish in larger rivers with more fishing opportunity).)

38. How did the District consider and weigh subsistence when evaluating the Recreation PIR Factor? Where is this located in the AR?

See Response to Question No. 26. From IPOP’s perspective, the reviewing attorneys realized that there were serious factual problems in making an adverse public interest determination based on non-existent subsistence impacts from the mining, they assisted staff in pivoting to imagined adverse effects associated with the Refuge. IPOP believes that Question No. 38 cannot be answered without supplementing the AR with the attorney communications and draft decision documents.

39. AR pp. 30328 – 30332, contains a string of emails referencing a meeting between District staff and the Solomon Native Corporation. Where in the AR are the notes or MFR documenting this meeting?

We are pleased to see a special interest in undocumented meetings with competing landowners, and note the relationship between the absence of documentation and Question No. 30 concerning the 1979 Settlement Agreement. It is our general impression that the largest number of documents missing from the AR are those relating to project regulatory personnel and the Alaska Native Corporations and related opponents, and we are including in Appendix 2 of additional documents we have found of this type not previously transmitted for inclusion in the record.

40. AR p. 30328, contains an email from the President of the Solomon Native Corporation requesting consultation with the District. Is it the District’s position that this “consultation” is a meeting that it would have with another adjacent landowner or as Government-to-Government consultation with a Federally Recognized Tribe?

We look forward to the District’s answer to this question, but believe that the Alaska District has no authority to grant the Solomon Native Corporation (SNC) any governmental status—that being reserved for the “Village of Solomon”. One of the documents the District has wrongfully refused to put in the AR, the October 29, 2021 Facebook post, specifies that government-to-government consultations were held with the Village of Solomon “as well as [i.e., not government-to-government] meetings with the Solomon Native Corporation, Bering Straits Regional Corporation, Norton Sound Economic Development Corporation, and Kawerak, Inc.” (The District Engineer carefully met with the entire rogue’s gallery of Alaska Native Corporation opponents, but refused to ever meet with IPOP.) It also would be useful for further proceedings to add the *Alaska Implementation Guidance for DoD Alaska Native Related Policies and Instructions* (April 13, 2020), which addresses this issue (see Annotated RFA at 15 & n.42), to the AR, and we have included it in Appendix 2.

More importantly, it is important to view the SNC as not merely an adjacent landowner, but a *competing gold miner*. The record reflects that the District provided detailed information concerning IPOP’s gold exploration, including coring locations and results, to SNC and others. It reflects that adjacent claim owner [REDACTED] (identified in the record as the SNC “Trespass officer”),⁶ together with a member of the [REDACTED] clan that controls SNC, were out on the claims checking the core locations

⁶ This is yet another reference supporting IPOP’s general interpretation that the project opponents regard IPOP’s gold claims as “their claims”. See Response to Question No. 5.

(AR2160)—probably even taking their own samples—and the Corps raised no concerns about that. (See also Response to Question No. 3.)

41. RFA p. 56 states, “Subsistence harvest is the subject of detailed government permitting and reporting, as well as analysis and reporting by Native Alaskan groups. In 2019, IPOP pulled lists of subsistence harvest permits and found no evidence of Bonanza Channel use and requested that the Corps host a meeting with Alaska Native representatives to identify possible issues”. For the Appellant, did you provide the District those lists of subsistence harvest permits? Is this in the AR and if so, where? For the District, were lists of subsistence harvest permits considered? If so, where is this in the AR? Did the District refuse to hold the requested meeting? Did the District document its decision on the meeting request and if so, where is this in the AR?

The AR reflects that the permit lists were initially provided on November 2, 2019 (AR2893 n. 1 (referencing Exhibits 2 & 3)), but they were not included in the AR for reasons unknown to IPOP. In any event, additional lists may be found at AR23461-624; the same list is among the significant forms of duplication in the record. The hunting permits are specific to coded areas in the second column, and do not include areas near the project. With respect to subsistence fishing, AR28258 documents extensive governmental reviews of area subsistence fishing which all confirm no use of the Bonanza Channel (the studies themselves are exhibits to the cited document).

The District refused to hold the requested meeting to facilitate a resolution of subsistence concerns (requested at AR2983-94), but we do not recall documentation of the refusal. We came to regard the refusal as still further evidence supporting our belief that the Alaska Native project opponents, and their allies with the Alaska District, were simply using “subsistence” as a club with which to attack IPOP, rather than having any genuine interest in how the project could enhance local fish and wildlife.

42. AR p. 100, The District states in the SOF “The proposed project is anticipated to have a negative impact on community cohesion”. Identify where this is documented in the AR and where this statement is supported in the SOF?

We assume this question is directed at Alaska District staff and look forward to the response. From IPOP’s perspective, the Alaska Native Corporation overlords of this community (see Annotated RFA at 5) have maintained their power and wealth by enlisting much of the community in pointless attacks on economic development projects that would benefit the larger community—and anything that assists the subjugated community to achieve greater material prosperity undermines ANC control and will be characterized by the ANC controllers as a reduction in “community cohesion”. In a corrupted community such as this, a reduction in community cohesion advances the public interest.

Appendix 1: Omitted Documents the District refuses to add to the AR⁷

20180404 Amendment No. 1 to APMA (Annotated RFA at 10 n.9)

20200506 Letter, ██████ to Brig. Gen. & District Counsel (demonstrates unlawful demands for public notice) (Annotated RFA at 71)

20200716 E-mail ██████ to Opponents (informal update and personal information) (bias)

20200904 ██████ e-mail announcing retirement from IPOP project (bias)

20210501 Path Forward presentation on IPOP application (bias and unlawful delay)

20210517 IPOP Fact Sheet (relevant for arbitrary changes in position)

20210517 IPOP Fact Sheet alternate version (relevant for arbitrary changes in position)

20210521 Letter B. Epstein (IPOP) to ██████ 5-21-21 [w-Exhibits 1-11] (includes FOIA requests) (Annotated RFA at 66-68)

20210618 Faces of IPOP Brochure mailed to Col. Delarosa (diversity of investor group) (Annotated RFA at 72 n.192)

20210623 IPOP Fact Sheet (relevant for arbitrary changes in position)

20210721 Letter ██████ to ██████ (final sent by ██████ with encl.) (bias)

20210730 IPOP Fact Sheet (relevant for arbitrary changes in position)

20210810 ██████ to ██████ e-mail finalizing site visit (completeness)

20210913 E-mail, ██████ to ██████ (bias)

20210914 E-mail, ██████ to ██████ (bias)

20210921 ██████ to ██████ (bias)

20210923 ██████ to ██████ (bias & unlawful conduct re: PAS Study)

20210924 2021 Report Field Survey and Desktop Study (previously submitted 9-7-21) (bias/delay)

20210924 ██████ e-mails Village of Solomon study (bias & unlawful conduct re: PAS Study)

20211021 NMFS to Corps (concur with Corps ESA conclusion on individual permit)

20211029 E-mail, ██████ to ██████ and ██████ (bias)

20211029 Alaska District Facebook Post (wrong location, specifies tribal v. corp. consultation) (Annotated RFA at 84 n.219)

20211116 ██████ to ██████ and ██████ with revised info paper (refers to omitted portions of AR)

⁷ IPOP agrees that the 20200815 Stop IPOP posting of ██████ comments is already in the record; the 20211216 Letter, ██████ to Commissioners was a duplication error.

20211116 ██████ to Commissioners and Col. Delarosa (delay)

20211202 EFH Materials (bias)

20211206 Letter ██████ to ██████ (Red Dog) (corrected version, with exhibits) (RFA at 32 n.86, 68 n.182)

20220110 Additional GTG consultation materials (bias)

20220113 Village of Solomon GTG record (compare 28511-15) (unlawful FOIA conduct by Alaska District)

20220126 Letter, ██████ to IG cc: District Counsel (seeking investigation of PAS contract) (with exhibits) (Annotated RFA at 64 n.165, 69 n. 186)

20220201 Ltr. to ██████ (Commerce OIG) (w-Exhibits 1-5) (Annotated RFA at 31 n.83, 64 n.165)

20220209 Letter ██████ to ██████ (2d letter deficiencies in 12-20-21 FOIA and check requests) (PAS Contract unlawful FOIA conduct)

20220222 Letter ██████ to Col. Delarosa et al. (12-20-21 FOIA response inadequacies) (PAS Contract unlawful FOIA conduct)

20220222 Letter ██████ to ██████ (Litigation Hold) (relevant to integrity of AR)

20220228 ██████ e-mails NEPA extension (delay / bias)

20220303 FOIA Appeal w-Exhibits 1-6 (PAS Contract unlawful FOIA conduct)

20220303 Letter (Supplemental) ██████ to Inspector General w-Exhibits 12-13 (PAS Contract unlawful FOIA conduct)

20220304 E-mail, ██████ to ██████ (delay)

20220309 ██████ NEPA extension (delay / incomplete record)

20220316 ██████ to Engineer Inspector General (update no state letter) (PAS Contract unlawful FOIA conduct)

20220329 ██████ to ██████ (outstanding FOIA issues and new requests) (Annotated RFA at 69 n.183)

20220426 Letter ██████ to Inspector General (PAS Contract unlawful FOIA conduct)

20220506 ██████ to Inspector General and Brig. Gen. Gibbs (Annotated RFA at 68 n.181) (disparate treatment)

20220509 ██████ PAS study exchange (PAS Contract unlawful conduct)

20220517 ██████ to ██████ (new District Counsel)

20220520 Doc 1 - IPOP Complaint - filed 5-20-22 (Annotated RFA at 8 n.6) (bias / delay)

20220526 Letter ██████ to ██████ (bias)

20220601 Letter ██████ to Inspector General and Corps officials (update re PAS issues and others)

20220614 Army Inspector General to [REDACTED] (DIH222107) (Annotated RFA at 69 n. 186)

20220803 FOIA Appeal (PAS Agreement) (PAS Contract unlawful FOIA conduct)

20220815 E-mail, [REDACTED] to [REDACTED] (no longer working for Alaska District) (Annotated RFA at 91 n.228)

20220829 Western District Litigation Filings (Complaint, Exhibits, Epstein Decl.) (Annotated RFA at 5 n. 3, 56 n. 142, 65 nn. 166 & 167)

20220909 Alaska District press release on denial (relevant for “partnership” with opponents) (Annotated RFA at 16 n.47)

Appendix 2: Additional Documents Omitted from the AR Relevant to the 42 Questions

19870630 Engineer Manual 1110-2-5026 Beneficial Uses of Dredged Material (general institutional knowledge of the Corps)

20180615 MOA EPA Corps Mitigation Sequence Alaska Wetlands (Annotated RFA at 93 n.233)

20180918 Alaska District Compensatory Mitigation Thought Process (Annotated RFA at 92 n.229)

20200413 E-mail [REDACTED] cc: [REDACTED] (false claims IPOP must be stopped to protect subsistence hunting for marine mammals)

