

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SOUTHEAST ALASKA)	
CONSERVATION COUNCIL, <i>et al.</i> ,)	
)	
Plaintiffs,)	1:06-cv-0009 JWS
)	
vs.)	ORDER AND OPINION
)	
)	[Re: Motions at Dockets 67 and 99]
FEDERAL HIGHWAY)	
ADMINISTRATION, <i>et al.</i> ,)	
)	
Defendants,)	
)	
and)	
)	
STATE OF ALASKA,)	
)	
Intervenor-Defendant.)	
_____)	

I. MOTIONS PRESENTED

At docket 67, plaintiffs Southeast Alaska Conservation Council, *et al.* (“plaintiffs”) move for summary judgment on their claims for declaratory and injunctive relief. At docket 81, defendants Federal Highway Administration, *et al.* (“defendants”) oppose plaintiffs’ motion. At docket 90, intervenor-defendant the State of Alaska (“intervenor-defendant”) opposes the motion. Plaintiffs reply at docket 95. Oral argument was not requested, and it would not assist the court.

At docket 99, plaintiffs move for leave to file a supplemental complaint. Defendant and intervenor-defendant oppose the motion at dockets 101 and 102, respectively. Plaintiffs reply at docket 103. Oral argument was not requested, and it would not be helpful to the court.

II. BACKGROUND

The subject of this action is the proposed Juneau Access Improvements Project (“the Project”). The Project, as approved, involves building a 50.8 mile two-lane highway from the end of the existing highway in Juneau to a new ferry terminal that would be constructed just north of the Katzehin River delta. The new ferry terminal would provide shuttle ferry service to Haines and Skagway. Existing mainline ferry service between Juneau, Haines, and Skagway would be discontinued. Most of the highway extension would be constructed within an inventoried roadless area encompassing over 1.2 million acres in the Tongass National Forest. The highway extension would cross three designated old-growth habitat areas. A brief history of the Project follows.

In the early 1990's, the Federal Highway Administration (“FHWA”) and the Alaska Department of Transportation and Public Facilities (“Alaska DOT”) initiated a project to improve surface access between Juneau, Haines, and Skagway in the Lynn Canal corridor of Southeast Alaska. These communities are currently served primarily by the Alaska Marine Highway System (“AMHS”) and have been connected by marine ferry service since the early 1960's.

Because the Project involves federal land, federal funds, and environmental impacts, Alaska DOT was required to obtain approvals and permits from several federal agencies. In June 1997, Alaska DOT and FHWA issued a Draft Environmental Impact Statement (“DEIS”) for the Project.¹ The DEIS stated that the purpose of the Project is to provide improved surface transportation to and from Juneau within the Lynn Canal corridor that will:

¹AR 2693-4409.

- 1) Provide the capacity to meet the transportation demand in the corridor.
- 2) Provide flexibility and improve opportunity for travel.
- 3) Reduce travel time between the communities.
- 4) Reduce state costs for transportation in the corridor.
- 5) Reduce user costs for transportation in the corridor.²

The DEIS evaluated six alternatives: a “No-Build/Transportation System Management” alternative, a highway on the east side of Lynn Canal connecting Juneau to Skagway, and four “all-marine” alternatives. The DEIS issued in 1997 did not identify a preferred alternative.

In January 2000, Governor Knowles identified Alternative 2, an east Lynn Canal highway between Juneau and Skagway, as the State’s preferred alternative, indicated that the alternative would not be pursued during his administration, and suspended work on the EIS.³ In 2002, Governor Murkowski directed that the EIS be completed.⁴ Under 23 C.F.R. § 771.129, “if an acceptable final EIS is not submitted to the Administration within 3 years from the date of the draft EIS circulation,” a written evaluation is required “to determine whether or not a supplement to the draft EIS or a new draft EIS is needed.” In January 2003, Alaska DOT completed a reevaluation determining that a Supplemental Draft Environmental Impact Statement (“SDEIS”) was needed for the Project. Alaska DOT also indicated that Alternative 2 would continue to be the preferred alternative for the SDEIS.⁵ FHWA approved the reevaluation.⁶

In April 2004, the Haines Borough Assembly adopted a resolution requesting state and federal agencies to focus on enhancing marine transportation within the Lynn Canal. In October 2004, Skagway residents voted 62 to 38 percent in favor of improved ferry service over a road. Telephone surveys of households in Haines, Skagway, and

²AR 2727.

³AR 19954.

⁴AR 30261.

⁵AR 12973.

⁶AR 28228.

