

# SOUTHERN ENVIRONMENTAL LAW CENTER

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*Via Electronic Email and U.S. Mail*

Colonel Steven J. Roemhildt  
District Engineer and Commanding Officer  
Mobile District Corps of Engineers  
Attn: Courtney Shea  
Birmingham Field Office  
218 Summit Parkway, Suite 222  
Homewood, AL 35209

Re: Public Notice SAM-2011-01079-CMS, Proposed Birmingham Northern Beltline

Dear Colonel Roemhildt:

The Southern Environmental Law Center submits these comments on behalf of Black Warrior Riverkeeper concerning the above referenced joint public notice ("JPN") issued by the U.S. Army Corps of Engineers ("the Corps") and the Alabama Department of Environmental Management ("ADEM") on October 12, 2011. The Alabama Department of Transportation ("ALDOT") has applied for a Section 404 permit under the Clean Water Act ("CWA") for a 3.4 mile section (stretching from SR 79 to SR 75) of the proposed 52-mile long Northern Beltline. We urge the Corps to deny this permit as it violates federal law.

The 3.4 mile project is flawed in seven major respects. First, this proposed project involves an improper segmentation because the 3.4-mile segment does not have "independent utility." Second, the permit fails to comply with the Environmental Protection Agency's ("EPA") 404(b)(1) Guidelines because the Corps has not demonstrated that less damaging practicable alternatives do not exist. Third, neither ALDOT nor the Corps has prepared adequate documentation under the National Environmental Policy Act ("NEPA") to support this project. Fourth, ALDOT has not provided ADEM with sufficient information to show that the project would not impact water quality. Fifth, the proposed Beltline cannot survive the Corps' own public interest review criteria for 404 permits. Sixth, the JPN does not adequately describe the mitigation that is being proposed to compensate for the tremendous landscape-scale impacts that would occur if the Beltline were to be constructed, starting with the application for the initial segment. Finally, ALDOT has not minimized and avoided these detrimental impacts to the aquatic environment.

## **BACKGROUND**

In 1997 ALDOT completed a Final Environmental Impact Statement ("FEIS" or "EIS") for the Northern Beltline. The highway proposed would have been four lanes wide and would

link Interstate 459 in Bessemer, Alabama to Interstate 59 in Trussville, Alabama. In reviewing the project, the EPA commented that ALDOT had selected the most environmentally destructive alternative as its preferred route for the proposed highway (see below). Furthermore, the EIS did not evaluate indirect and cumulative impacts as mandated by federal law.

Nonetheless, ALDOT issued its record of decision in 1999. Because more than three years elapsed before ALDOT moved forward with the project, ALDOT was required under Federal Highway Administration ("FHWA") regulations to reevaluate the conclusions reached in the EIS. Instead of reevaluating the entire 52-mile long Beltline, ALDOT only reevaluated the 3.4 mile section of the proposed highway that is the subject of this permit action. ALDOT completed this partial reevaluation in 2006. In the reevaluation, ALDOT changed the proposed road from a four-lane highway to a six-lane highway, but never analyzed the indirect and cumulative impacts associated with the highway. In 2011, ALDOT produced a *Summary of Preliminary Analysis Conducted for the Reevaluation of Project HPP-1602(530)(529)(502)(531)(532) Northern Beltline* ("Summary") which merely promised to reevaluate the entire Beltline (including the SR 79 to SR 75 section) and incorporate an indirect and cumulative impact study in that reevaluation.

The Beltline's project purpose stated in both the EIS and in the JPN, in part, is to enhance cross-region accessibility. However, the Metropolitan Planning Organization ("MPO") estimates that the Northern Beltline will only absorb between 1-3% of the current traffic from Birmingham off of I-20/59.<sup>1</sup> In addition, the road will not connect on the eastern side with the southern beltline, I-459. Thus, it may alleviate even less traffic congestion than predicted. In fact, in some areas, such as Trussville, it is predicted that the Beltline will increase traffic. FEIS 2-25.

Furthermore, the purpose and need of both the EIS and JPN also state that the Beltline will stimulate economic development in the area. FHWA currently estimates that the cost of the Northern Beltline will be \$4.7 billion, or \$90 million a mile.<sup>2</sup> Eighty percent of this road will be funded by the Appalachian Highway Development Fund; twenty percent (\$940 million) will be financed by ALDOT. This is not including the cost that local cash-strapped governments will have to pay for more infrastructure such as new water and sewer lines to create even the potential for economic development. To date, there have been no studies by ALDOT or FHWA that show this road will actually stimulate growth. If there is no evidence that such development will follow the project, then there is no economic justification for the project. If, on the other hand, such growth is reasonably foreseeable, then ALDOT and the Corps have not analyzed the indirect and cumulative impacts that will follow this project.

While the justifications for the project are questionable, the potential impact to the environment is not. The section between SR 79 and SR 75 that the Corps is currently proposing to permit through Self Creek and surrounding streams, part of the sensitive headwaters that feed the Locust Fork of the Black Warrior River, a river of both state and national significance. The National Park Service rated the Black Warrior's three forks in the top 2% of U.S. streams for

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<sup>1</sup> Regional Planning Commission of Greater Birmingham. *Public Involvement Meeting Documentation*. April 2010, p. 4-17.

