



July 6, 2020

**VIA EMAIL**

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Re: Kake Access Project, POA-2020-00274

Dear Mr. Berkner:

Earthjustice submits this letter on behalf of its clients the Organized Village of Kake (OVK), Alaska Rainforest Defenders, and Southeast Alaska Conservation Council (SEACC). This letter is in response to the U.S. Army Corps of Engineers' (Corps) June 4, 2020 notice of permit application for work in waters of the United States as part of the Kake Access Project, POA-2020-00274. We request that the Corps deny the permit application because the proposed Kake Access Project is not in the public interest and neither the Corps nor the U.S. Forest Service has met its legal obligations to consult with OVK regarding the project.

OVK is a federally recognized Tribal government that works to protect and sustain its citizens' customary and traditional hunting, fishing, gathering areas and uses within the Keex' Kwaan traditional territory, including Kupreanof Island and surrounding areas.

Alaska Rainforest Defenders is a conservation non-profit corporation that seeks to defend and promote the biological integrity of Southeast Alaska's terrestrial, freshwater, and marine ecosystems for the benefit of current and future generations. Southeast Alaska Conservation Council (SEACC) is a non-profit organization that works to protect the special places of the world's largest temperate rainforest, promote conservation, and advocate for sustainability in human use of natural resources. Both organizations have members across Southeast Alaska, including on Kupreanof Island.

OVK, Alaska Rainforest Defenders, and SEACC are concerned about the potential impacts of the Alaska Department of Transportation and Public Facilities (ADOT) constructing a road and dock in the midst of important Keex' Kwaan traditional lands without consulting with OVK or disclosing the scope and effects of the project to the public. The public notice seems to present the purpose of the project—increased access between Kake and Frederick Sound—as something

being done on behalf of the community.<sup>1</sup> OVK has not sought such transportation or access, and the project is not supported by the Tribe. The proposed project is also widely opposed by residents of Petersburg and by the City of Kupreanof. No federal or state agency has reached out to OVK to consult with the Tribe or solicit its views regarding the project. There is also a severe lack of information about the purpose, scope, siting details, and impacts of the project that hinder the Tribe's and the public's ability to participate in the decisionmaking process. The purpose of the project, length of new road miles, proposed road route, and funding sources have changed over time and the public notice provides no discussion of the reason for these discrepancies.

The Corps should deny this permit application and, in any event, must not proceed with this project until it has: 1) engaged in meaningful in-person consultation with OVK to fulfill its obligations under Executive Order 13,175 and the National Historic Preservation Act (NHPA); 2) worked with the U.S. Forest Service to complete subsistence findings required under the Alaska National Interest Lands Conservation Act (ANILCA); 3) completed an environmental impact statement pursuant to the National Environmental Policy Act (NEPA); and 4) ensured compliance with all applicable Clean Water Act (CWA) regulations.

In addition, the Corps' public notice invites Tribes to request consultation and the public to request public hearings regarding the proposed project. As discussed in more detail in these comments, OVK requests government-to-government consultation with the Corps and the Forest Service regarding this project. Alaska Rainforest Defenders and SEACC also request that the Corps hold public hearings in Petersburg and Juneau regarding this project.

I. THE ARMY CORPS AND THE FOREST SERVICE MUST ENGAGE IN MEANINGFUL, IN-PERSON CONSULTATION WITH OVK PRIOR TO ANY FURTHER ACTION ON THIS PROJECT.

The Corps and the Forest Service both have decisionmaking authority over this project and therefore both have legal obligations to consult meaningfully, on a government-to-government basis, with Alaska Native Tribes that are affected by the Corps' actions, and legal obligations under the National Historic Preservation Act (NHPA) and ANILCA to protect cultural, historical, and subsistence uses of public lands. Neither the Corps nor the Forest Service has met these obligations and the Corps should not proceed with this permit until after it rectifies this failure. OVK requests that consultation take place in-person, after the threat of the pandemic has subsided.