Juneau conducted for the SDEIS confirmed that residents were divided in their opinions about the desirability of highway access.⁷

In January 2005, Alaska DOT and FHWA issued a SDEIS for the Project.⁸ The SDEIS evaluated a “No Action” alternative, four alternatives with a highway on the east side of Lynn Canal, one with a highway on the west side of Lynn Canal, and four marine alternatives, all of which would require construction of new ferries, terminals, and/or roads. The SDEIS identified Alternative 2, requiring construction of a highway on the east side of Lynn Canal connecting Juneau to Skagway, as the preferred alternative. During the review period for the SDEIS, both branches of the Alaska Legislature submitted resolutions supporting Alternative 2.⁹

In August 2005, Alaska DOT issued a press release stating that the preferred alternative had been changed to Alternative 2B.¹⁰ Alternative 2B involves constructing a highway on the east side of Lynn Canal from the end of the road system north of Juneau to the Katzehin River delta, and the construction of a new ferry terminal at the end of the highway, with shuttle ferry service to Skagway and Haines. Alternatives 2, 2A, and 2C, which required constructing a road link to Skagway, were dropped from consideration after FHWA determined that constructing a road to Skagway would “require the use of lands from within the Skagway and White Pass District National Historic Landmark and that such lands are subject to Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303.”¹¹ Section 4(f) prohibits the Secretary of Transportation from authorizing the use of federal funds to finance the construction of

⁷AR 30276.

⁸AR 19911-23855.

⁹AR 30304.

¹⁰AR 28588.

¹¹Doc. 91-2 at p. 2.

highways though a public park, recreation area, wildlife and waterfowl refuge, or historic site unless there is “no feasible and prudent alternative to the use of such land.”¹²

On January 18, 2006, Alaska DOT and FHWA issued the Final Environmental Impact Statement (“FEIS”) for the Project.¹³ The FEIS evaluated seven alternatives, a “No Action” alternative, Alternative 2B with a highway on the east side of Lynn Canal, a west side of Lynn Canal highway alternative, and four marine alternatives. The FEIS identified Alternative 2B as the preferred alternative. In a section outlining the environmental consequences of each alternative, the FEIS acknowledged that the proposed alignment for Alternative 2B crosses 36 avalanche paths, and would result in the loss of 70 acres of wetlands and 428 acres of terrestrial habitat, including 286 acres of old-growth forests. The FEIS indicated that the highway for Alternative 2B would be located within 0.5 mile of 92 bald eagle nests and within 330 feet of 49 of these nests. The FEIS also pointed out that a critical habitat area for Steller sea lions is located along the proposed alignment for Alternative 2B, but stated that FHWA had determined that Alternative 2B is not likely to adversely affect Steller sea lions or adversely modify critical habitat based on the implementation of mitigation measures.¹⁴

On April 3, 2006, FHWA Division Administrator David Miller signed a Record of Decision (“ROD”) selecting Alternative 2B as the proposed action for the Project.¹⁵ The ROD completed FHWA’s review under the National Environmental Policy Act of 1969 (“NEPA”). On May 3, 2006, Alaska DOT sent a letter to FHWA requesting a right of way for the Project from the United States Forest Service (“Forest Service”).¹⁶ FHWA

¹²Section 4(f) was originally codified at 49 U.S.C. § 1653(f), which was section 4(f) of the Department of Transportation Act of 1966. The policy set forth in Section 4(f) is now codified at 49 U.S.C. § 303 and 23 U.S.C. § 138.

¹³AR 30259A-30867.

¹⁴AR 30270.

¹⁵AR 32954-33028.

¹⁶Doc. 70, exh. 63.

forwarded the request to the Forest Service.¹⁷ By letter dated May 22, 2006, the Forest Service consented to FHWA's appropriation of the portion of the right of way that is on federal lands within the Tongass National Forest for purposes of constructing Alternative 2B.¹⁸

On August 16, 2006, plaintiffs commenced this action under the Administrative Procedure Act,¹⁹ seeking review of the Project on the grounds that it violates NEPA,²⁰ the National Forest Management Act ("NFMA"),²¹ the Bald Eagle Protection Act ("BEPA"),²² and the Endangered Species Act ("ESA").²³ In addition to "appropriate injunctive relief," plaintiffs requested the court to enter a declaratory judgment that:

- a. the Forest Service violated NFMA by approving a right-of-way crossing designated Old-Growth Habitat without determining that no feasible alternative existed;
- b. FHWA acted arbitrarily by approving the choice of Alternative 2B when its own findings show that operation of the completed road may result in the taking of bald eagles in violation of the Bald Eagle Protection Act;
- c. the FEIS for the Juneau Access Improvements Project violates NEPA by failing to consider reasonable alternatives for improving transportation in Lynn Canal using existing infrastructure without new construction;
- d. FHWA acted arbitrarily by approving the selection of Alternative 2B when evidence in the record shows that the frequency delay times used in the Traffic Demand Forecast were inappropriate, and FHWA did not adequately explain its decision to use those times;

¹⁷Doc. 70, exh. 64.

¹⁸Doc. 70, exh. 65.

¹⁹5 U.S.C. § 701.

²⁰42 U.S.C. § 4321.

²¹16 U.S.C. § 1604.

²²16 U.S.C. § 668.

²³16 U.S.C. § 1536.