20200413 DoD_AI_and_AN_Policy_Alaska_Implementation_Guidance_revision

20200915 E-mail [REDACTED] to Opponents (opponents “have a special place in my heart”)

20200917 E-mails, [REDACTED] to Village representatives (preparations for 9/21/20 meeting)

20211019 E-mail, [REDACTED] (BSNC) to [REDACTED] (wants BSNC involvement, says SNC “is a member”)

20211101 E-mail, [REDACTED] cc: [REDACTED] & [REDACTED] (opponent engaged in mining in vicinity of IPOP)

FILE NAMES On Appendix 1 of Appellents response to RO questions	Location in AR or Reason for Exclusion	IPOP Response
20180404 Amendment No. 1 to APMA (Annotated RFA at 10 n.9)	AR260	Agreed.
20200506 letter, ██████ to Brig. Gen. & District Counsel (demonstrates unlawful demands for public notice) (Annotated RFA at 71)	Incorrect date. Date of document should be 20220506. Not directed to Regulatory nor is Regulatory CC'ed; this document was not directly or indirectly considered as Regulatory did not receive it	Agreed duplicate, see 20220506.
20200716 E-mail ██████ to Opponents (informal update and personal information) (bias)	AR004791-004796	Agreed.
20200904 ██████ e-mail announcing retirement from IPOP project (bias)	AR031472	Agreed.
20210501 Path Forward presentation on IPOP application (bias and unlawful delay)	Internal document is deliberative and not integral to the decision making process.	Any deliberative process privilege has been waived by production. The AR is not limited to records the Alaska District deems "integral" to the decision-making process, but to all materials directly or indirectly considered by decision makers. The material was unquestionably considered in the decision-making process.
20210517 IPOP Fact Sheet (relevant for arbitrary changes in position)	Internal fact sheet is deliberative and not integral to the decision making process.	Any deliberative process privilege has been waived by production. The AR is not limited to records the Alaska District deems "integral" to the decision-making process, but to all materials directly or indirectly considered by decision makers. The material was unquestionably considered in the decision-making process.
20210517 IPOP Fact Sheet alternate version (relevant for arbitrary changes in position)	Internal fact sheet is deliberative and not integral to the decision making process.	Any deliberative process privilege has been waived by production. The AR is not limited to records the Alaska District deems "integral" to the decision-making process, but to all materials directly or indirectly considered by decision makers. The material was unquestionably considered in the decision making-process.
20210521 letter ██████ (IPOP) to ██████ 5-21-21 [w-Exhibits 1-11] (includes FOIA requests) (Annotated RFA at 66-68)	AR014375-AR014711	Agreed.
20210618 Faces of IPOP Brochure mailed to Col. Delarosa (diversity of investor group) (Annotated RFA at 72 n.192)	Information regarding investors (pamphlet/mailer) not directly nor indirectly considered in permitting decision; not pertinent to the merits of the decision	IPOP charges political bias on the part of Colonel Delarosa in favor of ANC groups; the Colonel's' refusal to consider IPOP diversity shows bias.
20210623 IPOP Fact Sheet (relevant for arbitrary changes in position)	Internal fact sheet is deliberative and not integral to the decision making process.	Any deliberative process privilege has been waived by production. The AR is not limited to records the Alaska District deems "integral" to the decision-making process, but to all materials directly or indirectly considered by decision makers. The material was unquestionably considered in the decision making-process.
20210721 letter B. Epstein to ██████ (final sent by ██████ with encl.) (bias)	AR019203	Correct reference is AR19203-08, expanded to include pictures showing habitat water level variability
20210730 IPOP Fact Sheet (relevant for arbitrary changes in position)	Internal fact sheet is deliberative and not integral to the decision making process.	Any deliberative process privilege has been waived by production. The AR is not limited to records the Alaska District deems "integral" to the decision-making process, but to all materials directly or indirectly considered by decision makers. The material was unquestionably considered in the decision-making process.
20210810 ██████ to ██████ e-mail finalizing site visit (completeness)	To be added to AR	Agreed.
20210913 E-mail, ██████ to ██████, ██████ (bias)	AR023389; AR023748; AR023384	None of the cited references contain the red material that constitutes answers to the agency questions. However, the material does in fact appear at AR28937-38.
20210914 E-mail, ██████ to ██████ (bias)	AR023935-023940	The precise reference for this e-mail is AR23937-38.
20210921 ██████ to ██████ (bias)	Document regarding FOIA is not relevant to decision making process	The AR contains numerous FOIA requests and responses; this particular reference is relevant to show staff hostility toward IPOP for resorting to FOIA to find out what was going on given staff's general lack of communication.

20210923 ██████ to ██████ (bias & unlawful conduct re: PAS Study)	To be added to AR	Agreed.
20210924 2021 Report Field Survey and Desktop Study (previously submitted 9-7-2021)(bias/delay)	AR023779-AR023825	Agreed.
20210924 ██████ e-mails Village of Solomon study (bias & unlawful conduct re: PAS Study)	Email communication is internal/deliberative and not integral to the decision making process. However, the PAS SOW (July 2019) was provided by the Village of Solomon to Regulatory (AR 23759-23764)	Staff's interactions with the Village of Solomon concerning the PAS Study, strenuously denied at the appeal conference, are highly relevant to show improper bias and conduct against the project.
20211021 NMFS to Corps (concur with Corps ESA conclusion on individual permit)	AR023997-AR024020	Agreed.
20211029 E-mail, ██████ to ██████ and ██████ (bias)	Deliberative and not integral to the decision making process.	Staff's interactions with the head of the regulatory branch, whose initial determination concerning compensatory mitigation was cast aside after staff got Corps counsel involved, are highly relevant in assessing the arbitrary and capricious nature of Alaska District decisionmaking.
20211029 Alaska District Facebook Post (wrong location, specifies tribal v. corp. consultation) (Annotated RFA at 84 n 219)	The Alaska District's Facebook post is not pertinent to the merits of the decision	Relevant to show the Alaska District's continuing failure to distinguish between Safety Sound and the isolated areas of the Bonanza Channel where mining is proposed.
20211116 ██████ to ██████ and ██████ with revised info paper (refers to omitted portions of AR)	Internal email is deliberative and not integral to the decision making process.	Any deliberative process privilege has been waived by production. The AR is not limited to records the Alaska District deems "integral" to the decision-making process, but to all materials directly or indirectly considered by decision makers. The material was unquestionably considered in the decision-making process.
20211116 ██████ to Commissioners and Col. Delarosa (delay)	Letter IPOP to State. Not relevant to permit decision process.	Letter was copied to Alaska District permit decisionmaking to demonstrate extraordinary and continuing delay; Colonel Delarosa's only apparent response to this and other communications from IPOP was to cancel his participation at a planned meeting with state officials. It is relevant to demonstrate the Alaska District's arbitrary and capricious delaying conduct, as well as bias against IPOP.
20211202 EFH Materials (bias)	Deliberative and not integral to the decision making process.	Any deliberative process privilege has been waived by production. The AR is not limited to records the Alaska District deems "integral" to the decision-making process, but to all materials directly or indirectly considered by decision makers. The material was unquestionably considered in the decision-making process. It also shows staff knowledge that area was too warm for salmonids, despite continuing denials in other documents.
20211206 letter ██████ to ██████ (Red Dog) (corrected version, with exhibits) (RFA at 32 n.86, 68 n.182)	IPOP comments on Red Dog Mine. Not relevant to decision making process.	Comments were submitted to show strikingly different treatment of this Alaska Native Corporation mining operation by the Alaska District and are relevant for that purpose.
20220110 Additional GTG consultation materials (bias)	Final copy was mailed out to tribe with cover letter from COL Delarosa after revisions. See AR028509-028515	The materials submitted by IPOP are not a different version of the cited materials, and contain many important matters not addressed in the cited materials. Together, the two materials demonstrate an effort to remove from the AR evidence of the Alaska District's extraordinary bias against IPOP and in support of Alaska Native political objectives.
20220113 Village of Solomon GTG record (compare 28511-15) (unlawful FOIA conduct by Alaska District)	AR027004-027006	The cited reference is a Solomon Native Corporation consultation record, not a Village of Solomon record, and in no sense a duplicate of the material IPOP has submitted for inclusion.
20220126 letter, ██████ to IG cc: District Counsel (seeking investigation of PAS contract) (with exhibits)(Annotated RFA at 64 n.165, 69 n. 186)	Not directly nor indirectly considered for permit decision as Regulatory was not CC'ed.	IPOP believes that it was appropriate to communicate directly with counsel for Colonel Delarosa, the deciding official for the permit, and that materials submitted to advise Colonel Delarosa that IPOP was seeking further review of his extraordinary decision to fund a study for project opponents to use against IPOP are relevant to the decision-making process.
20220201 Ltr. to ██████ (Commerce OIG) (w-Exhibits 1-5) (Annotated RFA at 31 n.83, 64 n.165)	Letter not directly nor indirectly considered for decision.	This letter was submitted to both counsel for Colonel Delarosa, the deciding official for the permit, and to ██████, head of the regulatory branch, to demonstrate that the advice the Corps was receiving from NMFS on so-called Essential Fish Habitat was entirely false. It would have been arbitrary and capricious for the Alaska District to ignore this information in its decision on the permit.

20220209 letter ██████ to ██████ (2d letter deficiencies in 12-20-21 FOIA and check requests) (PAS Contract unlawful FOIA conduct)	Letter regarding FOIA, not relevant to decision making process	This letter again apprised the Alaska District, with copies to Col. Delarosa, his attorney, and ██████, of IPOP's position that the PAS Study to fund project opponents was unlawful. It would be arbitrary and capricious for the Alaska District to ignore this material in its decision on the permit.
20220222 letter ██████ to Col. Delarosa et al. (12-20-21 FOIA response inadequacies) (PAS Contract unlawful FOIA conduct)	Letter regarding FOIA, not relevant to decision making process	This letter apprised Col. Delarosa, his attorney, and ██████ that the Alaska District was unlawfully withholding documents concerning the PAS Study from IPOP. The Alaska District's failure to correct its conduct in this regard is highly relevant to demonstrate unlawful bias against IPOP and in favor of the Alaska Native opponents of the project.
20220222 letter ██████ to ██████ (Litigation Hold) (relevant to integrity of AR)	Letter regarding litigation hold. Not relevant to decision making process	The letter advises counsel for Col. Delarosa to ensure that evidence concerning the decision-making process on the permit is not lost; the continuing failure to release materials and/or include them in the AR, and to respond to this and other letters concerning the process, is relevant to assess the lack of good faith of the Alaska District in the permit decision.
20220228 ██████ e-mails NEPA extension (delay / bias)	Email exchange requesting NEPA extension as required by policy at the time of request. Later the policy changed and an approval of a NEPA extension was not required. Therefore, this is not relevant to permit decision process.	The material was part of the decision-making process, and this response further demonstrates incompleteness in the AR, because the NEPA policy change and how it was communicated to the Alaska District does not appear to be included in the AR.
20220303 FOIA Appeal w-Exhibits 1-6 (PAS Contract unlawful FOIA conduct)	Letter regarding FOIA, not relevant to decision making process	This letter is directed to Col. Delarosa and recites at length the expanding history of Alaska District misconduct with regard to concealing development of the PAS Study. No response to this letter was ever received, and the District's ongoing attempts to conceal the PAS Study constituted part of the decision-making process and are relevant to assessing the lawfulness of the permit decision.
20220303 Letter (Supplemental) ██████ to Inspector General w-Exhibits 12-13 (PAS Contract unlawful FOIA conduct)	Letter regarding FOIA, not relevant to decision making process	This letter, copied to the attorney for Col. Delarosa, provides further evidence that the PAS Study was undertaken in violation of Corps requirements. The Alaska District's unlawful collaboration with project opponents is highly relevant to explain the unusual decision-making process and results.
20220304 E-mail, ██████ to ██████ (delay)	Email exchange with Murkowski office with update on status of Corps permit. Not pertinent to the merits of the decision.	The exchange suggests an expectation that the decision-making process was near completion in a "couple months," which did not occur, and supports IPOP's claims of missing materials and arbitrary conduct during the further delay timeframe.
20220309 ██████ NEPA extension (delay / incomplete record)	Email exchange regarding NEPA extension request as required by policy at the time of request. Later the policy changed and an approval of a NEPA extension was not required. Therefore, this is not relevant to permit decision process.	The material was part of the decision-making process, and this response further demonstrates incompleteness in the AR, as the policy change and how it was communicated to the Alaska District does not appear to be included in the AR.
20220316 ██████ to Engineer Inspector General (update no state letter) (PAS Contract unlawful FOIA conduct)	IPOP letter to Engineer Inspector General/FOIA. Not considered directly or indirectly in decision. Only sent to AK OC. Not CC'd to AK Regulatory so never received by Regulatory.	This letter, copied to the attorney for Col. Delarosa, provides further evidence that the PAS Study was undertaken in violation of Corps requirements. The Alaska District's unlawful collaboration with project opponents is highly relevant to explain the unusual decision making process and results.
20220329 ██████ to ██████ (outstanding FOIA issues and new requests) (Annotated RFA at 69 n.183)	Letter regarding FOIA, not relevant to decision making process	The requests were intended to emphasize, among other things, that no other applicant was required to collect silt or muck for reuse, and were copied to the head of the regulatory branch. The arbitrary and capricious demands upon IPOP are highly relevant to assessing the lawlessness of the permit denial.
20220426 letter ██████ to Inspector General (PAS Contract unlawful FOIA conduct)	Letter not directed to Regulatory Division. IPOP complaints about process. Not relevant to decision making process or considered directly or indirectly in decision.	Letter was directed to the Division Engineer and counsel for Col. Delarosa, with enclosure copied to Col. Delarosa and Mr. Hobbie, outlining definitive proof of Alaska District misconduct in withholding materials concerning PAS Study. Again, the Alaska District's unlawful collaboration with project opponents is highly relevant to explain the unusual decision-making process and results.