A. The Forest Service and the Corps must consult with OVK on a government-to-government basis and under the National Historic Preservation Act.

Executive Order 13,175 requires all federal agencies to consult with Indian tribes on a government-to-government basis, regarding any federal actions with tribal implications.<sup>2</sup> The

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<sup>1</sup> U.S. Army Corps of Engineers, Public Notice of Application, POA-2020-00274, at 2 (June 4, 2020) (Public Notice).

<sup>2</sup> 65 Fed. Reg. 67,249 (Nov. 9, 2000).

consultation must be meaningful, and it must take place “early in the process of developing the proposed regulation.”<sup>3</sup> Consultation is also required, as a matter of right, under the United Nations Declaration on the Rights of Tribes.<sup>4</sup> Although the Declaration has not been ratified by the U.S. Senate, the Forest Service, the Department of Defense and, by extension, the Corps, recognized these principles when it adopted its directives on American Indian and Alaska Native relations. The U.S. Department of Defense American Indian and Alaska Native Policy explicitly notes both that, “consultation with tribes on a ‘government-to-government’ basis requires a high degree of formality” and, critically, that, “the single most important element of consultation” is timing – consultation must happen early enough that it “may actually influence the decision to be made.”<sup>5</sup>

Similarly, the National Historic Preservation Act requires that federal agencies take into account “the effect of [any] undertaking on any historic property”<sup>6</sup> and, in so doing, “shall consult with any Indian tribe . . . that attaches religious and cultural significance” to such property.<sup>7</sup> As in Exec. Order 13,175, the implementing regulations for the NHPA emphasize that, “Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty.”<sup>8</sup> While the extreme lack of clarity in this project’s public-facing documents make it challenging to identify whether or not specific cultural, historic, or religious resources will be affected, the project area is traditional Keex’ Kwaan territory and is highly likely to contain resources of cultural significance, including culturally modified trees and ancient village sites, underscoring the necessity of proper consultation, early in the process. In particular, the area near Portage Bay, which will include rehabilitation of existing roads and new roads, contains important cultural resources for Kake.

Despite the above obligations, the Corps and Forest Service have made no effort to consult with the Organized Village of Kake. The only effort to engage in any consultation was through a public notice posted on the Corps’ website, inviting Tribes to *request* consultation.<sup>9</sup> No direct contact was made with any representative of OVK. Ultimately, OVK learned of the project through the Alaska Department of Transportation’s website, which contained confusing and

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<sup>3</sup> *Id.* at 67,250.

<sup>4</sup> See UN Declaration on the Rights of Indigenous Peoples, art. 19.

<sup>5</sup> TRIBAL CONSULTATION POLICY AND RELATED DOCUMENTS, U.S. ARMY CORPS OF ENG’RS, 80 n.h, k (2013) (incorporating language from AMER. INDIAN AND ALASKA NATIVE POLICY, U.S. DEP’T OF DEFENSE, 4 n.h (Jan. 2012)); see also Forest Service Manual 1500, § 1563.02(4) (recognizing the rights of indigenous peoples to the conservation and protection of the environment in their lands and territories).

<sup>6</sup> 54 U.S.C. § 306108

<sup>7</sup> *Id.* at § 302706; 36 C.F.R. § 800.2(c)(2)(ii)

<sup>8</sup> 36 C.F.R. § 800.2(c).

<sup>9</sup> While an email with the public notice was sent to some individuals with OVK email addresses, the emails were not sent to any designated representatives and clearly fall short of the requirements of consultation. See *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Int.*, 755 F. Supp. 2d 1104, 1112 (S.D. Cal. 2010) (“Some of the listed contacts were with members of the Tribe, but these don’t appear to be designated representatives and therefore consultation with them doesn’t constitute consultation with the Tribe for NHPA purposes.”).

often conflicting information about the project. This process is a far cry from the consultation mandated by Executive Order 13,175, and the NHPA. It is not the duty of Tribes to scrape every government website to seek out notice of potential new projects, rather, NHPA and Exec. Order 13,175 each command the Corps and Forest Service to reach out and consult with interested Tribes of their own accord.