- e. FHWA violated NEPA by relying on inaccurate and misleading frequency delay times in predicting traffic demand and by failing to explain its use of those frequency delay times in light of evidence in the record showing that they were inaccurate; and
- f. FHWA acted arbitrarily in violation of the Endangered Species Act and Administrative Procedure Act by failing to initiate formal consultation when the proposed road may adversely affect designated critical habitat for Steller sea lions.²⁴

In the motion at bar, plaintiffs request the court to “enter a declaratory judgment in favor of Plaintiffs, vacate the Record of Decision for the project, vacate the Forest Service’s decision approving the easement right-of-way, and enjoin any and all activity related to [construction of] the project.”²⁵ Defendants request the court to deny plaintiffs’ motion and enter a judgment for defendants dismissing this action with prejudice.²⁶

III. STANDARD OF REVIEW

This action arises under the Administrative Procedures Act (“APA”), which provides for judicial review of final agency action.²⁷ Under the APA, the court “will reverse the agency action only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.”²⁸ “An agency’s action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency’s decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, or if the agency’s decision is contrary to the governing law.”²⁹ The determination of whether the agency acted in an arbitrary and capricious

²⁴Doc. 1 at p. 26.

²⁵Doc. 67 at pp. 1, 34.

²⁶Doc. 81 at p. 33.

²⁷5 U.S.C. §§ 701-706.

²⁸*Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005) (citing 5 U.S.C. § 706(2)).

²⁹*Id.* (internal citations omitted).

manner rests on whether it “articulated a rational connection between the facts found and the choice made.”³⁰ The court may not substitute its judgment for that of the agency but must ensure that the agency adequately considered and disclosed the environmental impacts of its actions.³¹

IV. DISCUSSION – MOTION AT DOCKET 67

A. Claims Against FHWA Under NEPA

Plaintiffs argue that 1) FHWA violated NEPA by refusing to consider an alternative which improved ferry service using existing ferries and facilities; 2) FHWA’s justifications for failing to consider an improved ferry service alternative are arbitrary; and, 3) FHWA violated NEPA by presenting a misleading analysis of user benefits which skewed its comparison of alternatives in favor of road alternatives. “Congress passed NEPA ‘to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action.’”³² “Although NEPA ‘does not mandate particular results,’ it does ‘prescribe the necessary process.’”³³

NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.”³⁴ It is undisputed that the Project qualifies as such. The EIS “shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or

³⁰*Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008) (quoting *Pub. Citizen v. DOT*, 316 F.3d 1002, 1020 (9th Cir. 2003)).

³¹*Id.* (quoting *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000)).

³²*Ilio’ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006) (quoting *Lands Council*, 395 F.3d at 1026).

³³*Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

³⁴42 U.S.C. § 4332(2)(C).

minimize adverse impacts or enhance the quality of the human environment.”³⁵ “The action alternatives are the ‘heart’ of an EIS.”³⁶ “The agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposal.”³⁷ The scope of reasonable alternatives an agency must consider is shaped by the purpose and need statement articulated by the agency.³⁸ “The existence of a viable but unexamined alternative renders an EIS inadequate.”³⁹ In reviewing the sufficiency of an EIS, the Ninth Circuit employs “a rule of reason” standard. “This standard involves a pragmatic judgment whether the [EIS’s] form, content and preparation foster both informed decision-making and informed public participation, and is essentially the same as review for abuse of discretion.”⁴⁰

Plaintiffs first argue that FHWA violated NEPA by failing to consider the “obvious alternative” of providing improved ferry service using existing ferries and terminals.⁴¹ Plaintiffs further argue that improving ferry service using existing ferries and terminals is a reasonable alternative because it meets the purpose and need statement for the Project. Namely, improving ferry service with existing boats and terminals could provide capacity to meet transportation demand in Lynn Canal, provide more flexibility and opportunity for travel, reduce travel times between Juneau, Haines, and Skagway, and reduce state and user costs for transportation in the corridor. Plaintiffs also contend that FHWA has not demonstrated “why adjusting schedules, increasing the frequency of ferry service, reducing fares, or other improvements using existing boats and terminals

³⁵40 C.F.R. § 1502.1.

³⁶*Friends of Yosemite*, 520 F.3d at 1038 (quoting 40 C.F.R. § 1502.14).

³⁷*Ilio’ulaokalani Coalition*, 464 F.3d at 1095.

³⁸*Id.* at 1097.

³⁹*Id.* at 1095; *Friends of Yosemite*, 520 F.3d at 1038 (quotation and citation omitted)).

⁴⁰*Friends of Yosemite*, 520 F.3d at 1033 (quoting *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 n.2 (9th Cir. 2003)).

⁴¹Doc. 67 at p. 15.

could not meet the purpose and need for the project.”⁴² Accordingly, plaintiffs seek a declaratory judgment finding that the FEIS for the Project violates NEPA by failing to consider a reasonable alternative for improving transportation in Lynn Canal using existing infrastructure without new construction.