20220506 ██████ to Inspector General and Brig. Gen. Gibbs (Annotated RFA at 68 n.181) (disparate treatment)	Letter not directed to Regulatory Division. IPOP complaints about process. Not considered directly or indirectly in decision. (This is same as Row 3, which was misdated. These two documents should be the same.)	Agree this is also the Row 3 letter; it was mailed to the Division Engineer and Col. Delarosa's attorney, demonstrating yet again extraordinarily disparate treatment between IPOP and mining operations not opposed by Alaska Natives. An admission that the Alaska District ignored this and other evidence of its disparate treatment by regulatory branch officials is an acknowledgment that the resulting decision was arbitrary, capricious and contrary to law.
20220509 ██████ PAS study exchange (PAS Contract unlawful conduct)	Email exchange not relevant to decision making process. Was not considered directly nor indirectly in decision as Regulatory not involved.	Exchange shows that PAS Study was designed to respond to IPOP application to mine in an area regarded (falsely) as the property of Alaska Natives, and whether or not Regulatory Branch officials show up in this e-mail chain, it is highly relevant to show the bias and improper conduct of the Alaska District with regard to the application.
20220517 ██████ to ██████ (new District Counsel)	Letter not directed to Regulatory Division. IPOP complaints about process. Not considered directly nor indirectly for decision.	The letter was directed to the new Alaska District counsel, bringing him up to speed on the unlawful delays and misconduct in connection with IPOP's permit application. Again, the District's apparent claim that ignored such complaints in its decision making is proof of arbitrary, capricious and unlawful conduct.
20220520 Doc 1 - IPOP Complaint - filed 5-20-22 (Annotated RFA at 8 n.6) (bias / delay)	IPOP lawsuit against Corps (Rivers of Gold versus Wormuth, 22-CV-1353). Not relevant to decision making process	The complaint sued the U.S. Army Corps of Engineers for failure to render a permit decision and it is not credible to suggest that it was ignored in the decision-making process.
20220526 Letter ██████ to ██████ (bias)	To be added to AR	Agreed.
20220601 letter ██████ to Inspector General and Corps officials (update re PAS issues and others)	Letter regarding lawsuit against Corps. Not considered directly or indirectly in decision as it was not sent to Regulatory.	The letter to Brig. Gen. Gibbs, the attorney for Col. Delarosa, and others addresses not only the lawsuit, but other aspects of the unlawful conduct of the Alaska District personnel, and urges command oversight. It falls within the class of materials that were, or should have been, considered by Col. Delarosa.
20220614 Army Inspector General to ██████ (DIH222107) (Annotated RFA at 69 n. 186)	Not considered directly or indirectly in decision as it was not sent to Regulatory.	The letter refers to an unspecific personal matter somehow connected to decision making on IPOP's application which is reflected nowhere in the record; the alleged "through inquiry" of the Inspector General is also reflected nowhere in the record. It is relevant to demonstrate that the AR remains incomplete.
20220803 FOIA Appeal (PAS Agreement) (PAS Contract unlawful FOIA conduct)	Letter regarding FOIA, not relevant to decision making process	This letter to Brig. Gen. Gibbs, Col. Delarosa, the attorney for Col. Delarosa, and ██████, addresses ongoing Alaska District and other misconduct with regard to IPOP's permit application. It is of obvious relevance to the decision-making process.
20220815 E-mail, ██████ to ██████ (no longer working for Alaska District) (Annotated RFA at 91 n.228)	Letter regarding FOIA, not relevant to decision making process	This letter advises IPOP that ██████, the official who had determined back in January 2022 that no compensatory mitigation would be required, and had promised a decision within days, left the Alaska District at some point before the decision finally issued. The note is consistent with IPOP's contention that the record is incomplete insofar as it fails to reveal the influence of others within the command structure who overrode his approach to the permit application.
20220829 Western District Litigation Filings (Complaint, Exhibits, Epstein Decl.) (Annotated RFA at 5 n. 3, 56 n. 142, 65 nn. 166 & 167)	IPOP lawsuit against Corps (Rivers of Gold versus Wormuth, 22-CV-1353). Not considered directly or indirectly in decision.	The litigation concerned the failure of the Alaska District to make a decision and it is not credible to suggest that it was ignored in the decision-making process.
20220909 Alaska District press release on denial (relevant for "partnership" with opponents) (Annotated RFA at 16 n.47)	Happened after the Permit Decision. Not considered directly or indirectly in permit decision.	The press release was prepared in connection with the decision and documents the bias of Colonel Delarosa in referring to the Alaska Native opponents of IPOP's project as his "partners".

Alaska District, Regulatory, Responses to RO Questions

POA-2018-00123

I. Staff's unresponsiveness to IPOP proposals and evidence, and solicitude for project proponents. RFA pp. 10-16

II.G. Staff's Rejection of IPOP's Reclamation Plan is Arbitrary and Capricious. RFA pp.45-55

II.I. The Decision's Reasoning About Environmental Impacts Is Arbitrary and Capricious in Light of Comparable Corps Decisions. RFA pp. 63-71

1. Does the District have any local policy or Standard Operating Procedures related to aspects of its decision that were followed during its consideration of the Appellant's proposal (e.g., Public Interest Review, alternatives analysis, subsistence)? If so, please provide those documents.

Alaska District's Guidelines for Individual Permits (IP)

Alaska District's Guidelines for General Permits (GP)

An electronic version will be submitted to the RO and Appellant.

2. RFA p. 6, states "Staff was generally nonresponsive to the data (much of which has, tellingly, been entirely ignored and is not addressed in the decision document)". For the Appellant, explain what data was provided not addressed in the decision document. For the District, was the data submitted by the applicant considered in the permit decision, if so, how? If not, why and explain where that is documented in the record.

Yes, the data submitted by the Appellant was considered at AR 121-148, 11-13, 24-26, 28-34, 37-43, 46, 49-50, 53-54, 56, 81-84, 89, 90, 94, 97, 103, and 114-115. See also response to Question 12.

3. RFA p. 7, the phrase "claim jumping" and or "regulatory claim jumping" is used. Explain what the use of these phrases means.

No response from the District.

4. RFA p. 7, The Appellant asserts the District assisted project opponents in preparation of an anti-IPOP website. Explain how the District assisted project opponents with this website.

AR 31471. The District responded to a question from a member of the public who was part of the Stop IPOP Facebook page, about the public notice comment process. The Corps' response was posted on the Stop IPOP Facebook page.

5. RFA p. 8, footnote 5 references an email, dated February 21, 2022. Where in the AR is this email?

The email is not in the AR. The email refers to a USACE Civil Works Planning Assistance to States Technical Assistance project authorized by Section 22 of the Water Resources Development Act (WRDA) of 1974, as amended by WRDA 2007, utilizing a Model Agreement from the HQUSACE Project Partnership Agreements page ([extension://efaidnbmnnnibpcjpcglclefindmkaj/https://usace.contentdm.oclc.org/utis/getfile/collectio n/p16021coll11/id/3996](https://efaidnbmnnnibpcjpcglclefindmkaj/https://usace.contentdm.oclc.org/utis/getfile/collectio n/p16021coll11/id/3996)) and including Option 1, authorized by Section 1156 of WRDA 1986 as amended by the Water Resources Reform and Development Act of 2014 and WRDA 2016.

6. AR p. 373, Field Report references a photo log. Where in the AR are these photos located?

AR 684-693

7. The project proposal combined the two-phase case study with the full-scale operation mining plan. Why was the case study combined with the full-scale operation in one IP review?

The case study was not a single and complete project from the full-scale operation (it did not have independent utility) (30 CFR 330.2i). AR 8224, 8266, 8313, 8319-8320, 8985-8987, 8989- 9010, 9244, and 9691-9692.

8. The AR includes multiple references to the production of a reality television show. What is the relevance of the television show to the project?

The television show would change the project's basic purpose, and subsequently overall purpose, which would then refine the range of alternatives evaluated under the National Environmental Policy Act (NEPA) and the 404(b)(1) Guidelines (AR 18-21). The applicant notified the District that the television show was no longer being considered, however the Corps received public notice comments expression concern about a television show. Nevertheless, the Alaska District was sued in May 2022 in the United States District Court for the Western District of Louisiana to compel action on the permit application by Rivers of Gold, Global TV Show and Global Merchandising LP.

9. Where are the notes from the March 28, 2018 meeting referenced on p. 14 of the AR?

They are not in the AR. The District was unable to locate any notes from that meeting from the employee(s) present and those employee(s) no longer work at the District.

10. RFA p. 75, The Appellant asserts "While Staff properly finds the issue outside the Corps' scope of review, Staff reproduces attacks on the economic viability of the project and even the presence of gold at the project, suggesting that Staff's decision making may have been rendered arbitrary and capricious by acceptance of further slanders from the project opponents. (Memo at 63)" (AR p. 67). It is not clear what this comment is referring to at "Memo 63" (which is at AR p. 67). Clarify this comment.

No response from the District.

11. AR p. 30456, Was the online Nome Nugget public poll considered by the District? Why or why not? How was the poll related to POA's PN?

The poll was submitted to the District as a public notice comment, however it was not substantive and therefore was not considered by the District in the assessment (AR 7682-7683).

II. The decision errs in describing the fundamental features of the Bonanza Channel and how they will be affected by suction dredge mining. RFA pp. 16-45

12. The AR indicates that IPOP conducted fisheries surveys during the summer of 2021, May/June 2022, and July 2022. IPOP states that "the purpose of the July 2022 sampling was conducted to further attempt to document fish presence at locations identified in the USACE Planning Assistance to States project with the Native Village of Solomon, 2022 Nearshore Fish Study Plan, Eastern Safety Sound". Within the Appendix 2 of the SOF (AR p. 142) the District states "it finds it difficult to draw conclusions about fish presence in Bonanza Channel due to the limited sampling (two days in July and primarily near the shorelines)". In making this conclusion, did the District consider all the sampling efforts conducted by IPOP or just the July 2022 effort? Did the District provide IPOP with any sampling protocols to follow?

The statement in AR 143, “The Corps finds it difficult to draw conclusions about fish presence in Bonanza Channel due to the limited sampling (two days in July and primarily near the shorelines)” was made in response to a specific fish study (*IPOP – Bonanza Channel, Fisheries Baseline Sampling 2021*, submitted October 6, 2021; AR 23956-23961) provided by the Appellant. Refer to AR 127-148. The District did not provide a specific protocol for collection of fish data.

The District forwarded public notice comments to the Appellant on October 29, 2020 (AR 7983-8085), January 8, 2021 (AR 8791-8797), and July 29, 2021 (AR 19237-19384) and requested the Appellant’s response to comments; the Appellant’s response was to collect various forms of data and submit it to the Corps (see AR 130-131, 136, 137-148). The District did not require the applicant to conduct data collection.

Studies voluntarily submitted in response to PN comments included:

- *Bonanza Channel Benthic Macroinvertebrate Survey*. D. Eilers. October 2020 (AR 9266-9268)
- *Bonanza Channel Environmental Baseline Studies – Updated Submerged Aquatic Vegetation Sampling*. D. Eilers. August 2021 (AR 27903-27920)
- *Bird Species Occurrence, Distribution, and Abundance on State Lands Near Proposed Dredging Operations in the Bonanza Channel East of Nome, Alaska*. Booms Biological Services. July 12, 2021 (AR 23101-23111)
- *August Bird Species Occurrence, Distribution, and Abundance on State Lands Near Proposed Dredging Operations in the Bonanza Channel East of Nome, Alaska*. Booms Biological Services. August 29, 2021 (AR 23285-23294)
- *Tundra Swan Feeding Behaviors and Habitat Use Near the Bonanza Channel East of Nome, Alaska*. Booms Biological Services. October 12, 2021. (AR24154-24211)
- *IPOP – Bonanza Channel, Fisheries Baseline Sampling 2021*. FISHEYE Consulting. Submitted October 2, 2021 (AR 23956-23961, 23947-23954)
- *Bonanza Channel Placer Project Near Nome, Alaska 2021 Water Chemistry Summary*. Otero Engineering, Inc. October 2021. (AR 24063-24137)

Studies and study updates voluntarily provided by the Appellant included:

- *Bonanza Channel Placer Project Near Nome, Alaska, 2021 Field Survey and Desktop Study*. IPOP, LLC. August 2021. (AR 23779-23825)
- *Bonanza Channel Placer Project Near Nome, Alaska, 2021 Field Survey and Desktop Study Rev. 1*. IPOP, LLC. December 2021. (AR 24703-24783)
- *Bonanza Channel Placer Project, Alaska TECHNICAL MEMORANDUM – 2022 Spring Reconnaissance and Sampling*. IPOP, LLC. June 13, 2022. (AR 30701-30713)
- *Bonanza Channel Placer Project, Alaska TECHNICAL MEMORANDUM – 2022 Spring Reconnaissance and Sampling - June 15 to 22, 2022*. IPOP, LLC. July 1, 2022. (AR 30733-30748)
- *Bonanza Channel Placer Project, Alaska TECHNICAL MEMORANDUM – 2022 Spring Reconnaissance and Sampling – July 4, 5 and 15, 2022*. IPOP, LLC. July 21, 2022. (AR 31036-31049)

See also AR 24925-24930.

13. AR p. 8, states the total project impacts are 192.5 acres; AR p. 88 specifies that those 192.5 acres are vegetated shallows; AR p. 90 the Statement of Findings (SOF) explains that mudflats will also be impacted by the proposal but does not include a measure of the impact area. Clarify the

acreage of impacts proposed in WOTUS, separated by aquatic resource type and where this is documented in the AR. Explain the rationale supporting your methods to distinguish between temporary and permanent effects to WOTUS and point to where that information is documented in the AR.