Moreover, appropriate consultation is in-person, reflecting the respect of the government-to-government relationship of the consultation process. The in-person nature of consultation is underscored by U.S. Department of Defense Guidance which requires consultation to “take place at a time and *in a location* convenient for tribal representatives,” and urges that “commander/commanding officer *presence* and signature is appropriate.”<sup>10</sup> This guidance is common-sensical in the context of remote consultation, demonstrating a clear intent that consultation is meant to occur in-person.

While we understand that in-person consultation is not possible during the current pandemic emergency, there is no urgency compelling the Corps to move forward with this permitting at a time when the Tribes affected by the permitting do not have the capacity to fully engage in the process. Accordingly, we respectfully request that your agency put the Kake Access Project on hold until after the threat of the pandemic has passed and it is safe to travel to our communities to hold government-to-government consultations in-person, as both respect for Tribal sovereignty and legal obligations demand.

B. The Forest Service is required to make subsistence findings before granting the right-of-way for the proposed project.

The Forest Service is also required to make subsistence findings and hold hearings pursuant to Section 810 of Alaska National Interest Lands Conservation Act (ANILCA), which requires that: “In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands,” agencies must “evaluate the effects of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.”<sup>11</sup> Moreover, prior to any action that will significantly restrict subsistence uses, the agency must also give notice to the appropriate state agencies and local committees and councils, hold hearings in the vicinity of the area involved, and make a determination that the restriction of subsistence use is necessary, the activity is using a minimal amount of public lands to reach its objective, and that reasonable mitigation is being taken to minimize adverse impacts on subsistence uses.<sup>12</sup> OVK is concerned that the proposed project will result in increased competition for subsistence resources, resulting

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<sup>10</sup> AMER. INDIAN AND ALASKA NATIVE POLICY, U.S. DEP’T OF DEFENSE, 22-23 (Jan 2012) (emphasis added); *see also* U.S. Army Corps of Eng’rs, *Tribal Nations Overview*, <https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/> (last visited June 29, 2020) (noting that the USACE Tribal Nations Program implements the Department of Defense’s American Indian/Alaska Native Policy).

<sup>11</sup> 16 U.S.C. § 3120(a).

<sup>12</sup> *Id.*

in a significant restriction of subsistence uses for OVK. As far as we are aware, the Forest Service has not made any subsistence findings, and the Corps should not proceed with this permit until the Forest Service makes the required findings, gives notices to OVK, and holds public hearings in the vicinity of Kake regarding the effects of the project on subsistence uses of the area. Since it is not possible to hold hearings in person, in the vicinity of Kake at this time, we again request that the Corps wait until after the threat of the pandemic has passed to proceed with its decision on this permit.

## II. THE CORPS OF ENGINEERS AND THE FOREST SERVICE SHOULD COMPLETE AN ENVIRONMENTAL IMPACT STATEMENT FOR THIS MAJOR FEDERAL PROJECT.

The Forest Service is responsible for granting the easement required for the state to construct this nearly 50-mile road over federal land that affects Tribal interests, includes important areas for subsistence and cultural uses, and abuts federally-designated wilderness.<sup>13</sup> The Corps has discretion over ADOT's application for a Clean Water Act permit. The Forest Service and the Corps are required to complete an environmental impact statement (EIS) and provide the public with an opportunity to comment on this major federal project in an informed way.

Major federal actions significantly affecting the quality of the human environment require EISs.<sup>14</sup> In determining significance, the agency should consider, among other things: impacts to public health and safety, proximity to historic or cultural resources, degree to which effects are uncertain or unknown, degree of controversy,<sup>15</sup> degree to which an action may facilitate additional impacts in the future, and whether the action is related to other actions with cumulative impacts.<sup>16</sup> In considering each of these factors, an agency must prepare an EIS if there are substantial questions about whether there will be significant impacts.<sup>17</sup>

