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*Joshua M. Kindred, Environmental Counsel*

January 19, 2018

Ms. Mary Romero  
Regulatory Division (1145)  
CEPOA-RD  
P.O. Box 6898  
JBER, Alaska 99506-0898

RE: Alaska Oil and Gas Association's Comments on Permit Application for Regional Material Site (Mine Site 3); **POA-2017-427**

Ms. Romero:

The Alaska Oil and Gas Association ("AOGA") submits these comments on the U.S. Army Corps of Engineers' ("USACE") above-referenced December 6, 2017 Public Notice of Application for Permit ("Notice"). AOGA is a professional trade association whose members account for the majority of oil and gas exploration, development, production, transportation, refining and marketing activities on Alaska's North Slope. AOGA appreciates USACE's consideration of these comments on the Notice.

As background, the Notice states that applicant North Slope Borough<sup>1</sup> ("NSB") proposes to develop a new gravel mine site in the Prudhoe Bay area ("Mine Site 3") with the intent of supporting regional industry needs while purportedly reducing the need for project-specific gravel mines. The mine would be developed in two phases over approximately seven years and would impact a total of 54.44 acres of wetlands, with 33.22 of those acres permanently impacted. NSB contemplates that the mine could be expanded in the future; however, such expansion would presumably require additional USACE review as well as public notice and comment at that time, and is not the subject of this Notice.

AOGA's members do not oppose NSB's development of Mine Site 3, which could meet a significant portion of the oil and gas industry's gravel needs over the seven-year life of the

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<sup>1</sup> The Notice states that the applicant is Gordon Brower. Mr. Brower is Director of NSB's Planning and Community Services Department. See <http://www.north-slope.org/departments/planning-community-services/contacts>.

proposed project. However, AOGA has significant concerns about statements in the Notice regarding the NSB's proposed limitations on project-specific gravel mine development. Specifically, under "Applicant Proposed Mitigation," NSB proposes to avoid impacts to wetlands by committing to deny permits for other gravel mines in the Prudhoe Bay Region. In other words, NSB is proposing to meet permit requirements for Mine Site 3 by preventing competing project-specific mines from being developed by others. While it is unclear if the consequences of such an approach were fully considered, this proposed avoidance measure should be rejected by USACE for the following legal, policy and practical reasons.

First and foremost, a commitment to deny future project-specific gravel mining permits at other locations does not constitute "avoidance" or minimization of wetland impacts pursuant to the Clean Water Act's implementing regulations and related guidance. In evaluating whether the Mine Site 3 proposal avoids potential impacts to wetlands to the maximum extent practicable, USACE must consider whether NSB has selected the least damaging project type or location *for Mine Site 3*.<sup>2</sup> In contrast, NSB's proposed avoidance relies on the suggestion that yet-to-be-proposed mines of unknown numbers, sizes or locations and with unknowable environmental impacts may be denied. This measure is hypothetical at best and, in any case, does not demonstrate that NSB's proposed wetland impacts are unavoidable or provide the necessary framework for the USACE to evaluate NSB's proposals to minimize and mitigate for unavoidable impacts at Mine Site 3.

Even if USACE could consider denial of future local mining permits as a means of avoiding Mine Site 3 wetland impacts, the NSB cannot commit to deny future permit applications as a matter of law. Under Chapter 19 of the NSB municipal code, NSB's Land Management Administrator *must* approve such a permit so long as the requirements of the municipal code are met, including meeting Borough policies, avoiding disturbance to traditional activities or cultural sites, and conserving natural features.<sup>3</sup> The NSB cannot predetermine the outcome of the Administrator's review or constrain the Administrator's judgment in carrying out the requirements of Chapter 19. Such a regulatory action would in any event be arbitrary and capricious, and violate applicants' due process and equal protection rights to have their proposals fairly evaluated on the merits. Because any commitment by the NSB to deny future permits is inconsistent with local law, USACE may not consider that commitment in evaluating the Mine Site 3 application and may not memorialize or require the commitment in any Mine Site 3 permit that USACE may issue.<sup>4</sup>

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<sup>2</sup> 40 C.F.R. § 230.10(a) (prohibiting discharge where there is a practicable alternative that would have a less adverse impact); see "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency: The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines," at §II(1) (Feb. 6, 1990) (defining "avoidance" to mean whether a proposal meets the requirements of 40 C.F.R. § 230.10(a)).

<sup>3</sup> See NSBMC §19.50.030 ("An approval *will be granted* by the Administrator if all the standards set forth below are met.") (emphasis added).