The total impacts to WOTUS are 192.5 acres from disposal-only activities plus dredging and disposal combination activities. The applicant reported that 8.11% of the area they surveyed, which is larger than and inclusive of the project area, was mudflats in their March 2022 Reclamation Plan. (AR 87-91, 27887, 27963, and 28675.) In AR 88, the District incorrectly stated that the entire project area consisted of only vegetated shallows. Based on summing numeric information provided by the Appellant in their Reclamation Plan Revision 2 (March 2022; AR 28572), approximately 15 acres of the project site consists of mudflats, which would then make approximately 177.5 acres vegetated shallows. See also AR 3188.

Temporary impacts (effects are impacts) are a temporary discharge of dredged or fill material where the post-project state or conditions are the same as pre-project conditions. The Appellant's reclamation plan proposed to permanently alter the morphology of Bonanza Channel by deepening one segment and discharging excess dredged material into other areas to make the channel shallower as part of a proposal to improve the distribution of fish and bird habitat.

14. What information did the District rely upon to determine the functional importance of the special aquatic sites and where in the AR is this documented?

The District relied upon information provided by the Appellant and comments received from the resource agencies, federally recognized tribes, Native corporations, and the general public at such as at AR 3488-3493, 3497-3501, 3510, 5976-5984, 7751-7805, 23285-23294, 23101-23111, 14364-14368, 15097-15118, 16014-16062, 28072-28118, 30025-30091, 4718-4719, 4721, 6853-6855, 2629-2630, 2634-2638, 2642-2646, 3281, 3313-3316, 3874-3877, 3874-3877, 5436, 5449-5455, 5475, 5494-5495, 5518, 5522, 5526, 5528, 5543-5545, 5635-5636, 5746-5747, 5873, 6006, 6022-6024, 6028-6029, 6045-6053, 6869-6885, 6896-6897, 6907-6915, 7451-7452, 7535-7548, 7580-7581, 7605, 7608-7610, 7671-7673, 7711-7713, 7739-7742, 7744, 15194-15211, 15984-15985, 207-211, 342-344, 365, 23101-23111, 23285-23294, and 24154-24211.

15. AR p. 88, the District states, "A permanent loss of waters of the U.S. is not anticipated if the reclamation proposal is successful; however, the result of the proposed reclamation would result in a conversion of waters type, with associated permanent impacts to the functions and values provided by the special aquatic sites." Considering these statements regarding "permanent loss" versus "permanent impacts", how did you distinguish between permanent loss and permanent impact. What information did the District rely upon to evaluate the impacts on aquatic resource functions and where is that documented in the AR?

A permanent loss of waters occurs when waters are converted into uplands. The mining plan and reclamation did not propose to convert waters into uplands, however proposed to alter the morphology of the Bonanza Channel by deepening one segment and discharging excess dredged material into other areas to make it shallower in a proposal to improve fish and bird habitat. Waters can be impacted permanently (for example, by placement of fill below the Ordinary High Water Mark), but not converted into uplands.

See response to Questions 13, 14, and 16 and AR 80-91, 97-98, 111-112.

16. AR pp. 10, 59, 91, 96, 102, within the SOF the District describes the project area as pristine. What criteria were evaluated to determine this area as pristine and identify what information within the AR supports the classification?

See the District's response to Question 14 and AR 92, 103, 216, 324-325, 3488, 3494, 25259-25456, 25463, and 19203-19208.

17. AR p. 30, the SOF states "The applicant did not propose any timing restrictions to minimize impacts to birds." RFA p. 40 the Appellant states "To the extent that Staff wished to mitigate risks that might rise to the level of actually killing a bird, Staff could have included a permit condition cautioning IPOP to avoid adverse impact on any bird nests in the vicinity of the camp—though flooding would probably destroy most of them anyway." Was there a discussion of potential special conditions (timing, additional sound abatement measures, etc.) that could have reduced the project's impacts upon birds? If so, where is this contained within the AR?

The District did not consider any special conditions because we could not permit the project as it was not the least environmentally damaging practicable alternative (LEDPA) (AR 119). Impacts to birds are discussed in AR 29-31 and 51. See AR 7983-8085, 9060-9062, 9088-9090, 9103, 9115-9120, 9124-9126, 19237-19384 and 23068-23134 for dialogue with Appellant regarding concerns with bird impacts.

18. AR p. 33, The District states "The Corps does not agree with the applicant that temperature would be a limiting factor for salmonids migrating in Bonanza Channel because the Corps does not have enough information about the temperatures in the channel over and at different depths." Did the District specify a certain methodology or a set of parameters to follow for collecting this data? After reviewing the report did the District discuss with IPOP additional information needed? Where is this documented in the AR?

No, the District did not specify a certain methodology for collection of temperature data; see AR 128-148. The District specified what information was needed for Essential Fish Habitat (EFH) consultation in a letter (AR 23984-23996) and during a meeting (AR 24286-24311) after the National Marine Fisheries Service (NMFS) letters regarding incomplete information for EFH consultation were not being addressed appropriately by the Appellant. See AR 32-33 and 115. See also Question 12.

III. The decision's arbitrary, capricious, and illegal assessment of the public interest. RFA pp. 72-89

IV. The decision's conclusion that IPOP's proposal is not the LEDPA is arbitrary, capricious, and contrary to law. RFA pp. 90-109

19. RFA p. 18, the Appellant states "IPOP's Certified Professional Geologist provided a detailed analysis of the gold-related aspects of the Bonanza Channel and surrounding areas that is, in substance, entirely ignored by Staff". For the Appellant, which report are you referencing and where is this report in the AR? For the District, did you review this report? If so, where in the AR is your analysis of the report documented and how was this analysis considered in the SOF?

Information from the Appellant at AR 9176-9187 3537-3545, 3637-3690 were considered by the District in AR 19-21, 42-45, and 66-80.

20. What rationale did the Appellant provide to support locating the 24-acre study area outside of the general mine area? Where is this rationale located within the AR?

AR 8224-8227, 8309, 8312-8313, and 8987

21. There is disagreement between the District and Appellant regarding the proposed mining reclamation plan. How did the District consider the proposed mining reclamation plan regarding it being viewed as mitigation and/or impacts? Where is this rationale located in the AR?

The District considered the proposed reclamation plan as impacts because the appellant was proposing to permanently alter the bottom elevation and the functions of the aquatic resource by proposing a conversion from one aquatic resource type to another. The discharge of dredged material was proposed in areas that were not proposed to be mined. See responses to Questions 13 and 15. See AR 16, 36-43, 50-51, and 111-112.

22. Was there a dialogue between the District and Appellant regarding less damaging alternatives and if so where is that dialogue documented in the AR?

AR 1550, 2584, 3197, 3511-3516 and 3607-3627, 2967, 7983-8085, 8265-8266, 8269-8280, 8721-8797, 8818-8819, 9176-9187, 9690, 10398, 10383, 10972, 14372-14374, 19209-19210, 19233, 19237-19384, 23068-23100, 23378-23379, 23743-23744, 23870-23871, 24335-24341, 24455-24457, 24784-24924, 28122, 28127-28130, and 28527-28634.

See also response to Question 24.

23. AR, p. 10, "Safety Sound is one of the few publicly accessible locations on the Refuge for viewing wildlife." Specify how many publicly accessible locations for wildlife viewing are available.

The Alaska Maritime National Wildlife Refuge is 3.5 million acres (AR 107 and 20575). The Nome Council Road provides the public access to a small portion of the refuge lands. There is no specific number of locations; popular spots are described in AR 104-105, 107-108, and 25154-25159.

24. AR p. 67, in the SOF, the discussion of alternatives states, "All information submitted by the applicant, including information found in letters submitted September 17, 2021 (case study as an alternative to full-scale 5mining); September 27, 2021 (a court case); and November 30, 2021 (general disagreements) has been considered during the alternative analysis; this is not a complete list." Provide a complete list of information considered during the alternatives analysis and identify the respective location in the AR.

See District response to Question 22.

See AR 23870-23871, 23744, 24335-24341, 24784-24924, 24926-24930, 28122, 28127-28130, 3511-3516, 9056, 9058, 9091, 9176-9187, 10383-10391, 10398, 10422, 10972, 23076-23097, 24300-24310, 24919-24924, 28528-28530, and 24456-24457.

25. AR p. 91, the District states "The project may have major effects to recreational fishers as during the project, portions of the Bonanza Channel would be closed off by the turbidity curtains and unavailable for use by the public." Did the District determine this to be a short-term or long-term effect, and how did they conclude the effect is major and not minor? Where is this documented in the AR?

See AR 35, 86, 91, 103-104, 28072-28118. See also the response to Question 18.

26. What is the geographic scope you identified for recreation PIR Factor and where is that explained in the AR? How much of that area is available or not available for recreation and where is that documented in the AR?

The geographic scope for the Recreation PIR factor is evaluated at a local level (e.g. regional, so Nome and the surrounding areas) in AR 104-105 and at a national level in AR 107-108. Since the area is not precisely delineated, an estimate of the assessment area available or not available for recreation is unavailable, however access to infrastructure like roads increases the access to recreational opportunities.

27. AR p. 109, The District states “The Corps has determined that the beneficial effects would be more than minimal but temporary as the applicant has provided their economic benefit estimate of the proposed project.” Where is the estimate located in the AR? Explain how the estimate was used to support the beneficial-effect determinations made in the PIR. What is the District’s rationale for beneficial effects being temporary?

See AR 3496 and 9109-9110 with District’s analysis in AR 100-101 and 108-109.

28. AR P. 109, What rationale was used to support the statement in relation to Public and Private Use that the “Corps has conservatively determined that the detrimental effects would be more than minimal and permanent”?

See AR 80-108 and 8722-8724.

29. AR p. 2572, the District’s letter to IPOP states, "We have not received geotechnical information regarding presence, location and depth of gold. We do not have sufficient geotechnical information to conduct an alternatives analysis of your project, as is required by the National Environmental Policy Act or the Clean Water Act under the 404(b)(1) Guidelines." In the SOF (AR, p. 21), however, the District states “the Corps is deferring to the applicant in assuming wide distribution of gold throughout the 32 claims for the Alternatives Analysis.” Why did the District require additional data if it was deferring to an assumption? What information did the Appellant provide to the District regarding presence, location, and gold depth? What documents did the District consider to support their alternatives analysis and where are they located in the AR?

The District requested additional gold data for avoidance and minimization of impacts to aquatic resources (WOTUS) on September 18, 2019 (AR 2572-2574). This was reiterated January 8, 2021 (AR 8721-8724). The District requested additional information and the Appellant went through the Nationwide Permit (NWP) process for survey coring multiple times. No additional mineral surveying was conducted beyond the 13 core samples which were combined into one single sample (AR 3537-3545, 3637-3690) and no additional gold information beyond the combined sample was provided to the District despite valid verifications to conduct additional exploratory survey work. The Appellant wanted the District to move forward on the IP application (December 16, 2021; AR 24926) and stated they would provide no additional information; therefore assumptions were made regarding the distribution of gold to come to a permitting decision.

See response to Questions 19, 22, and 24.

See also AR 8265 and 8722-8724.

30. AR p. 103, within the SOF the District’s evaluation for the Land Use PIR factor included discussion of a 1979 Settlement Agreement. The District states, “The Corps cannot enforce provisions of the Agreement since the Corps is not party to it; however, the Corps has considered the information in evaluating the proposed project.” How did the District consider this agreement and how was it factored into the decision of the project?

The District took into consideration the reasons these areas were to be set aside as described in the Agreement in the balancing of land uses in the Public Interest Review. See AR 65, 103, and 109.

31. AR p. 103, regarding the navigation PIR factor, the District states, “The channel itself is utilized by small boats as its depth does not support large boats.” The District concludes with the statement “The reduction in area for watercraft, as shallow littoral disposal sites are filled per the applicant’s reclamation proposal, would be detrimental to navigation after the conclusion of the project because the proposed project would reduce the width of available water area for boats that currently use the area.” Did the District consider the potential benefits to boaters/watercraft that may be provided by a deeper channel?

No, as described in AR 103, the deeper channel "would not be connected to deeper areas within Safety Sound or Norton Sound" and therefore would not be a benefit to deeper draft watercraft.

32. AR p. 105, regarding the recreation PIR factor, did the District weigh the potential benefits a deeper channel, as proposed in IPOP’s reclamation plan, would have on recreation opportunities? If so, where is it located in the AR?

No, see AR 103 and response to Question 31.