As to the Kake Access Project, each of these factors show there will be significant impacts, and there is so much uncertainty and controversy about the scope and status of the project, that it is difficult for the public to participate meaningfully without an EIS. Forty million dollars were originally appropriated for a road to connect Kake and Petersburg, co-located with an intertie.<sup>18</sup> But that project, now canceled, is entirely separate from the Kake Access Project.<sup>19</sup> Now the

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<sup>13</sup> See Memorandum of Understanding between State of Alaska and U.S. Dep't of Agric., FS Agreement No. 06MU-11100100-151, State of Alaska Agreement No. ADL 107516 (Sept, 22, 2006) (Memorandum of Understanding) (Attachment 1). It appears that the Forest Service granted a "D-1 easement" in November of 2006 under the State and Forest Service's SAFETEA-LU section 4407 Memorandum of Understanding, but has not yet granted a final easement. See U.S. Forest Serv., Right-of-Way Easement, Section 4407 of Public Law 109-59 (Nov. 21, 2006) (Attachment 2).

<sup>14</sup> 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11.

<sup>15</sup> Controversy, as understood for NEPA purposes, is "a substantial dispute [about the] size, nature, or effect of" an action. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992).

<sup>16</sup> 40 C.F.R. § 1508.27(b).

<sup>17</sup> *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

<sup>18</sup> Alaska Leg., Total Project Snapshot Report: Kake-Petersburg Road (May 2, 2012) (Attachment 3).

<sup>19</sup> Letter from Marc Luiken, Comm'r, Alaska Dep't of Transp., to Christine Bitterman, Mayor of Kake (Feb. 18, 2016) (Attachment 4).

ADOT website states the purpose of the Kake and Frederick Sound connection is “to provide increased recreational and subsistence opportunities on Kupreanof Island,” while the Corps’ public notice states that the purpose for the project is “to provide year-round surface transportation access on Kupreanof Island between the community of Kake and a new boat launch on the eastern shore of Kupreanof Island for the public to access lands along the route and to create an additional access point to navigable waters on Frederick Sound.”<sup>20</sup> But there is no apparent plan for maintenance, which is especially necessary during the winter months, and it is unclear why ADOT and the Corps are pursuing this project at all when the only stated purpose is not something Kake has sought.<sup>21</sup> Indeed, OVK took a poll of its citizens earlier this year and the results showed the community overwhelmingly opposes the road project.<sup>22</sup> Further, OVK has expressed concerns, discussed above, that the proposed project would interfere with subsistence by increasing competition for local resources and not improve access for the community of Kake.

Additionally, there has been little disclosure of project details, construction plans, or potential impacts. For example, as described in the public notice, the road would involve 42 miles of existing roads and 5.39 miles of new road, one bridge, and a boat launch.<sup>23</sup> Until July 1, the project description on ADOT’s website, however, stated that the project would involve 21.6 miles of existing road, 13.5 miles of new road, multiple bridges, and a boat launch.<sup>24</sup> Even the maps provided by the two agencies showed substantially different road routes.<sup>25</sup> ADOT appears to have changed the map on its website to conform to the information in the public notice, but has not explained the reason for the differences between the public notice and the website. The change, made less than one week before the close of the comment period, does not allay the uncertainty over this project where ADOT has constantly changed the scope of and purpose for the project without informing the public, or even the communities located closest to the project area. It is not clear from the information available in the public notice why the numbers have changed, and the public cannot adequately comment on a project without reliable information about the true scope of the project.

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<sup>20</sup> Alaska Dep’t of Transp., *Kake Access Project #69907*,

[http://dot.alaska.gov/sereg/projects/kake\\_acce55/](http://dot.alaska.gov/sereg/projects/kake_acce55/) (last viewed July 6, 2020); Public Notice at 2.