In opposition, defendants first argue that the FEIS “considered the alternative of improved ferry service with both existing and already planned new equipment as part of the no action alternative.”⁴³ In support, defendants argue that “the planned use starting in 2007 of the M/V Aurora as a shuttle between Haines and Skagway. . . is an improvement in the existing service.”⁴⁴ In the same paragraph, however, defendants acknowledge that mainline service under the “No Action” alternative would be reduced in Lynn Canal because of the phasing out of two mainline vessels. Defendants then inexplicably conclude that “[t]hus, the FEIS did consider an alternative that included improved ferry service using existing equipment.”⁴⁵

Defendants’ argument is unconvincing because the FEIS and ROD both expressly acknowledged that the “No Action” alternative would provide reduced service, not improved ferry service using existing resources as contemplated by plaintiffs. The FEIS stated in pertinent part:

The No Action Alternative is a projection of future Lynn Canal service based on the most recent [Southeast Alaska Transportation Plan (“SATP”)]. It is not a continuation of past or current service levels. As such, capacity, frequency, and cost are somewhat different from past and current service. Current service is a reduction in capacity from pre-fast vehicle ferry service. The No Action Alternative is a reduction below the current level of service due to reduced mainliner frequency in Lynn Canal. Mainliner frequency would be reduced because of projected reduction in the number of mainliners operating in the AMHS. The 2004 SATP envisions two mainliners operating out of Bellingham and one mainliner operating out of Prince Rupert to Whittier. The Bellingham

⁴²Doc. 95 at p. 5.

⁴³Doc. 81 at p. 11.

⁴⁴Doc. 81 at p. 12.

⁴⁵*Id.*

ferries would each make a trip through Lynn Canal once a week. In order to maintain a minimum level of Lynn Canal service, a Prince Rupert-based ferry would average one trip in Lynn Canal per week. The \$10.2 million operation estimate for the No Action Alternative in 2008 is therefore less than the \$11.7 million expended in 2004.⁴⁶

The ROD similarly stated, “The No Action Alternative includes a continuation of mainline AMHS service in Lynn Canal as well as the operation of the fast vehicle ferry (FVF) M/V Fairweather between Auke Bay and Haines and Auke Bay and Skagway, albeit at a lower level of mainline service than is currently provided.”⁴⁷ In addition, FHWA’s responses to comments to the FEIS stated that the “No Action Alternative is a projection of how the State will reduce costs by providing somewhat reduced service,” and indicated that “[t]he only improvement (or additional service beyond current service) included in the No Action Alternative is the addition of shuttle service between Haines and Skagway.”⁴⁸ Contrary to federal defendants’ assertion, the FEIS did not include a reasonable alternative for improving ferry transportation using existing infrastructure, such as by adjusting ferry schedules, increasing frequency of ferry runs, reducing loading/unloading times, reducing fares, or other improvements.

Intervenor-defendant next argues that Ninth Circuit case law does not require agencies to analyze “every possible alternative” meeting the purpose and need statement, and that plaintiffs’ proposal was just one more alternative within the spectrum of alternatives already considered in the FEIS. However, as discussed above, the “No Action” alternative contained in the SDEIS and FEIS is not similar to an alternative providing improved ferry service using existing vessels and terminals. Moreover, alternatives 4A through 4D are not comparable to the alternative suggested by plaintiffs because Alternatives 4A through 4D all require the construction of ferries, roads, and/or terminals, which result in higher capital costs. Given that one of the

⁴⁶AR 30324.

⁴⁷AR 32958.

⁴⁸AR 32994.

purposes of the Project is to reduce costs to the state, those capital costs make these ferry alternatives less attractive. While the court agrees that the agencies were not required to consider “every possible alternative” meeting the purpose and need statement, NEPA does require the agencies to “rigorously explore and objectively evaluate all reasonable alternatives.”⁴⁹

Alternatively, defendants argue that the court should not consider the improved ferry service alternative suggested by plaintiffs because it was first raised “at the eleventh hour after the FEIS had been completed.”⁵⁰ Defendants erroneously contend that “[p]laintiffs’ complaint is now that [the No Action] alternative did not sufficiently consider an option first set forth on behalf of the plaintiff Southeast Alaska Conservation Council (“SEACC”) in comments to the FEIS,” in which “SEACC offered specific suggestions as to the rescheduling of service in Lynn Canal by specific ferries including increased use of the M/V Fairweather.”⁵¹ Defendants misconstrue plaintiffs’ position. Plaintiffs do not argue that the agencies should have considered the exact alternative proposed by SEACC in its comments to the FEIS, but rather that defendants should have considered at least one alternative that provided improved ferry service without building new ferries, terminals or roads for Lynn Canal.⁵²

Moreover, “the primary responsibility for NEPA compliance is with the agency.”⁵³ NEPA does not require plaintiffs to raise specific issues “where the agency had independent knowledge of the issues that concerned Plaintiffs.”⁵⁴ Here, the administrative record is replete with the expressions of concern from 1994 through the completion of the FEIS in 2006 that a more efficient ferry service alternative should be

⁴⁹40 C.F.R. § 1502.14.

⁵⁰Doc. 81 at p. 14.

⁵¹Doc. 81 at p. 13.

⁵²Doc. 95 at p. 6.

⁵³*Ilio’ulaokalani Coalition*, 464 F.3d at 1092.