<sup>2</sup>FHWA, <https://fhwaapps.fhwa.dot.gov/foisp/publicActive.do> (last visited Aug. 3, 2011).

"outstandingly remarkable values."<sup>3</sup> *Boating* magazine called the Black Warrior River one of America's best kept secrets for recreational boating.<sup>4</sup>

In addition, the Beltline is now routed through the upper Cahaba River watershed which in 2007, the Sierra Club designated as one of "52 Most Important Places to Protect within the Next 10 Years."<sup>5</sup> The 2007 edition of the National Geographic College Atlas of the World names Southeastern Rivers among 6 global examples of biodiversity, and specifically names the Cahaba River as significant, noting that it has more fish species per mile than any other river in North America. Further, the 2004 designation as "Critical Habitat" by the Fish and Wildlife Service ("FWS") confirms the importance of the Cahaba River as essential for survival of imperiled aquatic wildlife.

The Black Warrior and Cahaba River basins also serve as the main sources of drinking water for the Birmingham metropolitan area, provide valuable freshwater habitats of global significance and are sources of fishing, recreation and beauty that add great value to the quality of life of the region's residents. In short, the waters that would be impacted by the proposed project are of particular importance to the Black Warrior and Cahaba ecosystems and the Corps should treat them accordingly.

Both the FWS and the EPA have discussed how damaging this Beltline will be on the environment. In four different letters, the FWS has stated its concern over the substantial indirect impacts of the entire Beltline. In its letter of July 16, 2009, FWS stated:

[b]ased on this anticipated growth [generated by the Northern Beltline], the Service is concerned that the listed species in the area could experience substantial adverse impacts as a result of the direct and indirect effects of the project caused by secondary development, habitat fragmentation, population isolation, road kills, increased predation and road right-of-way maintenance activities.... The Service believes that it is reasonable to expect long-term expansive secondary development as a logical extension of the project and that such development would disrupt the normal behavioral patterns such as feeding, mating, nesting, and sheltering of resident wildlife.

(See Exhibit I). As explained above, on September 8, 1997, the EPA noted that the preferred alignment for the Northern Beltline "has the most impacts to natural resources." The letter noted that the road would cross streams, impact 4,050 acres of forest within the right-of-way, destroy up to 68 acres of wetlands at 114 different sites, and have the "greatest impact on wildlife of all the alignments discussed." (Note: The FEIS states that actually 25 streams will be impacted. 4-63.) Finally, the letter noted that the road would "likely generate a high level of secondary development and associated impacts to the environment." *Id.* (See Exhibit II). Despite these flaws, as well as the others listed above, ALDOT is intent with moving forward with this project segment by segment.

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<sup>3</sup> Eastern Fly Fishing Magazine (Fall 2005).

<sup>4</sup> Boating magazine (Sept. 2005).

<sup>5</sup> America's Wild Legacy (2007) (available at [www.sierraclub.org/52places](http://www.sierraclub.org/52places)) (last visited Nov. 9, 2011).

## DISCUSSION

### I. The Beltline Section between SR 79 and SR 75 does Not Have Independent Utility

The Corps cannot separately issue 404 permits for segments of the Beltline with no independent utility when these segments are related to other segments of the Beltline that also require 404 permits. The segment between SR 79 and SR 75 has no independent utility and is clearly related to other segments of the Beltline that need 404 permits. "A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multiphase project that depend upon other *phases* of the project do not have independent utility..." CFR 33 Part 330; *General Condition Definition*. In addition, "All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA [Department of Army] permit would be required should be included in the same permit application. District engineers should reject, as incomplete, any permit application which fails to comply with this requirement." 33 CFR § 325.1(d)(2).

This 3.4 mile segment would not be built if the Northern Beltline was not constructed. Even the JPN explains:

*The project is part of a larger proposal to construct a 52-mile expressway from I-59/20 in Bessemer to I-59 north of Trussville. The applicant states that the Beltline will enhance cross-region accessibility and stimulate economic development in the area. This portion of the project will link two state highways, having SR 79 and SR 75 serve as logical termini for the project.*

JPN, SAM-2011-01079-CMS, p. 1 (emphasis added). This segment in and of itself would not fulfill the purpose of enhancing cross-region accessibility and stimulating economic development. Even the public notice affirms that the "*Beltline*" (not this segment by itself) will fulfill this purpose. Further, this segment has no logical termini; the JPN describes the segment as starting "west of" S.R. 79 and terminating "east of" S.R. 75. Maps in the 2006 Reevaluation indicate that this segment will reach for a little less than a mile to the west of 79 and to the east of 75. This effectively turns the segment into a road to nowhere, since it does not originate or terminate by intersecting with any existing roadways.