<sup>21</sup> A recent quote by the commissioner of ADOT, John MacKinnon, raises even more questions as to the purpose of the project and whether there is even a current rationale behind it. Referring to the original 2012 appropriation for a Kake road, Commissioner MacKinnon stated: “It’s one of those things, when we get an appropriation to do something we consider that an obligation to try and carry out.” Elwood Brehmer, ANCHORAGE DAILY NEWS (Mar. 12, 2020), <https://www.adn.com/alaska-news/rural-alaska/2020/03/12/opponents-of-40-million-kake-road-in-southeast-alaska-argue-for-shifting-cash-to-ferry-system/> (Attachment 5).

<sup>22</sup> *Id.*

<sup>23</sup> Public Notice at 2.

<sup>24</sup> See Alaska Dep’t of Transp., *Kake Access Road, Project No. 69607*,

[http://dot.alaska.gov/sereg/projects/kake\\_acce55/](http://dot.alaska.gov/sereg/projects/kake_acce55/) (last visited June 30, 2020).

<sup>25</sup> Compare Public Notice at 13 with Alaska Dep’t of Transp., *Kake Access Road Overview Map 1*, available at:

[http://dot.alaska.gov/sereg/projects/kake\\_acce55/assets/Kake%20Access%20Road%20Overview%20Map%201.pdf](http://dot.alaska.gov/sereg/projects/kake_acce55/assets/Kake%20Access%20Road%20Overview%20Map%201.pdf).

Regardless of the precise details of the road and its direct impacts, it is clear that the project threatens to affect historic and cultural resources. Increased access to areas that Kake residents value for cultural resources and traditional uses, such as hunting, gathering, fishing, and cedar harvesting, could hinder their ability to continue their use, as competition for the same resources increases with increased access. The map in the public notice indicates that the proposed road would be placed very close to culturally important areas such as Portage Bay and the Bohemian Range. Similarly, the Corps must consider how increasing access in this area could facilitate increased development in the future, including any mineral claims, logging, or other natural resource activities in the area.<sup>26</sup> Given the substantial potential impacts and high degree of uncertainty and controversy surrounding the project, the Corps must complete an EIS before issuing any permit.

The Forest Service's actions related to the Kake Access Project also require an EIS. SAFETEA-LU sec. 4407, which authorizes the grant of certain reciprocal easements and rights-of-way to the State of Alaska and the Forest Service, does not exempt this action from NEPA. Section 4407 provides: "Notwithstanding any other provision of law, the reciprocal rights-of-way and easements identified on the map numbered 92337 and dated June 15, 2005, are hereby enacted into law."<sup>27</sup> This language requires the grant of rights-of-way and easements that are shown on Map 92337, but does not require the grant of rights-of-way that do not follow the routes shown on the map. Although one Alaska district court considered the scope of section 4407 in *Alaska v. United States Forest Service*, 1:16-cv-00018-RRB, 2019 WL 2465174 (D. Alaska, June 11, 2019), that decision provides limited analysis of the scope of the statute and cannot be applied beyond the situation resolved in the case. To the extent it applies, the decision suggests that Section 4407 limits the Forest Service's discretion to grant or deny easements for corridors shown on the map or within D-1 easements granted under Section 4407 that "provide continuous links between the communities of southeast Alaska."<sup>28</sup> For such rights-of-way, Section 4407 may limit the applicability of NEPA.

In this case, however, the public notice for ADOT's project application for the proposed Kake Access Project shows that the road corridor does not follow the route shown on the map or connect communities. The final section of new road shown on the project map provided with the public notice appears to roughly follow Twelvemile Creek, while the yellow corridor shown on Map 92337 follows a more northern route.<sup>29</sup> It is not possible to determine, from the large-scale maps provided, whether the remainder of the route follows the Map 92337 corridor, but the final section clearly falls well outside the boundaries. In addition, the proposed project does not connect communities in southeast Alaska; rather, it connects Kake to a remote location on

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<sup>26</sup> The Central Tongass Draft Environmental Impact Statement identified the Portage Bay and Western Kupreanof timber analysis areas as two of the areas within that project with higher timber volume, but that currently would have high costs to log. U.S. Forest Serv., Central Tongass Draft Environmental Impact Statement at 3-69 (July 2019) (Attachment 6). However, the draft went on to state that if the Kake Access road were completed by the state, this might reduce costs associated with those two areas. *Id.* at 3-71.