⁵⁴*Id.*

considered. For example, in comments dated March 1994 to the Juneau Access Draft Reconnaissance Engineering Report which preceded the DEIS, the AMHS System Director stated, "The marine alternative utilizing existing AMHS assets to address the access question is not included. It would be the first obvious alternative before adding new feeders or shuttles."⁵⁵

Similarly, in comments to the DEIS, the United States Environmental Protection Agency stated:

The EIS does not indicate whether current AMHS operations within Lynn Canal are operating at their most efficient level. If improvements to current operations could be made that would address the summertime capacity problem identified in the EIS, we believe such improvements should be pursued as an alternative in the EIS.⁵⁶

In comments to the SDEIS, SEACC stated that the EIS should consider an alternative which improved "access to Juneau in the Lynn Canal using existing assets through changes in management, operations, and financial planning for the [AMHS]."⁵⁷

The record also shows that the involved agencies were aware of the need to address improving access with existing resources. Notes from a Juneau Access Weekly Meeting dated February 1994, state, "Remanaging the AMHS is the achilles tendon to the project. If cannot prove that AMHS is at optimization now then project in jeopardy."⁵⁸ In addition, the record shows that an alternative which focused on improving ferry service and efficiency in Lynn Canal without constructing new ferries or terminals was originally contemplated in the 1997 DEIS, but was dropped from consideration in the SDEIS and FEIS. The DEIS description of Alternative 1, the "No Build/Transportation System Management" alternative, stated:

This alternative would continue the existing mainline ferry service in Lynn Canal. Service would continue to transport about 95,000 passengers and 30,000

⁵⁵AR 255.

⁵⁶AR 2916.

⁵⁷AR 26946.

⁵⁸AR 52.

vehicles annually between Haines Skagway and Juneau. DOT&PF would continue to adjust ferry service to best accommodate all Southeast Region.

DOT&PF is studying options to enhance the efficiency of the existing fleet while maintaining an acceptable level of service to each community. Some of the options being considered would reduce overall travel time throughout the region by decreasing port time and/or reducing service to some communities, while increasing service to others. One primary objective of all scheduling options considered is to increase service within Lynn Canal, which, historically, is one of the highest demand and revenue generating routes for the ferry system.⁵⁹

However, when the EIS process was picked up again in 2002 and FHWA determined that a supplemental EIS was required, neither the ensuing SDEIS nor the FEIS analyzed an alternative aimed at providing improved and more efficient ferry service using existing assets. To the contrary, the FEIS stated in pertinent part:

The No Action Alternative is an updated version of the 1997 Draft EIS Alternative 1, titled No Build/Transportation System Management. Alternative 1 originally used the term No Build rather than No Action to help clarify that the AMHS has and would continue to implement new actions in the Lynn Canal corridor. An example of an expected AMHS addition to Lynn Canal is the use of the *M/V Aurora* as a shuttle ferry between Haines and Skagway.

Transportation System Management (TSM) refers to activities that maximize the efficiency of an existing system with little or no new construction. It is generally applicable to transportation systems in urban areas and typically involves options such as fringe parking, ride sharing, designating high-occupancy vehicle (HOV) lanes, and traffic signal timing optimization. Reassigning vessels to Lynn Canal could be reviewed as a form of TSM, but unlike more typical TSM measures, this would be at the expense of service elsewhere. For this reason, there is no TSM alternative in the Supplemental Draft EIS range of alternatives and the term TSM is not included in the Alternative 1 Title.⁶⁰

Based on the brief description and undeveloped discussion of Alternative 1 in the DEIS, the court cannot conclude that an alternative aimed at providing improved and more efficient ferry service was “rigorously explored” by the agencies.⁶¹ However, the

⁵⁹AR 2745.

⁶⁰AR 30323.

⁶¹40 C.F.R. § 1502.14.

fact that the FHWA and Alaska DOT gave passing consideration to such an alternative in the DEIS leads this court to conclude that an alternative which improved ferry service using existing ferries and terminals was “both reasonable and obvious” and should have been analyzed in the FEIS.⁶² Defendants’ failure to do so renders the FEIS inadequate.⁶³

Applying the “rule of reason” standard, the court further finds that because the FEIS did not include an alternative which improved ferry service using existing assets, the FEIS failed to foster informed decision-making and public participation. The FEIS’s omission of such an alternative is particularly troublesome in light of the agencies’ awareness that such an alternative was the “first obvious alternative” and had the fewest environmental impacts, and the fact that communities who stand to benefit the most from the Project explicitly requested the agencies to focus on improving ferry transportation within Lynn Canal. In addition to requiring agencies to “rigorously explore and objectively evaluate all reasonable alternatives,” NEPA and its implementing regulations require agencies to explain their reasoning for eliminating an alternative from consideration.⁶⁴ The reasoning provided in the FEIS for rejecting an alternative improving the ferry service and efficiency in Lynn Canal using existing resources was that a Transportation System Management alternative would “be at the expense of service elsewhere.”⁶⁵ In their response to plaintiffs’ motion, intervenor-defendants further argue that plaintiffs’ “Better Ferry Service proposal” would also increase costs.

Plaintiffs argue that defendants’ justifications for not considering an alternative providing improved ferry service with existing assets are arbitrary because those justifications apply to every alternative considered in the FEIS. Plaintiffs specifically

⁶²*Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 784 (9th Cir. 1980).

⁶³*Ilio’ulaokalani Coalition*, 464 F.3d at 1101; *Friends of Yosemite*, 520 F.3d at 1038.

⁶⁴*Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006); 40 C.F.R. § 1502.14(a).