In the 2006 Reevaluation and in the JPN, the benefits of just the 3.4 mile segment are never discussed, nor are there ever any discussions about only this segment fulfilling the project purpose. Repeatedly, this segment is spoken of as a "phase" of building the Northern Beltline, in relation to other phases of the Beltline. In a June 26, 2009 memo, Don Chappell of FHWA states the following to Kenneth Wester of the Appalachian Regional Commission: "This 50 mile corridor has been broken into 5 segments and assigned to consultants for preliminary design... The reevaluation document for the segment from SR-79 to SR-75 was approved on 8/17/2006." He goes on to describe each segment in detail. In a September 7, 2007 letter to Representative Bachus, Mark Bartlett of the Alabama Division of FHWA writes regarding the Northern Beltline, "To date, only one small section from Alabama Highway 75 to Alabama Highway 79 has had a reevaluation approved." ALDOT's 2011 Summary divides the project into sections and gives the construction schedule ("phases" of the Northern Beltline) (see below) of each of these segments and states, "The only section of the project that has advanced to ROW acquisition is

the SR 79 to SR 75 project.... The SR 79 to SR 75 section of the project would be the first to advance to construction with a date of 2012.”

<b>Project (Section)</b>	<b>ROW Start</b>	<b>CST Start</b>
I-459/59/20 to CR 46	2031	2032
CR 46 to US 78	2031	2032
US 78 to CR 77/Mt. Olive Road	2024	2026
CR 77/Mt. Olive Road to I-65	2019/ 2021	2021/ 2022
I-65 to US 31	2013	2014
US 31 to SR 79	2013	2014/ 2015
SR 79 to SR 75	2007	2012
SR 75 to I-59	2025	Not Programmed

Under NEPA, the Corps must also assess portions of a project beyond the regulated activity “where the environmental consequences of the larger project are essentially products of the Corps permit action.” 33 C.F.R. Part 325 app. § 7(b)(2). Determining whether the Corps’ scope of review extends beyond the regulated activity turns on the specific facts of the case. It also requires evaluating the regulated activity in relation to other portions of the overall project, such as the other segments of the road that will not be built without this segment. For instance, one factor in determining the Corps’ control is “whether or not the regulated activity comprises ‘merely a link’ in a corridor type project (e.g., a transportation or utility transmission project).” Part 325 app. § 7(b)(2)(i).

[F]or those activities that require a DA permit for a major portion of a transportation or utility transmission project, so that the Corps permit bears upon the origin and destination as well as the *route of the project* outside the Corps regulatory boundaries, the scope of analysis should include those portions of the project outside the boundaries of the Corps section 10/404 regulatory jurisdiction. To use the same example, *if 30 miles of the 50-mile transmission line crossed wetlands or other “waters of the United States,” the scope of analysis should reflect impacts of the whole 50-mile transmission line.*

Part 325 app. § 7(b)(3) (emphasis added). By permitting this one segment, the Corps determines the “route of the project” especially since this segment is at the top of the arch of the Northern Beltline. Without this segment, the Beltline could not be built as there would not be a Beltline but merely two roads to nowhere. This entire Beltline will affect 68 acres of wetlands at 114 different sites not merely the 1.66 acres that the Corps is suggesting that the permit will affect.

Further, evaluating the impacts of this road segment by segment does not allow for a full analysis of the overall direct impacts of the Beltline as required by law, nor does it allow for a cumulative or indirect impacts analysis of the entire road. Piecemealing also limits the discussion of analyzing the “least damaging practicable alternative,” as the 404(b)(1) Guidelines require.

**II. ALDOT's Section 404 Permit Application Fails to Satisfy the CWA and the 404(b)(1) Guidelines and Must Therefore Be Denied.**

The CWA and the EPA's Section 404(b)(1) Guidelines dictate the circumstances under which the Corps may permit discharges of dredged or fill material into wetlands or other waters. See 33 U.S.C. § 1344; 40 C.F.R. § 230.10. These EPA "Guidelines" are, in fact, binding regulations that impose substantive standards for evaluating permit applications. The Corps' own regulations recognize that the Corps must deny a Section 404 permit if the discharge for which a permit is sought would violate the Guidelines. 33 C.F.R. § 320.4(a)(1).

The 404(b)(1) Guidelines prohibit issuance of a permit where:

- (i) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences; or
- (ii) The proposed discharge will result in significant degradation of the aquatic ecosystem . . . ; or
- (iii) The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or
- (iv) There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.

40 C.F.R. § 230.12(a)(3). This permit application fails to meet all four of these regulatory criteria. Most notably, multiple alternatives to the Northern Beltline project as proposed are not only practicable, but preferable from both an environmental and economic standpoint. In addition, the Northern Beltline project's impacts have yet to be fully analyzed and addressed. Accordingly, the Corps cannot lawfully permit this project.

**A. ALDOT and the Corps Have Failed to Examine Whether Other Practicable Alternatives Exist that Would be Less Environmentally Damaging.**

The Corps must deny a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). An alternative "is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose." 40 C.F.R. § 230.10(a)(2). The Corps and EPA have explained in a Regulatory Guidance Letter that "the proposed discharge . . . must represent the *least environmentally damaging practicable alternative* in order to comply with the alternatives analysis requirement of the Guidelines[.]" RGL 92-2, Water Dependency and Cranberry Production, June 26, 1992 (emphasis added).