33. RFA p. 95, states that, “the gold mining, as proposed, is for shallow water gold recovery using equipment specially designed to operate in shallow water environments...A basic project purpose that includes all types of mining for gold, rather than shallow water dredge mining...improperly forces the applicant to rebut the premise that practicable alternatives that do not involve special aquatic sites are presumed to be available.” Please explain how the District concluded it was appropriate to expand the project purpose to different types of gold mining, even though the Appellant had already invested in shallow water equipment. Where is this documented in the AR?

See AR 19, 57, 67, 71, 8721-8724, and 9338-9339. 40 CFR 230.10 requires the Corps to take into account cost, existing technology, and logistics to determine the range of alternatives. Ocean mining for gold in the Nome area utilizes existing technology and is common in the area. The Alaska District, Regulatory Division has Regional General Permit (RGP) 4, which authorizes suction dredging in navigable waters, subject to certain restrictions; further information is available on our public website. Also, under 40 CFR 1506.1, until an agency issues a Finding of No Significant Impact (FONSI) or a Record of Decision (ROD), no action concerning a proposal can be taken that would limit the choice of reasonable alternatives, so the District cannot rely on the applicant’s early purchase of specialized equipment as a way to limit reasonable alternatives within the applicant’s own mining claims.

34. AR p. 71, the District refutes the Appellant’s statement in the LEDPA analysis that mining in the ocean offshore is not comparable to mining in the Bonanza Channel, stating no data to substantiate their claim that offshore mining was not comparable was supplied to the Corps.” For the Appellant, do you believe this is a true statement? If not, what data did you supply to the District and where is it in the AR? For the District, was other information used to determine that the ocean offshore mining was comparable to the Bonanza channel? If so, where is this in the AR?

AR 71 states that the potential to mine offshore in the Appellant’s existing mining claims is comparable *in size* to the Appellant’s proposal to mine in Bonanza Channel. Since the Appellant did not propose site-specific gold quantities, the District assumed gold was available on all Appellant’s mining claims. This was a reasonable assumption, since the original proposal involved mining all 32 claims, which would

have included the Appellant's ocean claims. See AR 2, 70-72, and 9184-9185. Refer to response for Question 24.

II.H. The Decision Arbitrarily Overstates Impacts to Subsistence Harvest by Alaska Natives. RFA pp. 56-62

35. Specify which plant and animal species were determined to be important to subsistence, how they were determined to be affected by the proposal, and where the consideration and evaluation of subsistence is supported in the AR.

The District determined that Saffron cod (also called tom cod), whitefish, salmon (coho, pink, chum), and migratory birds would be temporarily impacted during the project. Additionally, plants/berries are noted as an important subsistence resource but would not be impacted by dredging and disposal activities, however may be impacted if present in the man camp area. See analysis in AR 29-35, 60, 85-91, 102-106, and 155-156. These determinations were made based on information from public notice comments including agency comments, consultation with federally recognized tribes and Native corporations (to include Traditional Ecological Knowledge), comments received during the NWP permitting process, pre-application meeting comments, comments from the September 28, 2020 virtual public meeting (AR 7511-7516), and literature references. For example, see AR 155, 240-256, 2182, 7758, 7763, 7751-7771, 7772-7805, 9243-9415, 8832, 20548-20550, 20564-20571, 20579-20581, 2989-2994, 3881-3883, 7432-7436, 7710, 7730-7738, 7907-7909, 7979-7980, 8262-8264, 10179, 23766-23767, 27003-27006, 28509-28515, 24277-24279, 151-154, 7511-7516, 2629-2630, 5436, 5449-5455, 5475, 5494-5495, 5518, 5522, 5526, 5528, 5543-5545, 5635-5636, 5666-5668, 5729-5737, 5768-5777, 5797-5798, 5810, 5869-5873, 6006, 6010-6018, 6035, 6869-6885, 6891, 6896-6897, 6909-6910, 6925, 7257, 7260-7325, 7425, 7451-7452, 7475, 7538, 7567, 7570-7574, 7575-7579, 7587, 7604, 7605, 7608-7610, 7611-7665, 7668-7669, 7671-7673, 7675, 7685-7686, 7691, 7702, 7710, 7711-7713, 7716, 7730-7738, 7739-7742, 11932, 14125-14128, 14136, 15196, 15984-15985, 16780-16781, 16783-16837, 7831-7895, 7807-7826, 3510, 25154-25159, 25223-25224, 25461-25462, and 25628-25630.

36. Specify which subsistence activities the District determined would be impacted as a result of the proposed project and explain the standard used to weight the importance of these activities in the District's decision and where this is supported in the AR.

See response to Question 35. See AR 29-35, 85-91, 102-106, 151-156. See Questions 37, 41, and 42.

37. Are there subsistence opportunities unique to the project location that would not be available outside of the project location? Is this evaluated in the AR, if so, where?

Safety Sound and Bonanza Channel are a unique resource that the District assessed and the Appellant is proposing to impacting a portion of it. However, the location the appellant is proposing to impact is easily accessible, which means more users would be impacted. Detailed, specific information on subsistence opportunities and resources outside of the project area are unavailable as the District is not required to analyze this aspect in off-site project locations. See AR 33, 60, 35, 155-156.

38. How did the District consider and weigh subsistence when evaluating the Recreation PIR Factor? Where is this located in the AR?

The District assessed subsistence under food and fiber production in the PIR; see also analysis in AR 33-35. See response to Questions 35-37.

39. AR pp. 30328 – 30332, contains a string of emails referencing a meeting between District staff and the Solomon Native Corporation. Where in the AR are the notes or MFR documenting this meeting?

AR 27003-27006.

40. AR p. 30328, contains an email from the President of the Solomon Native Corporation requesting consultation with the District. Is it the District's position that this "consultation" is a meeting that it would have with another adjacent landowner or as Government-to-Government consultation with a Federally Recognized Tribe?

Consultation with Alaska Native Corporations chartered in accordance with the Alaska Native Claims Settlement Act (ANCSA), such as Solomon Native Corporation, is handled "on the same basis" as that of Indian tribes as directed by Public Law (P.L.) 108-199 div. H, Sec. 161, Jan. 23, 2004, 118 Stat. 452, as amended by P.L. 108-447, div. H, title V, Sec. 518 Dec. 8, 2004, 118 Stat. 3267. USACE consultation with ANCSA corporations is guided by Executive Order 13175, Department of Defense Instruction 4710.02, and Alaska Implementation Guidance for the DoD Alaska Native Policies and Instructions (last dated 13 April 2020). Under law and policy, ANCSA corporations are afforded a specific consultation status different than that of another adjacent landowner.

41. RFA p. 56 states, "Subsistence harvest is the subject of detailed government permitting and reporting, as well as analysis and reporting by Native Alaskan groups. In 2019, IPOP pulled lists of subsistence harvest permits and found no evidence of Bonanza Channel use and requested that the Corps host a meeting with Alaska Native representatives to identify possible issues". For the Appellant, did you provide the District those lists of subsistence harvest permits? Is this in the AR and if so, where? For the District, were lists of subsistence harvest permits considered? If so, where is this in the AR? Did the District refuse to hold the requested meeting? Did the District document its decision on the meeting request and if so, where is this in the AR?

The subsistence harvest permits associated with the 2019 letter (AR 2892-2894) are not in the AR. Subsistence permit information is provided in AR 27625-27788. The Corps held a public meeting (AR 7511-7516) but did not hold a specific meeting with Alaska Native representatives and the applicant on subsistence issues because that is not something the District would facilitate as part of the permitting process. Communication between subsistence users are in AR 151-153, 3883, 7432-7436, 7710, 7730-7738, 7907-7909, 7979-7980, 8262-8264, 10179, 23766-23767, 27003-27006, 28509-28515, 24277-24279. See also response to Question 35.

42. AR p. 100, The District states in the SOF "The proposed project is anticipated to have a negative impact on community cohesion". Identify where this is documented in the AR and where this statement is supported in the SOF?

See AR 100, 34-35, and 59-60. See also response to Question 35.

Guidelines for Individual Permits (IP)

(You should already have determined the geographic extent of wetlands and other waters and/or completed a jurisdictional determination before beginning the processes in this Guide. See [JD Guide](#).)

1. Individual Permits

In accordance with [33 CFR 320.1\(a\)\(3\)](#), USACE seeks to avoid unnecessary regulatory controls, therefore applications for Department of the Army permits should be evaluated at the lowest level possible. Before beginning evaluation of an application using the processes described in this guide, make sure that the project does not qualify for an exemption (see the [JD Guide](#)), a regional general permit or a nationwide permit ([GP Guide](#)), or a Letter of Permission (see below for further information and see the [LOP Guide](#)).

There are two types of individual permits, a standard permit (SP), and a Letter of Permission (LOP). A standard permit requires an environmental assessment level of NEPA analysis (or an EIS level of NEPA analysis, see the [EIS SOP](#)) and a full public interest review. Standard permits can be used to authorize impacts under either Section 404 of the Clean Water Act (CWA) or Section 10 of the Rivers and Harbors Act of 1899 (RHA), or Section 103 of the Marine Protection Research and Sanctuaries Act, or a combination of these laws. The procedures in this guide are for the processing of standard permits. [Corps Regulations](#), [HQ SOP](#), [Regulatory Guidance Letters](#).

Letters of Permission are used to authorize impacts that are subject only to section 10 of the RHA, when the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition. Letters of Permission require a categorical exclusion level of NEPA analysis and an abbreviated public interest review. Instead of a public notice, a 15-day agency letter is used to coordinate with Federal and state fish and wildlife agencies (see [33 CFR 325.2\(e\)\(1\)](#)). In Alaska District, LOPs cannot be used to authorize projects that require authorization under Section 404 CWA, therefore if project qualifies for an LOP, no 404(b)(1) analysis is completed. See the [LOP Guide](#) for procedures to process applications that qualify for LOPs.

The [33 CFR 325, Appendix B.6](#) has identified other projects that qualify for a categorical exclusion level of analysis under NEPA however, unless the proposed project meets the criteria for an LOP, the project requires authorization using a standard permit process and you must use the procedures in this guide to process those applications. Your level of analysis should be commensurate with the impacts. Your CDD should note that the project is being evaluated under a categorical exclusion level of NEPA analysis and therefore the sections of the CDD on NEPA scope of analysis and Finding of No Significant Impact are not applicable.

2. General SP Guidance

It is imperative that all staff review and familiarize themselves with our regulations and policies to ensure procedural correctness.

Please be aware of dates for your ORM entry requirements [NOTE: see the latest ORM SOP [ORM2](#) for completing ORM entry.

a. Pre-application Meetings It is often beneficial to meet with an applicant before they submit the permit application. This is the opportunity to discuss with them the permitting process, including alternatives, mitigation measures, and the 401 process (pre-filing meeting request, certification request, etc.)

b. Section 401 water quality certifications

Issuance, denial, or waiver of the Water Quality Certification is the responsibility of the Alaska Department of Environmental Conservation (ADEC) with the exception of the Metlakatla Indian Reservation and the Denali National Park and Preserve (and some Native Allotment properties) which are the responsibility of the Environmental Protection Agency (EPA). [See [33 CFR 325.2\(b\)\(1\) and 401 Certification Rule/Regulatory Interim Process](#)]. Applicants for both Section 404 projects and for Section 10 projects must apply for water quality certifications. We will not finalize the permit decision until a 401 certification has been issued or waived.

If an applicant submits an application to us without first requesting a 401 certification pre-filing meeting with the certifying authority (ADEC or EPA), we should begin processing their federal permit application, and inform them that they must submit a pre-filing meeting request to the certifying authority. [NOTE: Neither a pre-filing meeting request, nor a 401 certification request is required for a complete application.]

The project proponent must provide the certification request (no sooner than 30 days after the pre-filing request was submitted) to the Corps concurrently when it submits it to the certifying authority, this can be to regpagemaster@usace.army.mil and/or directly to the PM if known.

Within 15 days of receipt of a certification request, the PM must reply to the certifying agency establishing a reasonable period of time to complete their process, we should consider: complexity of the proposed project; nature of any potential discharge; and potential need for additional study or evaluation of water quality effects from the discharge ([33 CFR Part 325.2\(b\)\(1\)\(ii\) and 121.6c](#)). It is good practice to talk to the certifying authority before you establish the reasonable period of time. If the reasonable period of time needs to be longer than 60 days confer with your Section Chief. [Note: Be aware that PM/RS have additional timelines and reviews in the 401 certification process. Make sure to review the entire [401 cert interim guidance](#).]