<sup>4</sup> As the USACE certainly is aware, the agency lacks authority to require NSB to deny future gravel permits as a condition of any Mine Site 3 permit that USACE may issue. The USACE may require NSB as the permit applicant to minimize and mitigate for unavoidable impacts pursuant to the Section 404(b)(1) Guidelines at 40 C.F.R. § 230,

In addition, there are significant policy and practical reasons for USACE to reject NSB's proposed avoidance measure. Project-specific mine sites are generally developed because there is an identified need for quality gravel from a location in proximity to a project. Gravel type and location play an important part in the decision as to whether a project-specific gravel mine site is required. The denial of future project-specific gravel mining permits at locations other than the proposed Mine Site 3 has the potential to increase the environmental impacts and economic costs of future projects as well as introduce additional risk and safety concerns. Longer gravel hauls from Mine Site 3 to remote or long-distance project areas will require additional vehicle traffic associated with project development, thereby increasing the risk of an accident or incident, extending periods of vehicle noise, emissions, and increasing the possibility of wildlife interactions. Remote projects will be required to develop either new gravel roads or an extensive ice road system from the proposed Mine Site 3 to more isolated project locations, expanding the project footprint and possibly introducing additional safety risks (e.g., significantly more manhours worked, vehicle hours, and project complexity) and operational risks (e.g., river crossings, longer ice roads, etc) to the project. Project safety concerns and costs would increase due to the need for increased vehicle trips and additional road construction. Project construction schedules would have to be extended to accommodate longer timelines for gravel hauling and additional road construction, also adding significant safety risk and costs to a project.

Finally, NSB states that, in conjunction with denying future gravel mining permits, it will work with industry to ensure gravel is obtained from Mine Site 3 "at a fair price," but it provides no explanation for how a fair price will be established or maintained. NSB also proposes that it will identify compensatory mitigation projects in cooperation with USACE, but it is unclear how the costs of such projects will impact gravel prices at Mine Site 3 or whether NSB will have any incentive to choose cost-effective mitigation options if industry members are required to purchase gravel at Mine Site 3. The effect of NSB's proposal appears to be to create a regional gravel monopoly that prevents individual companies from developing project-specific mining and mitigation plans that may be more cost effective while meeting the requirements of the Clean Water Act. However, a fair price can only be established by an open market based upon impartial regulatory approvals. By contrast, measures resulting in restricted competition will likely have the opposite effect of driving up prices. USACE should not be in the business of preventing competition among developers, but instead should evaluate each gravel mining application on its merits under the 404(b)(1) Guidelines.

Perhaps more concerning, the USACE should also consider the potential constitutional issues surrounding such an approach. The Commerce Clause (Art. 1, § 8, cl. 3) provides

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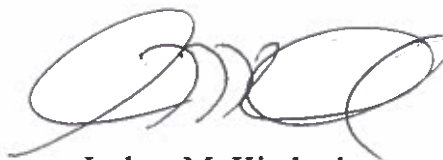
but cannot impose conditions requiring NSB as the local municipality to take any specific action under local laws and policies with regard to entirely separate projects.

“a self-executing limitation on the power of the States to enact laws imposing substantial burdens” on commerce.<sup>5</sup> Its limits on state power, referred to as the dormant Commerce Clause, “prohibit state or municipal laws whose object is local economic protectionism.”<sup>6</sup> It prevents the enactment of regulations that discriminate against out-of-state entities or burden interstate commerce.<sup>7</sup> The NSB’s proposal to use its regulatory authority over land use to prevent future gravel mines, on grounds that gravel may instead be obtained from the NSB-controlled mine, is discriminatory on its face against interstate commerce. In this context, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>8</sup> The NSB’s plan would benefit the NSB at the expense of the private companies that need gravel to develop projects on the North Slope. This burden on non-local businesses is discriminatory on its face and a discriminatory governmental action is “virtually per se invalid.”<sup>9</sup>

For the foregoing reasons, USACE should not consider or rely on NSB’s proposed avoidance measure of denying future project-specific gravel mining permits when evaluating the Mine Site 3 application or issuing any associated Clean Water Act permit. AOGA and its members appreciate the USACE’s consideration of these comments. If you have any questions, please do not hesitate to contact the undersigned.

If you have any questions regarding these comments, please feel free to contact me at 907-272-1481 or [kindred@aoga.org](mailto:kindred@aoga.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Kindred', written in a cursive style.

Joshua M. Kindred  
Environmental Counsel

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<sup>5</sup> *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984).

<sup>6</sup> *C&A Carbone, Inc. v. Town of Clarkston, N.Y.*, 511 U.S. 383, 390 (1994).

<sup>7</sup> *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

<sup>8</sup> *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994).

<sup>9</sup> *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008).