⁶⁵AR 30323.

argue that all of the alternatives considered in the FEIS, and particularly Alternative 2B, “have the potential to reduce service elsewhere or to increase costs.”⁶⁶

The record supports plaintiffs’ argument. The SDEIS stated in pertinent part: Current planning for funding the construction of any build alternative in the [SDEIS] assumes a project-specific congressional earmark. If a special congressional appropriation does not become available, initial funding would come from the state’s Federal Aid Highway Program. This would require a revision to the STIP by delaying or eliminating projects in the current 2004 to 2006 STIP to make room for the Juneau Access Improvements Project.⁶⁷

A section of the SDEIS titled “Irreversible and Irrecoverable Commitments of Resources” further provided:

Depending on the alternative selected, up to approximately 660 acres of land and intertidal and subtidal habitat would be committed to the proposed project. Construction of transportation facilities would result in the permanent commitment of energy, concrete, aggregate, asphalt, water, and other construction materials. Project construction costs ranging from \$98 million to \$294 million would be committed; these costs would be offset by savings in travel time and energy use and the economic stimulus of improved access to the communities of the Lynn Canal region.⁶⁸

As to Alternative 2B, which was identified as the preferred alternative in the FEIS, plaintiffs argue that “[e]liminating [mainline] Lynn Canal ferry service with the construction of a road, and the resulting loss of revenue from those lucrative ferry runs, would force the agencies to choose between increasing subsidies for the ferry system or decreasing service elsewhere to reduce costs.”⁶⁹ In support, plaintiffs cite an analysis of the Project prepared for AMHS, which stated in part,

It is possible that extirpation of ferry service from [Northern Lynn Canal (“NLC”)] could cause ferry service to deteriorate. If the ferry capacity freed from NLC is redeployed elsewhere in the system, the result is likely to be a decline in load factors, and an increase in the subsidy appropriation needed from the state.

⁶⁶Doc. 67 at pp. 16-17.

⁶⁷AR 20000.

⁶⁸AR 20284.

⁶⁹Doc. 95 at p. 3.

If the Legislature requires AMHS to operate without an subsidy increase, the loss of cross-subsidy from profitable NLC routes could require service elsewhere to be curtailed to below levels existing before the Skagway-Juneau highway made NLC ferry service redundant.⁷⁰

Defendants do not respond to plaintiffs' arguments. Because defendants' reasons for not considering plaintiffs' proposed alternative apply to every alternative considered in the FEIS, defendants' explanations are contrary to the evidence and so implausible that they cannot be "ascribed to a difference in view or be the product of agency expertise."⁷¹ Accordingly, the FEIS failed to satisfy NEPA's requirements "to consider or properly reject proposed alternatives."⁷²

Plaintiffs next argue that the FEIS violated NEPA by presenting a misleading analysis of user benefits and skewing its comparison of alternatives in favor of road alternatives by relying on unrealistic frequency delay analysis and user costs. The court need not decide this issue because it has determined that there are other bases for finding that the FEIS does not satisfy NEPA's requirements.⁷³ Plaintiffs' arguments and evidence on this issue can be submitted to FHWA and made part of the administrative record if and when defendants conduct a new NEPA analysis for this Project.⁷⁴

B. Plaintiffs' Claims Under Other Statutes

In addition to their arguments that defendants violated NEPA, plaintiffs further argue that the Forest Service violated the National Forest Management Act by failing to analyze feasible alternatives to constructing a road through old-growth habitat reserves. Plaintiffs also contend that FHWA violated the APA by approving a road that may cause eagles to abandon their nests which amounts to a taking under the Bald Eagle

⁷⁰AR 6122.

⁷¹*Lands Council*, 395 F.3d at 1026.

⁷²*Northern Alaska Environmental Center*, 457 F.3d at 979.

⁷³*Lands Council*, 395 F.3d at 1032.

⁷⁴*Id.* at 1030.

Protection Act, and that FHWA violated the Endangered Species Act by failing to initiate formal consultation regarding steller sea lions.

The court need not address the above issues because it has determined that there are other bases for rejecting the ROD and enjoining the Project. Given the complexities of the above issues, the court declines to decide them absent the need to do so.⁷⁵ Plaintiffs may, of course, raise the above claims if and when defendants conduct a new NEPA analysis for this Project. Furthermore, compliance with this order and NEPA will likely involve either the preparation of a new or supplemental EIS, which could result in the selection of a different alternative, in which case plaintiffs' arguments could be moot.

The court further notes that based on the administrative record presented in this case, the current status of the ferry system and its capacity to meet transportation demands in Lynn Canal is unclear. It is likely that transportation demands in the Lynn Canal have changed in the twenty plus years since the EIS process for the Project was initiated. Ferry service in Lynn Canal has also changed during the EIS process. In fact, intervenor-defendant suggests that the level of ferry service reflected in the "No Action" alternative in the FEIS "reflects a 100% improvement from the service outlined at the start of the project,"⁷⁶ which begs the question of whether the goal of improving surface transportation to and from Juneau in the Lynn Canal has already been met, but that issue is not before this court. Should defendants conduct a new NEPA analysis for the

⁷⁵*Lands Council*, 395 F.3d at 1030.