- c. **Section 408 review, impacts to Federal Projects** In accordance with the [Alaska District SOP on Section 408](#) projects, PM/RS shall screen all permit applications and other requests for potential Section 408 involvement (any project that is located on, or in the vicinity of a Federal flood control project and/or harbor project) within 5 business days of receipt and shall notify the Section 408 Coordinator [REDACTED] when a proposed project may be located within or near a Federal Project. [Note: Be aware that PM/RS have additional timelines and concurrent reviews in the 408 certification process. Make sure to review the entire Section 408 SOP.]
- d. **Review timelines** In addition to the 401 review timelines and the 408 timelines above, within 15 days of receiving an application, we must either determine it complete and issue a public notice, or determine it incomplete and notify the applicant of the information needed to complete the application (see 33 CFR Parts 325.1(d) and 33 CFR 325.3(a)). [Corps Regulations](#) . [NOTE: the 2020 DPMAP Performance Standard 4 requires that PM/RS issue additional information letters and/or public notice (PN) within 15 days of application receipt date 80% of the time.]
- e. **NEPA timelines and page limits** The revised NEPA regulations ([40 CFR 1501.10\(b\)\(1\)](#)) require that federal agencies complete an environmental assessment within 1 year (unless the Assistant Secretary for the Army, Civil Works approves a longer period). The 1 year time frame starts from the date that the Public Notice is issued and ends with the issuance of the initial proffered permit (which should approximately coincide with the date that the CDD is signed). For time frames associated with an EIS, see [40 CFR 1501.10\(b\)\(2\)](#).
- The revised NEPA regulations (see [40 CFR 1508.1\(v\)](#), [1501.5\(f\)](#), and [1502.10](#)) require that an environmental assessment (CDD) can be no longer than 75 pages in length (unless the Assistant Secretary for the Army, Civil Works approves more pages). The page limit does not include appendices. A page is defined as 500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information. For page limits associated with an EIS, see [40 CFR 1502.7](#).
- f. **Time extensions** For requests for time extensions to an existing individual permit, see the [Modification Guide](#).
- g. **Permit modifications** For minor modifications to an existing individual permit, see the [Modification Guide](#). This IP Guide should be used to evaluate a modification to an existing permit if a full public interest review is required, such instances would include:

- i. Time extension request is received after the permit expiration date. Please see [RGL 91-01](#) for further guidance on when and how this process can be expedited.
- ii. Modifications that are substantially beyond the scope of the originally permitted project.
- iii. The project impacts would be more than minimal.
- iv. There were substantial objections to the authorized activity that were not considered in the original review.
- v. The request is for a time extension on a maintenance dredging permit and ten years have passed since we have done a full public interest review.
- vi. The project purpose and/or regulations have changed (including new information regarding ESA or 106 issues).

[NOTE: Under [33 CFR 325.7](#), if an applicant proposes a modification which includes a request to impact wetlands avoided pursuant to the Clean Water Act Section 404(b)(1) Guidelines or to impact wetlands preserved in perpetuity as under the Clean Water Section 404(b)(1) Guidelines, consult your supervisor about whether or not we will accept the application for evaluation.]

[ALSO NOTE: There shall be no administrative appeal of any issued individual permit that an applicant has accepted, unless the authorized work has not started in waters of the United States, and that issued permit is subsequently modified by the district engineer pursuant to 33 CFR 325.7 (see [33 CFR 331.5\(b\)\(1\)](#)).]

- h. **Applications where previous enforcement actions occurred** If the application is for an area where an enforcement action occurred, see [33 CFR 326.3\(e\)](#) for instances when we will not accept an application for additional work in that area.

3. SP Evaluation

- a. **Acknowledge receipt**, Upon assignment of an application, send an acknowledge receipt of request via email and provide the file number and contact information for PM/RS assigned to the project. See "Acknowledge Receipt of Request", "[Acknowledgement and Request for Info](#)" and the new "[Email Acknowledge Receipt of Request](#)".
- b. **Prepare Preliminary Regulatory Assessment form (PRA)**, The purpose of this form is to assist you to identify any issues that may come up in evaluating the application (such as the need to initiate consultation, or request an application under ANILCA). See section 3.d. below for resources to assist with completing the PRA. If there are sections of the PRA that you cannot complete with the information available to you, consider the need to request additional information from the applicant in

the acknowledgement letter (see section 3.c. below). [NOTE: It is highly recommended that new RS/PMs utilize the PRA to assist in their initial review of applications for DA permits. PM/RSs are not required to fill out this form for the Administrative Record. It is also recommended that PM/RSs have the public notice and decision document templates open while reviewing the application.]

- c. **Review for Completeness** [there are a number of checklists available to facilitate review for complete application, see [Checklist](#), or [Initial Data Entry Sheet](#), as well as [33 CFR 325.1\(d\)](#) and [33 CFR 325.3\(a\)](#), [Corps Regulations](#)] [NOTE: Coordinate with Civil Works on Projects that require Section 408 review ([404/408 folder](#)), Section 408 project timelines differ from Regulatory timelines.]

If application is complete, prepare [Acknowledgement Letter](#). (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#) and [408 SAD](#))

OR

If an application is NOT complete, prepare [Acknowledgement Letter and Request for Additional Info](#) requesting the information needed to complete the jurisdictional determination (if applicable), and to make the application complete. (see [Administrative Correspondence Review](#) and [Letter Distribution Guide](#) and [SAD](#))

- d. **Requesting Additional Information** You should use the Acknowledgement letter to request information that is not required for a complete application but that will need to be provided during the evaluation process (i.e. alternatives analysis, information needed to initiate ESA or 106 consultation, dredged material sampling plan, other information necessary to complete the public interest review or make factual determinations under the [404\(b\)\(1\)](#) guidelines, and etc.). If you receive the information necessary to make the application complete, but not other information that you requested, you should not delay issuance of the Public Notice. [NOTE: if the project is water dependent ([40 CFR 230.10\(a\)\(3\)](#)), an analysis of alternatives may not be required (see also [RGL 92-02](#)).] Use the following resources to identify information needed to make the permit decision, but not needed for a complete application:

1. If a copy of the prefilling meeting request for a 401 Water Quality Certification was not provided with the application, notify the applicant that we should be copied on the request. (See 401 Certification Rule/Regulatory Interim Process) and
2. Cultural resources, see the [Consultation under NHPA Guide](#)

[ORM2 NOTE: if you are making a “no historic properties affected”/”no effect”, “adverse effect”/”will adversely affect”, or “no adverse effect” call add a Historic Properties sub action.]

3. Threatened/Endangered Species and/or Critical Habitat, see the [Endangered Species Act Consultation Guide](#).

[ORM2 NOTE: if the project is in the range of an ESA listed species add an Endangered Species sub action.]

4. Research Essential Fish Habitat (EFH) [EFH web site](#) and the [Anadromous Waters Catalog](#). Think about what your scope of analysis is for EFH. List any species with EFH located in the proposed project. Think about what effect, if any, the project would have on the EFH. If the project would have adverse effects to EFH, follow required consultation procedures ([50 CFR 600.920 and 50 CFR 402.14](#))([33 CFR 320.3 \(i\), 320.3\(e\), 320.4\(c\), and 325.2\(b\)\(5\)](#)). [EFH Library Folder](#)

[ORM2 NOTE: if EFH is present add an Essential Fish Habitat sub action.]

5. Tribal coordination is needed for most projects. Projects have the potential to significantly affect protected tribal rights or resources, and federally recognized tribes and ANCSA regional and village corporations must be notified of their right to identify those protected rights or resources and invite USACE to government to government consultation or government to corporation consultation. [NOTE: This consultation is separate from consultation with Indian tribes under Section 106.] (See G2G Guide, [Tribal coordination](#) , [BIA webpage](#) , [HUD webpage](#) , [Tribal maps from UAF](#) , , [BIA’s latest Federal Register List of Federally Recognized Tribes](#) , [map](#), [Tribal G2G Coordination](#))

[ORM2 NOTE: if G2G consultation is required, add a Tribal Coordination sub action.]

6. ANILCA (Title XI of Alaska National Interest Lands Conservation Act). If your project is located within the National Wildlife Refuge System, National Park System, National Wild and Scenic Rivers System (<https://www.rivers.gov/publications.php#section7>, and ORM2->Map Tab at top->Federal folder->USFS subfolder->Wild and Scenic Rivers layer), National Trails System, or the National Wilderness Preservation System then you are within a Conservation System Unit (CSU) and ANILCA may apply. ANILCA will only apply when the project involves a Transportation or Utility

System (a system for transportation of water, pipelines for liquids other than water, a system for electric transmission, a system for telecommunications, improved ROW for snow machines and other all-terrain vehicles, or roads, highways, airports, tramways, tunnels, docks and other general transportation), or access to In-holdings, or Special Access, or Temporary Access. (see [Public Law 96-487](#), [ANILCA overview](#) and [ANILCA folder](#))

7. Determine if the proposed project is located within the vicinity of or may affect a Civil Works project. Projects which would alter or use land that is part of a USACE federally authorized civil works project require a permit under [33 USC 408 \(Section 408\)](#). A Section 10/Section 404/Section 103 permit cannot be issued until the Section 408 permit is issued. For a list of federal projects, see the [Section 408 Alaska District SOP](#), [404/408 folder](#), and check the website below for projects <https://www.arcgis.com/home/webmap/viewer.html?webmap=248eb0676a3f4091b123a2acd8d09256&extent=-180,51.5933,-115.8402,71.4704>. [See [Engineering Circular 1165-2-214](#) and Talking Points on [Section 408](#) in the Library for more info on the Section 408 process. See also the [Signed 408 MFR Delegation of Decision Authority](#).]
 8. There are a number of different mapping resources available to further research your project area. [Regulatory Viewer](#), [Digital Globe](#), GIS maps developed by federal agencies, state agencies, and boroughs, and etc. See the [JD Guide](#) for other additional resources.
- e. If no response to our request for additional information to make the application complete is received within 30 days, close the file and send the applicant a [file closure letter](#). (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#))
 - f. Prepare [Public Notice \(PN\)](#) (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [SAD](#))
 1. Prepare a Public Notice within 15 days of receipt of a complete application.
 2. A determination of effects should be made in the public notice for cultural resources, ESA, and EFH, if we have enough information to do so.
 3. CULTURAL RESOURCES: Select the appropriate paragraph and delete the others. Modify your chosen paragraph as necessary to fit your project. Under certain circumstances a PN may be used to

initiate consultation under Section 106, however see the [Consultation under NHPA Guide](#)

4. ESA: Select the appropriate paragraph and delete the others. Modify your chosen paragraph as necessary to fit your project. See the [Endangered Species Act Consultation Guide](#). [NOTE: A PN cannot be used to initiate consultation under ESA.]
5. EFH: Select the appropriate paragraph and delete the others. Modify your chosen paragraph as necessary to fit your project. If a determination of “may adversely affect” is made for EFH, the Public Notice serves to initiate consultation with NMFS [NOTE: Make sure the information necessary for consultation is included in the PN, see [50 CFR 600.920\(e\)](#)]. If you are unable to make a determination of effects in the Public Notice, and a “may adversely affect determination” is made later, then a letter must be sent to NMFS to initiate consultation.

If a “no effect” determination is made for EFH, then no consultation is required. (See [50 CFR 600.920](#) and [33 CFR 320.3 \(i\), 320.3\(e\), 320.4\(c\)](#), and [325.2\(b\)\(5\) Corps Regulations](#)).

6. TRIBAL CONSULTATION: The language included in the Public Notice serves as our advisory letter of an upcoming project. Discuss with your Supervisor to determine if notifications of a Tribe’s opportunity to invite USACE to consultation are needed (These are separate letters, and must be signed by the District Commander, see [SAD](#).) See guidance on G2G consultation in [Templates/Tribal Coordination G2G](#) and in the [Library/G2G](#).
7. Edit paragraphs as appropriate for Mitigation etc.
8. Specify whether it is a 15 or 30-day comment period. If a project qualifies for a categorical exclusion (with the exception of a Letter of Permission) consider a 15-day comment period for the public notice. [see [33 CFR 325.2\(d\)\(2\)](#) [Corps Regulations](#)
9. Public Notice Distribution: When determining who to send the PN to, consider all the members of the public who might be impacted by the type of project being proposed: industry trade groups (local pilots associations, sportfishing associations, river user-groups), environmental groups, and etc. [NOTE: per [33 CFR 325.3 \(d\)\(3\)](#) you must include a complete list of all addresses to whom the PN was sent in the Administrative Record. Only including the distribution form from the PN template is not adequate.]
 - i. List the names and addresses of adjoining property owners [NOTE: it may not be appropriate to limit this list to property owners who have property which immediately abuts the property where the proposed project would be located; consider including property owners which may be located along traffic routes that could be impacted by increased

construction traffic, property owners in the vicinity of materials sites, and etc.]