<sup>27</sup> Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, § 4407, Pub L. No. 109-59, 119 Stat 1144 (Aug. 10, 2005).

<sup>28</sup> *Alaska v. United States Forest Serv.*, 2019 WL 2465174 at \*1.

<sup>29</sup> Compare Memorandum of Understanding, Attachment A (Map 92337) with Public Notice at 13.

Frederick Sound. Even the purpose and need for the project does not mention connecting communities.<sup>30</sup> There is no pretense that this project is about linking communities and therefore, even under *Alaska v. United States Forest Service*, it is not exempt from NEPA.

Further, to the extent that SAFETEA-LU Section 4407 applies to this project at all, it applies only to the Forest Service's authority to grant a right-of-way, not to the Corps' decision regarding this permit application.

Lastly, it is not permissible for the Corps or Forest Service to rely on the Kake to Petersburg Transmission Line Intertie Project EIS completed in 2016. According to the public notice, the purpose of the project the Corps is considering is to increase access from Kake to Frederick Sound,<sup>31</sup> and ADOT's website states the purpose is to provide increased recreational and subsistence opportunities on Kupreanof Island.<sup>32</sup> But the 2016 intertie EIS had an entirely different purpose: to provide lower-cost electricity to Kake.<sup>33</sup> None of the alternatives considered new roads.<sup>34</sup> The routes shown for the proposed intertie project are also different from the routes now shown in the public notice for the Kake Access Project.<sup>35</sup> It is impossible to assess the environmental effects of a road from Kake to Frederick Sound, or whether that road would meet the stated purposes for the project, on the basis of an EIS assessing alternatives to provide lower-cost electricity to Kake. Nor does the intertie EIS consider alternatives, as required under NEPA, to meet the purpose of the current project—providing access from Kake to Frederick Sound.

Moreover, the 2016 intertie EIS noted that the intertie project was “pursued independently” from the Kake Access Project and proposals for a road from Kake to Petersburg.<sup>36</sup> The 2016 intertie EIS explicitly stated that effects of new roads in the area may include “increased access to and competition for subsistence resources,”<sup>37</sup> which would decrease subsistence opportunities for local residents. It is thus irrational to rely on the intertie EIS for this project, which has the purpose of increasing subsistence opportunities, when the intertie EIS stated roads through the areas in question would decrease those opportunities. For the reasons explained above, the Corps has an independent obligation to complete an environmental impact statement for the proposed project and may not rely on the 2016 intertie EIS.

### III. THE CORPS MUST ADHERE TO CWA REGULATIONS AND REQUIRE COMPENSATORY MITIGATION FOR THIS PROJECT.

The Corps is required to adhere to both its own regulations implementing the CWA, as well as the U.S. Environmental Protection Agency's (EPA) 404(b)(1) guidelines when issuing Section

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<sup>30</sup> Public Notice at 2.

<sup>31</sup> *Id.*

<sup>32</sup> Alaska Dep't of Transp., *Kake Access Road, Project No. 69607*, [http://dot.alaska.gov/sereg/projects/kake\\_acce55/](http://dot.alaska.gov/sereg/projects/kake_acce55/) (last visited July 6, 2020).

<sup>33</sup> U.S. Forest Serv., *Kake to Petersburg Transmission Line Intertie Final Environmental Impact Statement at S-1 (June 2016) (2016 Intertie EIS) (Attachment 7)*.

<sup>34</sup> *See id.* at Abstract (“No new roads would be built under any of the alternatives.”).

<sup>35</sup> *See id.* at 2-3, Fig. 2-1; Public Notice at 13.

<sup>36</sup> 2016 Intertie EIS at 1-8.

<sup>37</sup> *Id.* at 3-157.