Where a discharge is proposed for a wetland or other special aquatic site, all practicable alternatives to the proposed discharge that do not involve a discharge to the wetland "are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3). In addition, if the activity associated with a discharge to a wetland does not require access or proximity to or siting in a wetland (*i.e.*, is not "water

dependent”), practicable alternatives that do not involve wetland sites “are presumed to be available, unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3).<sup>6</sup>

In addition, an applicant for a Section 404 permit for a non-water-dependent project such as this must “clearly demonstrate” that no practicable alternatives exist that do not require a discharge into wetlands or other special aquatic sites. 40 C.F.R. § 230.10(a)(3). See *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169 (D. Md. 1983), *aff’d*, 725 F.2d 677 (4th Cir. 1984). “[T]he applicant and the [Corps] are obligated to determine the feasibility of the least environmentally damaging alternatives that serve the basic project purpose. If such an alternative exists . . . the CWA compels that the alternative be considered and selected unless proven impracticable.” *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1188-1189 (10th Cir. 2002). Under the CWA, “the test is whether the alternative with less wetlands impact is ‘impracticable,’ and the burden is on the Applicant . . . with independent verification by the [Corps], to provide detailed, clear and convincing information *proving* impracticability.” *Id.* at 1186 (emphasis in original).

To begin, ALDOT’s project purpose of the proposed project is flawed. To implement the Guidelines properly and identify the least environmentally damaging practicable alternative, the Corps must begin by setting forth a correct statement of a project’s “basic purpose.” See 40 C.F.R. § 230.10(a)(3); 33 C.F.R. Part 325, App. B(9)(b)(4). Courts have agreed that determining the project’s purpose is “central” to the Corps’s analysis, as it dictates both the range of practicable alternatives and the applicant’s burden of proof. See *Nat’l Wildlife Fed’n v. Whistler*, 27 F.3d 1341, 1345 (8th Cir. 1994). The Northern Beltline’s purposes as identified in the project’s FEIS are “to increase cross-region accessibility and for its potential to stimulate economic development.” FEIS at 1-1. Neither ALDOT nor FHWA have produced evidence that the Beltline will “stimulate economic development.”

Unlike the 1960s when this project was first conceptualized, and even in 1997 when it was last studied, conventional thinking about the need for and the beneficial effects of large highway projects has changed dramatically. National studies now suggest that often the “growth” from such projects is not new investment but rather a redistribution of ongoing growth that would have occurred elsewhere in the region.<sup>7</sup> These premises are borne out by observing examples such as Greenville, South Carolina<sup>8</sup>, and Fort Wayne, Indiana<sup>9</sup>, both of which built

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<sup>6</sup> The Guidelines “couple a general presumption against all discharges into aquatic ecosystems with a specific presumption that practicable alternatives to the fill of wetlands exist.” *Hough v. Marsh*, 557 F. Supp. 74, 83 (D. Mass. 1982). “[A]n applicant . . . must rebut both of these presumptions in order to obtain a permit.” *Bersani v. Robichaud*, 850 F.2d 36, 39 (2d Cir. 1998) (emphasis added).

<sup>7</sup> Marlon G. Boarnet, *Highways Economic Productivity: Interpreting Recent Evidence*, October 1995; 24 (available at <http://www.uctc.net/papers/291.pdf>).

<sup>8</sup> “No major economic development can be attributable to the Southern Connector.” *Transportation Projects Impact Case Study*. US Strategic Highway Research Program. <http://transportationforcommunities.com/t-pics/#app=19ba&87c3-selectedIndex=0&511-selectedIndex=0> (last visited May 27, 2011).

<sup>9</sup> I-469 has led to little economic growth in some places and almost none in others. The study attributes this lack of development to the road’s rural setting and the corresponding lack of infrastructure like sewer, tertiary roads, and utilities needed for development along interchanges. *Economic Impacts of Freeway Bypasses on Medium Sized Cities*. Economic Development Research Group. September, 2000; See also

costly beltlines to spur economic growth that never materialized, mainly because they did not have the complimentary infrastructure. (Note: the Northern Beltline is also located on a route with sparse infrastructure.<sup>10</sup>) At the same time, many thriving Southeastern cities do not have complete beltlines, such as Greensboro, Winston-Salem, Charleston, Knoxville, Chattanooga, Tampa, and Orlando. In fact, since 1997 many cities such as Charleston, South Carolina are shelving proposed beltline additions because of their high costs and marginal benefits.

Even if the Corps were to focus just on the portion of the project purpose of “increase[ing] cross-region accessibility,” the Applicant and the Corps have done a woefully inadequate job of demonstrating how the proposed Northern Beltline route would be the least damaging practicable alternative. As explained above, in its September 8, 1997 letter, the EPA noted that the preferred alignment for the Northern Beltline “has the *most impacts* to natural resources.”

Additionally, as mentioned above, the evidence shows that the proposed six-lane highway is not going to absorb traffic and in some locations, it may even increase traffic.<sup>11</sup> Yet the Applicant and the Corps failed to consider other options such as improving existing roads (such as Malfunction Junction), increasing the connectivity of the existing network (i.e. connecting Corridor X to I-59/20 instead of stopping it at Hwy 31), or constructing a smaller parkway. These types of alternative road projects must be considered to determine if they would meet the proposed project purpose, are practicable, and would be less harmful to aquatic resources.

Furthermore, ALDOT never examined whether multimodal forms of transit could serve as practicable alternatives to the proposed project. The economic and transportation benefits of multimodal forms of transportation in the Northern Beltline region has never been studied but must be examined to “clearly demonstrate” that no practicable alternatives exist. Virtually all of the 50 largest metropolitan areas in the country are planning transit expansions.