- ii. [Distribution Lists](#): Make the appropriate selections from the following lists and copy the addresses onto the distribution sheet of the public notice template:
- Go to the [Cities Directory](#) and choose the appropriate cities and boroughs; and you may add other public places in the vicinity of the proposed work as appropriate. [NOTE: Although post offices are required to display public notices, sometimes they do not, use your local knowledge to identify other public places where notices could be displayed, such as the local library or community center.]
 - In the [Public Notice Distribution Lists](#) Folder, and choose the appropriate entries from the Public Notice EMAIL, and Public Notice PAPER Mail lists. [NOTE: You do not have to copy the list into the PN, you can just state the name of the list or lists that should be included.]
 - List appropriate [Federally Recognized Tribes](#) (FRT). Public Notices shall be distributed to FRTs that have or may reasonably have protected rights or resources affected by the issuance of a DA permit. PM/RS's should send the PN to any FRT which has historically used the area where the proposed project occurs. See the [BIA webpage](#) or [HUD webpage](#) for geographic locations of Federally Recognized Tribes, and/or see Tribal maps from UAF, or talk to the Alaska District Tribal Liaison (see also the [BIA's latest Federal Register List of Federally Recognized Tribes](#) or [map](#)) and our [Tribal Directory](#).
 - List the Regional ANCSA Corporation within whose region the project occurs. For each FRT that is included in the distribution list, also include their corresponding Village Corporation. (see <http://dnr.alaska.gov/mlw/trails/17b/corpindex.cfm> for a list of Regional and Village Corporations).
 - Suggest appropriate local media outlets, you can use the Media and Newspaper folder as a place to start. When we need to target the "mom and pop media shops" in smaller communities, we use a hard-bound media directory, which you can access by contacting PAO. [NOTE: We do not pay media outlets to publish our Public Notices, therefore it is at their discretion to run a story on the proposed project, small, local

- media outlets will be more likely to publish information about the public notice than larger media outlets.]
- If your proposed project is located on or near a Civil Works project, this will be a joint PN, distribute the PN to Civil Works and any individuals that they designate.
 - If your proposed project crosses or is within the vicinity of a Native Allotment, include the Bureau of Indian Affairs Alaska Region (ak_archeology@bia.gov) and USEPA. (see link and select Ownership Map and view the Survey Boundary layer <http://dnr.alaska.gov/mapper/controller?gsid=EF17A6C428CE91CEB3D8A1F9302464F7.tomcat-91>)
 - If your project is in or near a Wild and Scenic River make sure you include the Bureau of Land Management or the National Park Service, as appropriate.
- iii. As appropriate, consider also sending the PN to shipping companies, conservation organizations, and watershed associations. If you propose to send the public notice to an entity that is not already included on one of the lists in the Distribution lists folder, you will have to provide the name and address of that entity on the distribution sheet as you complete the public notice template.
- iv. Add in special addressees in [33 CFR 325.3\(d\)\(2\)](#) when your particular project applies: these projects include structures or dredging in the ocean waters, construction of structures or artificial islands on the outer continental shelf, construction of structures to enhance fish propagation along the coasts, construction of structures that may affect aircraft operations or seaplane operations, and activities in connection with a foreign trade zone. [NOTE: The contact information for the DoD Siting Clearinghouse has changed since the regulations were published; submit PNs to the Defense Siting Clearinghouse via email (osd.dod-siting-clearinghouse@mail.mil) or mail to 3400 Defense Pentagon, Room 5C646, Washington, DC 20301 – 3400 (see <https://www.acq.osd.mil/dodsc/contact/dod-review-process.html> for more information on the Defense Siting Clearinghouse.)]
- v. Per [33 CFR 325.3\(d\)\(1\)](#), all Public Notices are to be sent to the U.S. Senators and Representatives who represent the area where the work is to be performed. The correct contact information is already included in the Public Notice Template.

- vi. If you have a project with an effect call for historic properties other than “no potential to cause effects to historic properties”, you should also send the PN to all appropriate consulting parties [see [Guide to Consultation under NHPA](#), [33 CFR 325 Appendix C \(4\)](#), [36 CFR Part 800.6\(n\)](#), and [36 CFR Part 800.3\(f\)](#)][Note: under Appendix C, Indian Tribes as defined, is not limited to Federally Recognized Tribes, it also includes Regional and Village Corporations. See [36 CFR Part 800.16\(m\)](#)].
10. Plans attached to the public notice should be labelled to include applicant name, file number, waterway name (pre-ORM files also have a waterway number which we no longer use), and should be dated and numbered (e.g., John Public, POA-2000-00000, Big Lake, January 1, 2004, Sheet 1 of 5)(In the file, make sure it is obvious which plans went out with the Public Notice, especially when there are multiple copies of plans.) See the [Checklist for Drawings](#) for a list of the elements that would make the drawings complete.
 - i. For large projects with lots of adjoining property owners, or for projects with very large plans, a full Public Notice may be posted on the web, and a brief summary public notice or post card referencing the full electronic public notice may be mailed out. See examples in the Library folder under [Sample Documents](#).) [NOTE: Talk to your Admin about post card public notices. See Post Card information for large linear projects email in the [Sample Documents](#) folder for instructions on this process.]
 11. If the applicant withdraws their application after issuance of a Public Notice, it may be appropriate to issue a Public Notice -withdrawn to notify the public that we are no longer evaluating the proposal. Discuss the need for this public notice with your supervisor. [Public Notice](#)
 12. [Revised Public Notice](#) (revised, supplemental or corrected PN) There is limited information in the regulations about issuing revised PNs [see [33 CFR 325.2\(a\)\(2\)](#) and [33 CFR 325.2\(d\)\(2\)](#)]. There are instances during the comment period where it is appropriate to issue a revised PN. You must decide whether or not the comment period needs to be extended (15 or 30 days). Examples of instances where it would be appropriate to issue a revised PN would be: clearly erroneous information about the project or its location or minor changes in the project scope (that result in increased impacts), or there is an extension to the comment period.
 13. When there are substantial changes or a new comment period is warranted, issue a new PN.

g. Reviewing Comments Received

1. Review comments received (if clarification or additional information is needed, contact the commenter) (see also [RGL 92-01](#))
2. Send [Comment Letter Acknowledgement](#) (not usually required for federal/state agency comment letters) If you are unable to contact the commenter, make note of it in the file. (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#))
3. Requests for time extensions [see [33 CFR 325.2\(d\)\(2\)\(iv\)](#)]
 - i. If the PN comment period is less than 30 days and FWS, EPA, or NMFS requests an extension, we must extend the comment period to 30 days (see [404q](#) and [SAD](#))
 - ii. If the PN comment period is 30 days and FWS, EPA, or NMFS requests an extension it must be done in accordance with our [404q](#) agreements and the response letter must be signed by the Division Chief (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#))
 - iii. If the comment period is 15 or 30 days and anyone other than a 404q agency requests an extension, consult with your Supervisor (see [SAD](#))
4. [Forward Comments to Applicant](#)/agent for their consideration by letter, fax or email. RS/PM must edit the template letter to identify the substantive comments and determine a reasonable amount of time (usually at least 15 days, but not more than 30 days) for the applicant to respond. The letter should also clearly identify any additional information that the District needs to make a decision on the permit application ([HQ SOP](#), Page 20). [NOTE: it is a good idea to copy DEC on this letter.]
5. Review the applicant's/agent's response (if received) and determine if additional information or clarification is needed.
6. If alternatives information or other information necessary to make our permit decision was previously requested and is not received from the applicant by the end of the public notice comment period (or a date specified in the request letter), send either [Close in 30 Days](#) or [Close File](#) letter. (In order to close the file, we must have previously specified in writing that if the information was not provided in 30 days/or a date specified in the request letter, we would close the file.) (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), [Staff Action Sheet](#), and [Letter Distribution Guide](#) and [SAD](#))
7. If there are unresolved agency or Tribal concerns or if we are not carrying agency recommended conditions forward you MUST contact the agency representative and inform them how we are treating their concerns/conditions and why. In addition, if we receive a letter from EPA, USFWS, or NMFS stating in their opinion

the project may/will have substantial and unacceptable impacts to [Aquatic Resources of National Importance](#) (ARNI), the [404\(q\)](#) process has been initiated. Consult with your Supervisor or Deputy Chief if you receive a “3(a) letter,” which is the letter received mentioning ARNI signed by the appropriate person, which initiates the 404(q) process. A “3(b) letter” must be received to continue the 404(q) process (see [404\(q\) Memorandum of Agreement](#) and local procedures). This process must be discussed with your supervisor [NOTE: There are specific timelines and requirements associated with the 404(q) process.]

8. If a request(s) for a public hearing or a public meeting is received, consult with your Supervisor (see [HQ SOP](#) and [SAD](#)). It is district guidance that public hearing requests will be responded to typically within 30 days of the public notice closing.
 - i. A public meeting or a public hearing is held when there is a need to gather additional information that would inform our decision, or we suspect that there may be information that would change or modify our decision.
 - ii. A public hearing is formal, recorded, and has no opportunity for dialog between the participants. [See [33 CFR Part 327 Corps Regulations](#)] You must write an MFR stating reasons why you are either supporting or denying the request for a Public Hearing for routing to your Regional Division Chief , and if denying the public hearing, you must write a [Public Hearing - Denied](#) letter. (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#)) **The letter(s) must be mailed prior to finalizing our permit decision.**
 - iii. A public meeting is informal, not formally recorded, and provides an opportunity for dialog and for the public to ask questions. You must write an MFR stating reasons why you are either supporting or denying the request for a Public Meeting for routing to your Regional Division Chief , and if denying the public meeting, you must write a [Public Hearing - Denied](#) letter. (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#)) **The letter(s) must be mailed prior to finalizing our permit decision.**

h. 401 Water Quality Certification Process

1. The project proponent must provide the certification request (no sooner than 30 days after the pre-filing request was submitted) to the Corps concurrently when it submits it to the certifying authority, this can be to regpagemaster@usace.army.mil and/or directly to the PM if known.

2. Within 15 days of receipt of a certification request, the PM must reply to the certifying agency establishing a reasonable period of time to complete their process, we should consider: complexity of the proposed project; nature of any potential discharge; and potential need for additional study or evaluation of water quality effects from the discharge (33 CFR Part 325.2(b)(1)(ii) and 121.6c). If the reasonable period of time needs to be longer than 60 days confer with your Section Chief.
3. The Corps must notify the EPA within 5 days of receiving the certification from either Certifying Authority (i.e., we have to send EPA their own Certifications) for the EPA to determine whether the discharge from a certified project may affect the water quality in a neighboring jurisdiction (Note: EPA may request the permit application). EPA has up to 30 days from receipt to choose to use their discretion and to determine if the discharge may affect water quality in a neighboring jurisdiction.
4. Send a notification in an email to R10-401-Certs@epa.gov. Specify that the “WQC is within Alaska” in the subject line of the email transmittal and attach the certification. An automated response shall be sent from EPA stating: “EPA has determined that there is not likely to be an effect on any neighboring jurisdiction’s water quality, based on the location of the project and the 401 certification conditions. You may proceed with processing the license or permit and need not wait the entire thirty (30) days provided by 40 CFR § 121.”
EPA has determined that there are no neighboring jurisdictions in or adjacent to Alaska. As a result, EPA has determined that all WQCs in Alaska are not likely to have an effect on neighboring jurisdiction water quality (EPA-Corps 401a2 Procedural Agreement).
5. If you do not receive a response from EPA, you must wait 30 days from notification to EPA to proceed with permit issuance. Review certifications to determine compliance with procedural requirements in section 401 and the final rule (e.g., we review that all conditions have a citation to water quality standards, we do NOT evaluate whether a decision/condition is within the scope of certification or the substantive merits of the basis for conditions or denials (40 CFR 121.7(d)). Include conditions in the permit that satisfy the procedural requirements of the final rule (40 CFR 121.10).

i. Consultation

1. You may contact the appropriate agency (USFWS/NMFS/SHPO) or your supervisor, or the Regulatory subject matter expert for information that will help you to define the area over which you will consult and to make your determination of effects. You should have a good idea of what your “scope of analysis” will be prior to issuing

the Public Notice. If possible, you should define your determination of effects in the Public Notice. There may be times when you do not have sufficient information to make an effect call in the Public Notice.