404 permits for projects such as the Kake Access Project. In addition to a written determination of the short- and long-term effects of a proposed action on the aquatic environment, the 404(b)(1) guidelines require analysis of alternatives to determine whether there are alternatives that would have less adverse impacts on the aquatic ecosystem.<sup>38</sup> The public notice does not provide sufficient information to show how the Corps will make such a determination, nor has the Corps shown how it has analyzed any alternatives to the proposed project. It is unclear how the Corps would go about analyzing alternatives because the stated purpose and need for the project is unsupported. As explained previously, the community has not sought increased access to and from Frederick Sound, so there is not a real way to analyze what the goal is and what alternatives could achieve it. Indeed, one practicable alternative that would not have an adverse impact on the aquatic ecosystem would be to deny the permit application.

The Corps' own CWA regulations require the agency to both conduct a public interest review and evaluate the project for consistency with historic, cultural, scenic, and recreational values. Given the importance of these areas to Kake, both of these processes must be done in consultation and collaboration with OVK. The Corps is required to complete the public interest review before permitting by balancing favorable impacts against detrimental impacts—including cumulative impacts—and should not issue a permit if it would be contrary to the public interest.<sup>39</sup> The public interest review must include factors such as conservation, economics, fish and wildlife values, and the needs and welfare of the people.<sup>40</sup> The Corps must also consider the need for the proposed work, conflicts as to resource use, reasonable alternative locations and methods to accomplish the objective of the work, and the extent and permanence of the work on uses in the area.

Again, a valid purpose for the project has not been provided, such that the Corps can balance need or alternatives against the substantial potential detrimental impacts. Cutting a road across the island would cause long-lasting, adverse, environmental impacts, and even if the road were eventually left unmaintained in the future, it would take decades for the forest to grow back. The proposed road also has the potential to create direct conflicts regarding resource use, by making it easier to access certain areas for hunting, fishing, and even resource extraction such as mining or logging.

OVK has a strong interest in maintaining its ability to protect the lands and wildlife surrounding Kake for its members' cultural and traditional uses, including hunting, gathering, and fishing. People enjoy and rely on the forest and its waters for nourishment, as the food available in grocery stores might not be as healthy or affordable. These interests are heightened during the current Covid-19 pandemic, which has already resulted in a need to request emergency hunting authority to address food security. The Corps must work with the Tribe to recognize and understand these interests in making any public interest determination for this project.

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<sup>38</sup> 40 C.F.R. § 230.10(a); *id.* § 230.11.

<sup>39</sup> 33 C.F.R. § 320.4(a); *id.* § 323.6(a).

<sup>40</sup> *Id.* § 320.4(a).

Lastly, the 404(b)(1) guidelines and the Corps' own CWA regulations require the Corps to offset the destruction of aquatic resources by developing a plan to preserve or restore such resources in another location.<sup>41</sup> The Corps has failed to require compensatory mitigation for the 14.55 acres of wetlands that will be permanently destroyed as part of this project because it alleges this amount of loss is minimal.<sup>42</sup> But the guidelines do not contain an exception for size and the Corps must require a plan to offset these losses. Compensatory mitigation is available near the project area and should be required.

#### IV. CONCLUSION

The Kake Access Project poses a significant threat to the Tribe's millennia-long cultural and traditional uses of the area. The Corps must deny the permit and not proceed with this project until it has engaged in meaningful, in-person consultation with OVK after the threat of the pandemic has subsided and until the Forest Service has also met its consultation and ANILCA obligations. Additionally, many citizens of the City of Kake, the City and Borough of Petersburg and the City of Kupreanof strongly oppose the project as being contrary to the best interests of their communities, and the Corps should grant requests from the public to hold in-person hearings after the threat of the pandemic has subsided. In the event that the Corps proceeds with this project after consultation and hearings, the Corps must ensure it: has adequate information about the purpose, scope, and impacts of such a project; has a completed, project-specific EIS; and will comply with relevant legal requirements, including CWA regulations.

Sincerely,



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<sup>41</sup> *Id.* §§ 230.91–230.98; 33 C.F.R. § 320.4(r).

<sup>42</sup> *See* Public Notice at Enclosure A, 2.

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