The inadequacy of the ALDOT FEIS does not excuse the Corps from its independent obligation to analyze and select the less-damaging alternatives that the CWA and its implementing regulations presume are available. According to the 404(b)(1) Guidelines, “the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines.” 40 C.F.R. § 230.10(a)(4). But, where the NEPA documents “may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines[,]” “it may be necessary to supplement these NEPA documents with this

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<http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20080720/LOCAL/807200426/> (last visited Aug. 3, 2011).

<sup>10</sup> “Along the Northern Beltline...the one big question mark is how do you get infrastructure, mainly sewer, to those areas. You just cannot have a lot of development on septic tanks and expect to see the sort of things you've seen on I-459 repeated on the Northern Beltline...” Tom Howard, head of southeast development of USS Real Estate property, *On the Record: Tom Howard of USS Real Estate Talks About the Largest Landowner in County*, BIRMINGHAM NEWS, March 20, 2011.

<sup>11</sup> See note 1.

additional information.” *Id.* Where the existing NEPA documents do not contain sufficient information, the Corps has authority to require ALDOT to provide the additional information needed for “an informed, considered analysis of the environmental impact” of project alternatives.” *Lakewood Assocs. v. United States*, 45 Fed. Cl. 320, 332-33 (Ct. Cl. 1999). The Corps must require ALDOT to provide the information on practicable alternatives described above before it can legally proceed with this permit action.

**B. “Sufficient Information to Make a Reasonable Judgment as to Whether the Proposed Discharge Will Comply With the Guidelines” Does Not Exist.**

Neither ALDOT nor the Corps has ever studied the indirect and cumulative impacts of the project. Thus, ALDOT and the Corps have failed to demonstrate the impact that the proposed project will have on the structure and function of the aquatic system. This error has undermined the alternatives analysis as well as the requirement to show that the project has avoided and minimized the direct, indirect, and cumulative impacts to the maximum extent practicable. The Guidelines require the Corps to make certain factual determinations addressing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment. *See* 40 C.F.R. § 230.11. Among these factual determinations is the following provision:

Aquatic ecosystem and organism determinations. Determine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms. Consideration shall be given to the effect at the proposed disposal site of potential changes in substrate characteristics and elevation, water or substrate chemistry, nutrients, currents, circulation, fluctuation, and salinity, on the recolonization and existence of indigenous aquatic organisms or communities.

40 C.F.R. § 230.11(e) (emphasis added). According to the Guidelines, these factual determinations shall be used in conducting the alternatives analysis and in determining whether the proposed discharge includes all appropriate and practicable avoidance and minimization measures. *See* 40 C.F.R. § 230.11 (saying “[s]uch factual determinations shall be used in § 230.12 in making findings of compliance or non-compliance with the restrictions on discharge in § 230.10”).

There is no evidence that ALDOT or the Corps has ever studied the indirect effects on the aquatic ecosystem. As stated above, the FWS has repeatedly expressed concern over the indirect impacts of the construction of the Northern Beltline on threatened and endangered species. Even in the FWS’s most recent October 4, 2011 letter, they state, “the Service is extremely concerned that the area could, depending on the exact route selected, experience substantial adverse impacts as a result of the direct and indirect effects.” Similarly, there is no evidence that ALDOT or the Corps ever considered the cumulative impact of such development on the environment. The Corps cannot legally complete its permit analysis until it secures this information.

**III. Until ALDOT Supplements the 1997 EIS, the Corps Cannot Legally Grant a Permit for the Proposed Project.**

**A. To Comply with NEPA and to Provide the Information Needed to Comply with the 404(b)(1) Guidelines, ALDOT Must Provide a Supplemental EIS for the Entire Project.**

In order for the Corps to grant this 404 permit, it must have sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Guidelines. And NEPA requires agencies to prepare an EIS before undertaking a major federal action that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Northern Beltline, which this segment is a part, is a 52 mile road that in 1997 was projected to severely impact aquatic resources. The road will be routed through the sensitive headwaters of both the Cahaba and Black Warrior rivers. Even if the Beltline is built with the best possible design, construction, and land management practices, there could be severe degradation to the rivers and to tributaries by the Beltline's indirect and cumulative development impacts. The science regarding impacts of land use on watershed ecosystems and water resources supports the concern that a highway of this magnitude and the intensive growth it is intended to create cannot be built without negative impacts to the watershed. These impacts need to be fully analyzed and vetted in an EIS, not an Environmental Assessment.

NEPA requires that every EIS must discuss the adverse environmental effects of the proposed action and the alternatives to the proposed action which may avoid or minimize these adverse effects. 42 U.S.C. § 4332(2)(C), (E). The "effects" that must be discussed in an EIS include, among other considerations, the direct environmental impacts of the proposed action, the indirect effects of the proposed action, and the cumulative impacts of the proposed action. 40 C.F.R. § 1502.16(a) – (h); 40 C.F.R. § 1508.27(b)(7). Although ALDOT and FHWA completed an EIS in 1997 and a Reevaluation of this 3.4 mile segment in 2006, they have never studied the indirect and cumulative effects of the project. The Corps cannot depend on these faulty documents.