⁷⁶Doc. 85 at p. 7. As support for its argument, intervenor-defendant states:

"Early reports on AMHS service in Lynn Canal called out a 'low of 3-4 runs per week from October to April to a high of 7-8 runs weekly from June to August.' The SDEIS and FEIS reflect improvements in service of 12 trips per week May through September and 7 trips weekly during October through April. Averaging those figures results in a net increase from 4.7 round trips per week in the 1990's (per the 10 month window provided in the Engineering Reconnaissance Report) to 9.1 round trips per week as reflected in the FEIS (full year calculation – if calculated over the same 10 months as estimated in the Engineering Reconnaissance Report, the round trips per week would average 9.5)."

Project, the court directs them to supplement the record in the involved agencies so as to permit informed decision making.⁷⁷

C. Remedies

NEPA Claim. In addition to a declaratory judgment that the Project's FEIS violated NEPA, plaintiffs request the court to vacate FHWA's 2006 Record of Decision and "enjoin any and all activity related to construction of the project."⁷⁸ Defendants argue that the court should deny injunctive relief because "[n]o actual construction has been commenced and to Defendants' knowledge no contracts have yet been entered by the State for that construction."⁷⁹ Defendants further contend that the State of Alaska will not enter any contracts for construction until the State receives "necessary permits, including permits from the U.S. Army Corps of Engineers."⁸⁰ The court notes that the Corps of Engineers has now issued a permit to Alaska DOT authorizing the discharge of dredged and fill material into waters of the United States for construction of the proposed road and ferry project.⁸¹ Defendants finally argue that the public interest supports denial of injunctive relief because the State has determined that the Project is in the public interest.⁸²

Defendants' arguments are unavailing because they fail to address "the traditional balance of harms analysis" for injunctive relief.⁸³ "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of

⁷⁷*Lands Council*, 395 F.3d at 1030 n.10.

⁷⁸Doc. 67 at p. 34.

⁷⁹Doc. 81 at p. 32.

⁸⁰*Id.*

⁸¹Doc. 99, Exh. 1.

⁸²Doc. 81 at pp. 32-32.

⁸³*National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001) (citations and quotation omitted).

equities tips in his favor, and that an injunction is in the public interest.”⁸⁴ As such, “a court must balance the competing claims of injury” in determining whether injunctive relief is appropriate.⁸⁵

Here, defendants fail to allege a claim of injury, while plaintiffs claim that “[c]onstruction and operation of the proposed road extension and shuttle ferry system will cause irreparable harm to members of the plaintiff groups, who rely on the Lynn Canal and Berners Bay areas for recreational, subsistence, and commercial uses.”⁸⁶ Plaintiffs further contend that the Project “will result in the loss of old-growth habitat, harm wildlife, and dramatically affect the roadless area character and values of the area” irreparably.⁸⁷ “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”⁸⁸ “When the ‘proposed project may significantly degrade some human environmental factor,’ injunctive relief is appropriate.”⁸⁹

Based on the above standards, plaintiffs have made the requisite showing for injunctive relief. The likelihood of the Project’s adverse effects on the environment is not uncertain. The FEIS itself confirms that the proposed alignment for Alternative 2B would result in the loss of 70 acres of wetlands and 428 acres of terrestrial habitat,

⁸⁴*Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008).

⁸⁵*Amoco Prod. Co. Village of Gambell*, 480 U.S. 531, 541 (1987).

⁸⁶Doc. 67 at p. 33.

⁸⁷*Id.*

⁸⁸*Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987).

⁸⁹*National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001) (quoting *Alaska Wilderness Recreation & Tourism Assoc. v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995)).

including 286 acres of old-growth forests.⁹⁰ “What is uncertain is the extent of the likely environmental injury, and the impact of the proposed mitigation measures.”⁹¹

Based on the record presented in this case, the court concludes that defendants have not complied with NEPA. More specifically, the FEIS for the Project violated NEPA by failing to consider an alternative for improved ferry service using existing ferries and terminals. “[T]he policies underlying NEPA ‘weight the scales in favor of those seeking the suspension of all action until the Act’s requirements are met.’”⁹² Accordingly, the court will vacate FHWA’s Record of Decision and enjoin all action on the Project which is dependent on a valid EIS until defendants satisfy their NEPA obligations.

NFMA Claim. In their motion for summary judgment, plaintiffs also request the court to vacate the Forest Service’s March 2006 decision approving the right-of-way easement for the construction, operation, and maintenance of the Project.⁹³ Plaintiffs’ request is based on their claim that the Forest Service violated NFMA “by failing to analyze feasible alternatives to constructing a road through old-growth habitat reserves.”⁹⁴ For the reasons discussed above, the court has declined to rule on the merits of plaintiffs’ claim under NFMA. However, based on the fact that the Forest Service granted the right-of-way easement for the construction, operation, and maintenance of the Project which has now been stayed, and the fact that the right-of-way easement incorporates by reference the terms and conditions of the FEIS and ROD which the court vacated herein, the court shall remand the right-of-way easement to the

⁹⁰AR 30268.