2. Endangered Species: see the [ESA Guide](#) and the ESA folder in the Library on the Regulatory Drive [rd\\$/Private/Library/ESA](#).
3. Section 106 of NHPA: see the [Consultation under NHPA Guide](#).
4. EFH: There are specific timeframes for initiating consultation and our response to any conservation recommendations, see [HQ SOP](#), [50 CFR 600.920](#), and [Section 305\(b\)\(4\) of the Magnuson-Stevens Fishery Conservation and Management Act](#). If you do not make a determination of effects in the public notice and you later make an “adverse effect” call for EFH, you must send a letter to NMFS to initiate consultation. If NMFS responds with conservation recommendations, you must respond to state which conservation recommendations that you are implementing as special conditions, and which you are not, within 30 days of receiving recommendations. For those conservation recommendations that you are not implementing, you will need to indicate why you are not implementing them. If we are not adopting any of NMFS’ EFH recommendations, the letter must be sent 10 days prior to issuing the permit.
5. Tribal Consultation: Government to Government (G2G) Consultation with Federally Recognized Tribes can occur at any time in the permit process. It can even continue after permit issuance. Current G2G guidance states that if a Tribe requests G2G, then we will engage with them. (See guidance on G2G consultation in [Templates/Tribal Coordination G2G](#) and in the [Library/G2G](#).) (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), [Letter Distribution Guide](#), and [SAD](#))
 - i. Also, if you make an effect call that is other than “no potential to cause effects to historic properties,” under Section 106 of NHPA, you need to consult with both Federally Recognized Tribes, as well as Village and Regional Tribal Corporations. [NOTE that this is not equivalent to G2G, but you may consult with a Federally Recognized Tribe under both G2G and NHPA.]

j. Decision Document

1. If a Federal, state, or local government with a permit or certification to issue on a project that requires Department of the Army authorization states that they will not issue a permit or denies a permit, the Project Manager, in consultation with their Supervisor, must decide whether to proceed with processing the application or deny without prejudice. ([33 CFR 320.4\(j\)](#) and [HQ SOP](#))

2. If you believe that there is an alternative that may be the Least Environmentally Damaging Practical Alternative (LEDPA), which is not the applicant's preferred alternative, that the project may not otherwise comply with the 404(b)(1) guidelines, or that the project may be contrary to the public interest, discuss these issues with your supervisor. You should have a meeting with the applicant to notify them why the proposal is inconsistent with regulatory requirements and discuss measures that could lead to project approval. The discussion should also provide the applicant with information about changes to the project that could be made which may resolve the identified issues and could allow a DA permit to be issued. ([HQ SOP](#))[NOTE: The PM/RS must be clear that we are not denying the DA permit at this time, only that we are identifying potential issues. PM/RS must be careful not to be pre-decisional. Remember that permit denial only occurs when the District Commander signs a Combined Decision Document (CDD) or Record of Decision (ROD).]
3. Complete CDD. For assistance in completing the document make sure to turn on the "paragraph sign" or ¶ by pressing Ctrl * and also see the [old CDD Guide](#) for more information. The level of analysis should be commensurate with the degree of impacts. The CDD should document how we came to our decision and show what we decided based upon our regulatory requirements and the comments received. Review signature authority delegation ([SAD](#)) and [peer review guidance](#) for appropriate signature level and review on decision document.
 - i. ORM Summary: This is a report generated by ORM that you will attach to your CDD. Before running this report, make sure all your ORM actions, subactions (ESA, EFH, 106, Public Notice, 401 cert, etc.), and contacts tabs are completed.
 - ii. To obtain this report, log in to ORM, enter your file number in the fields next to "Go to Regulatory Action DA#", and press "Go". Once you are on the ORM page for your specific file number, you will see a number of tabs across the top of the page, these begin with "Folder", "Location", "Aquatic Resources", and go on to "Regulators", and "Comments". The last tab will be called "Summary". Click on "Summary", select the permit action to be included in the report (use the filters to narrow down the list if there are many actions to choose from), and click "Generate Decision Summary Document" and a rtf document will be generated. Re-save this as a pdf document and append to your CDD.
 - iii. This summary will be used to supplement your CDD, as well as QA/QC your CDD, check it to make sure that your CDD and your ORM input are consistent.

4. Coordinate proposed special conditions with applicant/agent while completing the CDD and prior to sending the first transmittal. This will allow the applicant to identify conditions that they cannot accept or comply with; thereby avoiding the potential for appeals or later modifications. If you propose to include a special condition that is not on the list of standard [Special Conditions for the Alaska District](#), you must obtain Branch Chief approval. [See also the [HQ SOP](#) for more guidance on special conditions.]
 5. When a permit decision is contrary to the written position of the Governor of the state in which the work would be performed, the permit or the denial must be signed by the Division Engineer in POD [see [33 CFR 325.8\(b\)\(2\)](#)]
- k. Permit, First Transmittal, and Second Transmittal.
1. Notice of Completed Review (i.e., we have made our decision to issue the permit, and the required Agency 401 Water Quality Certification (WQC) or waiver of the WQC has not been received).
 - i. Prepare Provisional Notification [Permit](#) letter and [Permit](#).
 - ii. Once the required Agency 401 WQC process has been completed, follow the below instructions in part (b, c, or d, as appropriate).
 2. Permits (i.e., we have made our decision to issue the permit and Agency 401 WQC process has been completed and certification was received or waived).
 - i. Prepare [First Transmittal](#), [Initial Proffered Permit](#), [Appeal Form \(check initial proffered permit\)](#)(see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#))
 - ii. Permit fees: Agencies or instrumentalities of federal, state or local governments will not be required to pay any fee in connection with permits, also no fee is required for modifications not requiring a Public Notice. A fee of \$100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A \$10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. Tribes are local governments and would not be charged. Native corporations will be charged if they are for-profit organizations. If they are non-profit organizations native corporations will not be charged. No fees will be charged for time extensions, or letters of permission. See [33 CFR 325.1\(f\)](#)

- iii. Construction duration can be variable according to the particulars of your project, and is limited in only two instances, see [HQ SOP](#).
- iv. If your Supervisor determines legal review is required, route typed documents to Counsel.
- v. Mail documents to applicant/agent.
- vi. If the applicant declines to sign the Initial Proffered Permit, and provides a completed appeal form stating their objections to the permit, then a modification process begins [See the [Appeal Form](#)]. The term “initial proffered permit” as used in this part refers to the first time a permit is sent to the applicant. The initial proffered permit is not an appealable action. However, the applicant may object to the terms or conditions of the initial proffered permit and, if so, a second reconsidered permit will be sent to the applicant. After reviewing the objections, you may: (a) modify the permit to address all of the concerns, (b) modify the permit to address some of the objections, or (c) not modify the permit having determined that the permit should be issued as previously written. This is an internal appeal process that does not include review by an appeal officer. Document your decision in an MFR. Upon making your decision, send the [First Transmittal](#), Proffered Permit, and Appeal Form (check the proffered permit box). (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#)). The term “proffered permit” refers to the second permit that is sent to the applicant. Such proffered permit is an appealable action. [NOTE: you will have to modify the First Transmittal letter to explain to the applicant if you decided to modify the permit, that you are sending the applicant a proffered permit, and explain the remaining appeal options.]

If the applicant declines to sign the Proffered Permit and submits a completed Appeal Form, (see [33 CFR 331.6\(b\)](#) for the Appeal Regulations) this begins a formal process that includes review by an Appeal Officer. The applicant has the option to request a copy of the Administrative Record if they Appeal the permit decision, without initiating a FOIA request. [See also the [Appeal Form](#)]

- vii. Once applicant/agent returns signed permit, countersign and date the permit, and the yellow card. [NOTE: Make sure to keep an electronic copy of the fully signed permit for your administrative record.]
- viii. Prepare [Second Transmittal](#) and send the permit and yellow card to the applicant/agent (see [Administrative](#)

[Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#)). - Make sure [check remittal form](#) is part of the file if fee was required. Do not place a copy of the check in the file. Provide the check remittal form and the check to Admin to forward to Resource Management (RM).

3. Permit Denials with prejudice (the Corps has determined the application for the permit must be denied). [NOTE: If you think that a permit denial may occur, begin discussion with your Section Chief as soon as possible. A permit denial will require robust documentation.]
 - i. Prepare a package, including the CDD/ROD to route to OC and the District Commander. Then prepare the [Denial Letter](#) and [Appeal Form](#) for routing to the District Chief of Regulatory (the Denial Letter can be signed at the District Chief of Regulatory level, but the Commander must sign the CDD/ROD first). Prepare a 'brief' for the OC and the Commander to understand the project and specify the action we are asking the Commander to take. Use [GEARS](#) (see [GEARS SOP](#)) to route the package, your Administrative Staff can assist with this. This package will be sent through the Branch Chief to the District Regulatory Chief. The routing order is District Regulatory Chief, Office of Counsel, Deputy District Commander, District Commander. Once it has been approved by the Regulatory Chief, they will route to OC.
 - ii. Discuss with your Section Chief whether or not to ask the Commander if he wants to visit the project site. If you are going to invite the District Commander to visit the site, prepare a brief for the District Commander. This should be done at least 2 weeks prior to the decision document's arrival in the Executive Office. (Discuss the method of the briefing with your Supervisor, it could be in the form of an Info Paper, Regulatory Update, etc.)
 - iii. After the District Commander has determined the permit should be denied, you should talk to your Section Chief about whether or not to contact the applicant via phone to offer them the opportunity to withdraw their application. Make sure to document your conversation with the applicant for the file. If the applicant chooses not to withdraw the application report back to District Commander for denial signature. [NOTE: This should not be the first time that you have conversation with the applicant regarding issues that may affect our ability to authorize the project. If the application is denied with prejudice, the applicant must change the project substantially before we will accept another application for that project.]

- iv. When the package comes back from the Executive Office, the RS/PM must ensure that the Takings Implication Assessment (TIA) prepared by Counsel and signed by the District Commander has been removed from the file (Counsel retains these). UNDER NO CIRCUMSTANCE IS THE TIA TO BE MAILED TO ANYONE.(See [HQ SOP](#) and [Guidance on preparing Takings Implication Assessments 10 May 1989.pdf](#))
 - v. If a permit is denied, we must provide a copy of the Decision Document with the denial letter (see [33 CFR 331.2 Denial Determination](#)). Talk with your Section Chief regarding who to CC on the denial letter. (see [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#))
 - vi. Be aware that the applicant can request a copy of the administrative record in compliance with our Appeals Regulations and if the applicant appeals, you will have 14 days to provide the administrative record to the applicant and the appeals officer. (See [33 CFR 331](#) and the 2012 Guidance on preparing the AR for an Appeal, and the [Appeals Guide](#))
4. Permit denials without prejudice (this means a required federal, state, or local authorization and/or certification has been denied). Consult with your supervisor to determine the best way to proceed. (See [33 CFR 320.4 \(j\)\(1\)](#))
- i. You may decide to complete your permit evaluation. Upon completion of your evaluation, you may decide to deny the permit as contrary to the public interest and /or not in compliance with the 404(b)(1) Guidelines (see Denial with Prejudice section c above).
 - ii. You may decide to stop evaluating and issue a denial without prejudice. If you decide to stop evaluating, document for your record your decision to deny without prejudice in the CDD/ROD. Prepare a [Denial without prejudice](#) letter. (Denials without Prejudice are signed at the Section Chief level. See [Administrative Correspondence Review](#), [Electronic Correspondence Guidance](#), and [Letter Distribution Guide](#) and [SAD](#))
 - iii. You may decide that a permit could be issued if the applicant is able to get the required approvals from the federal, state or local agency. Complete your decision document and state that, if the applicant is able to get the required approval, that a DA permit would be issued (the letter that we send them is called a [Provisional](#) Notification. We would not issue a permit until the required approvals are received.)(See [Administrative Correspondence Review](#),

[Electronic Correspondence Guidance](#), [Letter Distribution Guide](#) and [SAD](#)).

- I. **Filing the AR** PM/RS reviews the file for completeness using the [Guide to Archive Administrative Record](#). Prepare the administrative record in accordance with the [Electronic File SOP](#).
 - 1. Be aware that under the revised NEPA regs ([40 CFR 1501.6\(a\)\(1\)](#)), EA's where we make a FONSI are releasable to the public without a FOIA request. We are responsible for ensuring that the CDD does not contain certain information about archeological sites or historic properties. See [33 CFR 325 Appendix C. 4.c](#), [36 CFR 800.11\(c\)](#) and [36 CFR 800.6\(a\)\(5\)](#).
- m. **ORM Close-out** All actions and sub-actions must be closed out in ORM within 7 days of their completion. If permittee-responsible compensatory mitigation is required as part of a permit, make sure that the location of the mitigation site is entered into ORM.

4. Revision History

<i>Revision Level</i>	<i>Revision Date</i>	<i>Section</i>	<i>Description of Revisions</i>
-1-	October 2015		Original Document
-2-	Jan 2017	multiple	Add hyperlinks for ESA and 106 consultation
-3-	March 2019	Public Hearing	Updated language describing district guidance for public hearing requests to be responded to typically within 30 days of the public notice closing
-4-	June 2020		General updates, links corrected and added Section 408 SOP
-5-	March 2021	Multiple	Revised to reflect changes in regulations (401 cert regulations and NEPA regulations), and general updates.
-6-	May 2021	multiple	Updating 401 protocols and IP background info
-7-	December 2021	multiple	Reversing 401 changes
-8-	April 2022	multiple	Re-Reversing 401 changes
-9-			
-10-			
-11-			
-12-			