In addition, ALDOT segmented the Reevaluation, making it invalid. Segmentation is not allowed under NEPA regulations, thereby precluding the advancement of a section of the project that cannot stand on its own as a reasonable transportation investment. 40 C.F.R. § 1508.27(b)(7). Highway projects analyzed under NEPA must have independent utility, logical termini, and must not foreclose the analysis of alternatives to serve the underlying purpose of and need for the proposed project. 23 C.F.R. § 771.111(f). The 2006 Reevaluation fails all three of these requirements. First, the 3.4-mile segment of the Northern Beltline connecting S.R. 79 with S.R. 75 has no independent utility. Connections between these two roads exist both north and south of the Beltline, including a direct connection roughly a mile south of the proposed Beltline. The Beltline segment here is an unnecessary redundancy. Second, the segment as defined has no logical termini, making it essentially a road to nowhere. (See above at I). Further, evaluating and constructing this segment of the Beltline on its own will necessarily constrain alternatives for future segments of the Beltline or alternative transportation investments.

Another problem with the 1997 EIS is that it is 14 years old and many factors that involve aquatic resources have changed since it was written creating the need for an ALDOT Supplemental EIS or a Corps EIS. The road is now proposed to be six lanes instead of four dramatically increasing the secondary impacts to wetlands and streams. On October 13, 2011, the MPO writes in its public comments regarding the Summary that the "Purpose and Need" need to be revised: "it is very difficult to ascertain from this document...the substantial changes in population, employment and/or travel demand (both existing and forecast) that would necessitate the increase in roadway capacity." The MPO furthers, "The statement 'Although the number of lanes has increased, the construction footprint of the project remains the same...' could be misconstrued by some as suggesting the environmental impacts remain the same. Although the footprint of the roadway may remain the same, the environmental impacts of the project will change with the additional lanes. **One example would be at river crossings with the additional bridge structures.**" (emphasis added) (See Exhibit III). The Corps should certainly not rely on an old document that does not adequately explain the impacts of river crossings.

In addition, the long-term, post-construction impacts of stormwater runoff and other hydrological changes caused by projects like the Northern Beltline are now understood to be the primary impacts to watersheds, exceeding even the impacts caused by construction itself. These significant post-construction impacts were neither acknowledged nor considered in the 1997 EIS. The Birmingham area has continued to grow and develop over the last 14 years. Changes in demographics, population density, and locations of homes and businesses must be taken into account (225 *more* homes and businesses will now be relocated). In their comments to the Summary, the MPO describes one of these altered communities, "There is an area within the triangle created by the system to system interchange between the Northern Beltline and I-22 (Corridor X) that qualifies as an environmental justice area.... We recommend that impacts to this area be appropriately analyzed and documented, and as the ALDOT proceeds that it takes into account these communities' plans in terms of growth and green infrastructure."

The price of the project has skyrocketed, Jefferson County is bankrupt, a number of streams in the path of the footprint have been added to the 303(d) list, Birmingham is now ranked by several sources as one of the dirtiest city in terms of air pollution,<sup>12</sup> and impacts to newly discovered drinking water sources have not been studied. The Corps cannot rely on ALDOT's faulty NEPA documents and must create its own NEPA analysis for this major federal action in order to determine whether "the proposed discharge will result in significant degradation of the aquatic ecosystem" and whether this Beltline is the least damaging practicable alternative.

**B. If ALDOT Does Not Supplement the EIS, the Corps Must, at the Very Least, Wait Until ALDOT has Produced its New Reevaluation for the Entire Road Before Deciding Whether to Issue a 404 Permit**

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<sup>12</sup> <http://www.forbes.com/pictures/mef45ejdj/7-birmingham-hoover-cullman-al> (last visited Nov. 7, 2011); American Lung Association <http://www.stateoftheair.org/2011/city-rankings/most-polluted-cities.html> (last visited Nov. 10, 2011).

ALDOT has promised to complete a Reevaluation of the entire Beltline that will include this 3.4 mile segment and contain a study on the indirect and cumulative effects of the road. *See Summary.* The Corps should at the very minimum wait until this document is published to fully understand the current significant adverse impacts to the structure and function of the aquatic system.

#### **IV. The Discharge Would Cause or Contribute to Violations of Water Quality Standards.**

EPA regulations provide: "No discharge of dredged or fill material shall be permitted if it causes or contributes...to violations of any applicable State water quality standard." 40 C.F.R. § 230.10 (b). ADEM must certify that this segment and this road will not contribute to violations of water quality standards.

First, ADEM does not have the information that it needs to make such a certification. With a faulty and outdated EIS and Reevaluation that do not address indirect and cumulative impacts, ADEM could not possibly make a determination that the indirect and cumulative effects of the Beltline (and of this segment) will not affect water quality standards. Watershed impacts to the Locust Fork of the Black Warrior and Cahaba Rivers will affect one of the Birmingham metropolitan area's primary sources for drinking water and recreation. Runoff from reasonably foreseeable development arising from the Northern Beltline will flow into the Locust Fork, upstream of the Birmingham Water Works Board's identified potential new source for the region's drinking water (the Holt Lake Reservoir). These cumulative impacts should be fully acknowledged, studied, and understood. The 1997 EIS makes no mention of these potential impacts to the quality of drinking water.