⁹¹*National Parks & Conservation Ass’n*, 241 F.3d at 739.

⁹²*Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984) (quoting *Alpine Lake Protection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975)).

⁹³Doc. 70, exh. 65.

⁹⁴Doc. 67 at p. 22.

Forest Service for its reconsideration in light of the court's stay and its finding that the FEIS and ROD violate NEPA.

V. DISCUSSION – MOTION AT DOCKET 99

At docket 99 plaintiffs ask the court to permit them to file a supplemental complaint advancing a claim against the United States Army Corps of Engineers (“Corps”) based upon its approval of a permit on June 18, 2008. According to the supplemental complaint, the permit is based on a record of decision which relies on the FEIS.⁹⁵ The Corps is not a party to this lawsuit.

Plaintiffs commenced this action on August 16, 2006.⁹⁶ The Administrative Record was filed on January 29, 2007.⁹⁷ Pursuant to D. Ak. LR 16.3, a briefing schedule calling for the completion of all briefing not later than April 16, 2007,⁹⁸ nearly two years ago. The date for completion of the briefing was extended to July 25, 2007, at the parties' request.⁹⁹ Thereafter there was extensive motion practice concerning the augmentation of the record and adjusting the briefing schedule. The court eventually granted in part and denied in part the request to augment the record.¹⁰⁰ The result was that the amended administrative record was filed on January 18, 2008,¹⁰¹ which led to another request to extend the time for filing plaintiffs' opening brief until March 6, 2008, which was approved by the court.¹⁰² Responses to plaintiffs' opening brief were filed on May 20, 2008, by defendants and May 30, 2008, by the intervenor-defendant. When

⁹⁵Doc. 99-6 at ¶ 9.

⁹⁶Doc. 1.

⁹⁷Doc. 16 (75 days from January 29, 2007).

⁹⁸Doc. 17.

⁹⁹Doc. 19.

¹⁰⁰Doc. 60.

¹⁰¹Doc. 61.

¹⁰²Doc. 64.

the plaintiffs filed their reply brief on July 1, 2008, briefing was finally completed somewhat more than fourteen months later than originally scheduled by the court.

In the meantime, on June 11, 2008, plaintiffs had moved to amend their complaint.¹⁰³ After that motion was fully briefed, it was denied,¹⁰⁴ but not before plaintiffs filed their motion to file a supplemental complaint.¹⁰⁵ It is that motion which is presently before the court.

As the tortured procedural history of this case well illustrates, litigation can spin out of temporal control when the parties continue to shift or expand its focus. The substantive motion discussed in the preceding section of this order required the court to review thousands of pages of materials, and now plaintiffs want to add additional matters for the court to consider. This comes at a time when the court has determined that the FEIS is inadequate and the remedy is to send this matter back for compliance with NEPA. Moreover, the court's disposition of the main motion effectively halts any activity which is dependent upon compliance with NEPA, so it appears the relief that might be obtained through examination of the claims advanced in the "supplemental" complaint has effectively been granted. The Corps permit is based on the FEIS. The court has ruled that the FEIS is inadequate. Under these circumstances, this court declines to exercise its discretion to permit the filing of the supplemental complaint.

Furthermore, the court notes that the Corps permit, which authorizes Alaska DOT to perform work only in conjunction with the Project, sets forth circumstances which could require a reevaluation of the Corps' decision on the permit, which include:

- a. You fail to comply with the terms and conditions of this permit.
- b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

¹⁰³Doc. 86.

¹⁰⁴Doc. 104.

¹⁰⁵Doc. 99.

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.¹⁰⁶

The court assumes without deciding that the court's stay of the Project and finding that the FEIS and ROD violate NEPA could qualify as circumstances requiring a reevaluation of the Corps' decision to issue the permit.

VI. CONCLUSION

For the reasons set out above, plaintiffs' motion at docket 67 for summary judgment is **GRANTED IN PART**. Plaintiffs' motion is **GRANTED** to the extent that it requests the court to enter a declaratory judgment that the Environmental Impact Statement for the Project violates the National Environmental Protection Act. For the reasons stated herein, the court declines to decide plaintiffs' claims that defendants have violated the National Forest Management Act, Bald Eagle Protection Act, and Endangered Species Act. Consequently, plaintiffs' motion at docket 67 is **DENIED** without prejudice as to those claims.

It is **FURTHER ORDERED** that the Record of Decision issued by FHWA in April 2006 is **VACATED**, and the decision granting the right-of-way easement issued by the Forest Service on May 22, 2006, is **REMANDED** to the Forest Service for its consideration in light of this order.

It is **FURTHER ORDERED** that all construction on the Project, as well as all activities which are dependent upon the issuance of a valid Environmental Impact Statement, are enjoined until such time as defendants demonstrate full compliance with 42 U.S.C. § 4332, its implementing regulations, and this order.

It is **FURTHER ORDERED** that plaintiffs shall file a proposed form of judgment within ten (10) days of the filing of this order.

Lastly, the motion at docket 99 is **DENIED**.

DATED at Anchorage, Alaska, this 13th day of February 2009.

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

¹⁰⁶Doc. 99, exh. 1 at p. 7.