In July of 2002, ADEM finalized its FY 2000 303(d) list, Alabama's list of "impaired" waters. That decision classified the Cahaba River as impaired due to "siltation" and "other habitat alteration" as far north (upstream) on the Cahaba River as I-59 and prompted the need for a TMDL study of sediment in the Cahaba River. Scientific evidence and experience in the Cahaba watershed demonstrate that sediment pollution from both construction activities and from post-construction hydrologic changes persist downstream for the entire length of the river and for many decades following a rainfall event.<sup>13</sup> Based on the current plans for the Beltline, on current experience of construction runoff from ALDOT highway projects and on the expected indirect growth impacts, it is highly likely that the Beltline will cause increased sediment pollution into this sediment-impaired stretch of the Cahaba.

Similarly, the Black Warrior Basin has seen a significant number of local waters added to the 303(d) list since the FEIS: Mud Creek, portions of the Locust Fork, Newfound Creek, Village Creek and Valley Creek are all in the development foot print of the Northern Beltline. ALDOT must consider how the direct and indirect effects of the Beltline (during construction and upon

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<sup>13</sup> T.J. Beechie, *et al.*, *Process-based Principles for Restoring River Ecosystems*. BioScience: Vol. 60(3) 209-222 (2010); G.M. Kondolf, *et al.*, *Process-based ecological river restoration: Visualizing three-dimensional connectivity and dynamic vectors to recover lost linkages*. Ecology and Society 11: 5 (2006).

potential development) may affect the health and recovery of these waters. Moreover, Village Creek now has a TMDL for siltation which should be part of any re-evaluation as well.

Even for those pollutant levels that are currently below water quality standards, the Corps and ADEM must take into account the degradation of water quality that would occur as a result of the proposed Northern Beltline. 40 C.F.R. § 230.10(c). Runoff from lawn-related pesticides and petroleum byproducts, increased impervious surface cover, increased erosion and sedimentation from storm water, eutrophication, and changes in temperature and dissolved oxygen in the river due to the removal of vegetation may all occur with increased development.

**V. The Proposed Project Cannot Survive the Public Interest Review.**

Applications for Section 404 permits are subject to the Corps' Public Interest Review requirements set forth at 33 C.F.R. § 320.4. Under the regulation, "the decision whether to issue a permit will be based on an evaluation of the probable impacts, **including cumulative impacts**, of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a)(1). This evaluation requires a balancing test, in which "[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments." *Id.* In making this decision, the Corps must consider all relevant factors, including:

conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

*Id.* Every public interest review must also consider these general criteria:

- (i) The relative extent of the public and private need for the proposed structure or work;
- (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
- (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

33 C.F.R. § 320.4(a)(2).

The Corps' public interest regulations explicitly recognize the importance of wetlands to the public interest, stating that "[m]ost wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 CFR § 320.4(b)(1). Accordingly, the regulations provide that "[n]o permit will be granted which involves the alteration of wetlands identified as important [to the public interest] unless the district engineer concludes . . . that the benefits of the proposed

alteration outweigh the damage to the wetlands resource.” 33 CFR § 320.4(b)(4). *See Shoreline Assoc. v. Marsh*, 555 F. Supp. 169, 179 (D. Md. 1983) (upholding Corps’ denial of permit based on its finding that wetlands were important to the public interest).

Applying the Corps’ public interest analysis, the permit should be denied. The entire 52 mile project could potentially have one of the largest impacts to streams and forests in Alabama in decades. If constructed the entire Beltline will impact dozens of streams, thousands of acres of forests and numerous acres of wetlands. This 3.4 mile segment alone will destroy 1.66 acres of wetlands and 7,004 linear feet of stream bed. The project will impact water quality, including Birmingham’s drinking water, fish and wildlife, recreation such as fishing and hiking opportunities, and aesthetics—all relevant factors under the Corps’ public interest regulations. It will destroy habitat and wetlands on tributaries of the Black Warrior and Cahaba Rivers—rivers of national significance. This project will relocate 520 homes and businesses in total and will have detrimental Environmental Justice impacts. The scope of all the cumulative and indirect impacts are unknown because ALDOT and the Corps have not completed adequate analysis of these impacts.

Further, in this recession where Jefferson County has just declared bankruptcy, the economics of this project do not make sense. The price of this project has exponentially increased, even in the last year. The increase in projected costs—from \$3 billion to \$4.7 billion (\$7,138 per Jefferson County resident)—has also raised the state’s price tag for the entire proposed project to approximately \$1 billion. And, as stated above, this will buy a road that will only relieve an insignificant amount of traffic and is not guaranteed to produce economic development.

In addition, if this road does produce economic development, there is the general environmental concern of creating even worse air quality by increasing the number of miles driven by the cars and trucks on the road. These mobile sources of air pollution will emit more ozone precursors, fine particulate matter pollution (PM), and greenhouse gases. The Birmingham area has long battled problems with smog and other air pollution; the American Lung Association’s 2010 State of the Air Report ranked Birmingham metropolitan area in the top 10 for annual and daily PM pollution and in the top 20 for ozone pollution. Forbes magazine just ranked Birmingham as having the 7<sup>th</sup> dirtiest air in the country.<sup>14</sup> (The two highways that currently surround the city are one of the causes it cites for the city’s bad air.) Although air quality in the area has improved somewhat due to a number of factors, the Birmingham metropolitan area has not yet been re-designated by the EPA as in attainment for PM pollution under the Clean Air Act. In addition, Birmingham exceeds the annual standard that both EPA staff and the Clean Air Scientific Advisory Committee (CASAC), the independent scientific panel established by the Clean Air Act to advise EPA on air quality standards, have recommended EPA lower it to. EPA staff and CASAC have recommended 11-13 micrograms per cubic meter. Birmingham’s at 13.7. In addition, the Birmingham metropolitan area is teetering on the threshold of violating EPA’s current ozone standard. Projects like the Beltline will only hinder Birmingham’s ultimate ability to meet these standards, and failure to meet them

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<sup>14</sup> <http://www.forbes.com/pictures/mef45ejdj/7-birmingham-hoover-cullman-al> (last visited Nov. 7, 2011).

carries high costs in terms of negative public health impacts and being unable to attract new businesses and industries.

Surely, the destruction of thousands of acres of forest, the demolition of hundreds of feet of streams and wetlands, the impairment of our drinking water, the polluting of our air, and the prohibitive cost outweigh any small traffic reduction and any uncertain economic development.

**VI. The JPN Provides Insufficient Detail to Fully and Meaningfully Comment on the Mitigation Package.**

As an initial matter, the JPN does not provide sufficient detail regarding the proposed mitigation. The Corps regulation on this issue, states:

*For an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. . . . The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts.*

33 C.F.R. § 332.4(b)(1) (emphasis added). The JPN simply does not contain sufficient information on the proposed mitigation in light of the scope and scale of this project, which involves impacts to significant aquatic resources. The JPN simply states:

The applicant proposes to compensate for unavoidable wetland impacts by debiting wetland credits from an ALDOT mitigation bank. The applicant proposes to compensate for unavoidable stream impacts by either debiting credits from an ALDOT mitigation bank or by purchasing credits from a Corps approved mitigation bank.

There is no indication in the Public Notice of the magnitude of mitigation that might be achievable, or the type of mitigation that will, or should, ultimately be selected (preservation versus enhancement versus restoration). In short, there is no explanation of how the identified mitigation sites will fully compensate for all of the aquatic impacts of the Northern Beltline or even this segment that will impact 1.66 acres of wetlands and 7,004 linear feet of stream bed.

The JPN fails to disclose, for example, the quantity of mitigation credits required, the location of the mitigation sites, how ALDOT and the Corps selected the proposed mitigation sites, what standards and criteria will be used to determine whether the plan appropriately compensates for lost aquatic functions and values, and what adaptive management measures will be used to manage risks inherent in any restoration and enhancement activities proposed. The documents also lack baseline information about the current state of the impacted watershed and the aquatic resource needed to be fulfilled through mitigation. Without this information, the available materials cannot provide reasonable assurance that the impacts of the Northern Beltline or this segment will be adequately mitigated, nor can the public adequately comment on the proposal.

**VII. ALDOT has Failed to Avoid and Minimize Impacts.**

The JPN also fails to demonstrate that ALDOT has avoided and minimized impacts to the maximum extent practicable. Compensatory mitigation is, and has always been last resort. Under the Corps' Guidelines for Preparing a Compensatory Mitigation Plan a mitigation plan must provide a statement demonstrating the permittee's efforts to first avoid and minimize impacts. Guidelines at 12. This statement must identify and specifically address impacts to outstanding resources (i.e. rare, unique, or high quality aquatic resources). *Id.* No such documentation is provided here. This segment bisects important habitats and impacts the Black Warrior River watershed, which is a nationally ranked river of environmental importance. *See* Background. In addition, the entire Beltline will bisect the Cahaba and Black Warrior tributaries numerous times.

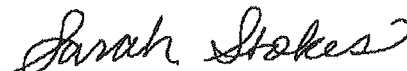
Furthermore, as discussed above, the FEIS and other documents indicate that adverse impacts, including impacts to outstanding resources, could have been avoided and minimized, but were not. Impacts to aquatic resources and the failure to select the least damaging alternative are discussed above. And, while we applaud ALDOT for bridging part of Self Creek, the Corps is proposing four non-bottomless culverts, four relocations of streams, and five channelizations of the stream for this segment, when all impacts could be minimized with bridges or avoided all together with practicable alternatives. As the 404(b)(1) Guidelines provide: no permit shall be issued "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10 (d). As described above, this has not been done.

**CONCLUSION**

A 404 permit for this 3.4 mile section should be denied. This 3.4 mile segment of a 52 mile road can not be evaluated independently. It is fundamental to constructing the larger project and would not be built without the construction of the proposed Northern Beltline. In addition, this Beltline and this segment both have less damaging practicable alternatives that would harm fewer water resources. The cumulative and indirect effects of this Beltline, and this segment that locks the Beltline into its route, are not understood as they have never been studied. Until the cumulative and indirect effects on this Beltline are fully analyzed in conjunction with the direct impacts, ADEM can not issue a water quality certification nor can this project pass the Corps' Public Interest balancing test.

We appreciate the opportunity to submit these comments on the proposed project.

Sincerely,



Sarah Stokes  
Associate Attorney

Colonel Steven J. Roemhildt  
November 11, 2011  
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cc:

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