MEMORANDUM

CITY/BOROUGH OF JUNEAU
155 South Seward Street, Juneau, Alaska 99801

DATE: November 1, 2011

TO: Planning Commission

FROM: Teri Camery, Senior Planner
Community Development Department

FILE NO.: VAR20110011

SUBJECT: Supplementary information and analysis

This memorandum is a supplement to the original VAR20110011 staff report, dated September 22, 2011. The project was originally scheduled for the September 27, 2011 Planning Commission meeting but was pulled from the agenda at the applicant's request.

City staff recommendations for the project have not changed. Since the date of the original staff report, six additional information items have come in, which are addressed below in the order received:

1.) 10/14/11 U.S. Fish and Wildlife Service (USFWS) Comments regarding original staff report (Attachment A) and **2) 10/21/11 USFWS Final Eagle Permit (Attachment B).**

USFWS comments on the CBJ staff report in Attachment A address specific details regarding the USFWS eagle permit and USFWS regulations. Some details from the CBJ staff report have been confirmed, while others have been corrected. City staff's recommended conditions are based on consistency with past eagle variances and the requirements of the CBJ Land Use Code, therefore we do not recommend any changes to the conditions based on USFWS' comments. However USFWS' response under item number five warrants additional emphasis, as follows:

> "Furthermore, Federal Eagle Take and Eagle Nest Take Permits do not prohibit the City and Borough of Juneau from requiring greater restrictions to meet their management needs. For this purpose a second standard condition is included in every Eagle Take/Eagle Nest Take permit issued:
>
> "Permittees and subpermittees operating under this permit may not take or disturb eagles contrary to the laws or regulations of any State, Tribal, or Municipal government, and none of the privileges of this authorization are valid unless the permittee possesses the appropriate State permits, or other authorizations, if required."

The final eagle permit from USFWS, dated October 21, 2011, is included as Attachment B. Final USFWS permit conditions are included on page 2 and 3. Section E states that, "this permit does NOT authorize take of active nests."

However CBJ interprets USFWS' October 14, 2011, response to the staff report (Attachment A), to mean that eagles may be killed, or eagle eggs substantially damaged, based on the following excerpt from their response in item number one below:

1) "Wounding or killing of eaglets would still be subject to prosecution under the Federal Bald Eagle Protection Act" (staff report pg. 5).

   Service response: USFWS Eagle Take Permits (50 CFR 22.26) may authorize lethal take of eagle adults, chicks, and/or eggs. However, the USFWS does not believe phase III of ADOT's Glacier Highway Project constitutes a safety emergency and believes lethal take of adults can be practicably avoided. Consequently, the Service does not anticipate authorizing take of active nests or lethal take of adult eagles. The Service does [emphasis added] anticipate authorizing disturbance of nesting eagles which may result in decreased productivity resulting from: (1) nest abandonment, (2) adults flushing from nests resulting in cracked, knuckled, or otherwise unviable eggs, (3) reduced food delivery rates to chicks, (4) premature fledging, etc.

These USFWS comments, which were received before the permit was finalized, indicate that the service "does not anticipate…lethal take of adult eagles" but "does anticipate authorizing disturbance which may result in…1) nest abandonment, 2) adults flushing from nests resulting in cracked, knuckled, or otherwise unviable eggs," and more.

USFWS explains further, in Attachment A item number two, that the eagle permit is based on an acceptable level of statewide mortality for eagles, and specifically allows lethal take of up to 555 bald eagles per year. This is a statewide model that does not address Southeast Alaska as a region. Just as wildlife managers would not manage deer populations on a statewide basis; it seems questionable for USFWS to set acceptable levels of mortality without a review of the eagle population and sustainable management objectives in each region. USFWS has acknowledged that under this allowance, a high percentage of the 555 lethal take, or hypothetically even the entire amount, could be concentrated in one single area.

Comments from USFWS on past eagle variances were helpful to city staff by providing information on how the intent of the CBJ Code could be met to protect eagles while allowing for reasonable development. However, the new eagle permit regulations represent a major policy shift which allows for "take" and "disturbance" and an accepted mortality rate.

This is in stark difference from the CBJ Land Use Code, which has not changed. City code says only that:

> *(a) Development in the following areas is prohibited:*
> *(2) Within 330 feet of an eagle nest on public land; **(49.70.310)***

Variances to this standard, like all variances, are granted only under unusual circumstances and after all practicable measures to reduce impacts have been taken. City staff has been given no direction by the Assembly that the city code should be changed to allow for acceptable levels of eagle mortality.

3) 11/1/11 DOT response to 9/25/11 staff recommendation (Attachment C).

In this message DOT states that the city staff recommendations would delay the project by "at least one year." DOT repeatedly emphasizes that USFWS has approved the work, which allows blasting and all other heavy equipment activities throughout the year, and that city staff should adopt the conditions of the USFWS permit. (DOT later changed its opposition to the eagle monitoring condition, which will be addressed under item number six at the end of this memo.)

Again, the CBJ Land Use Code has not changed to reflect changes in the USFWS policy and permitting procedure. Nothing in the CBJ code allows "take" or "disturbance" of eagles, with or without bonds, permits, or other measures. Therefore city staff's intent is to be consistent with current code requirements and past reviews, especially past reviews of projects such as the Stablers Point rock quarry which involve blasting.

Because of the public need for the project, the staff recommendation already incorporates a major compromise because it restricts only blasting instead of all heavy equipment use, which has been the standard on other eagle variances. The uniform restriction on blasting within 330 feet of all eagle nests would apply only between March 1 and May 31, while blasting from June 1 through August 31 would be prohibited only within 330 feet of active nests. This would allow heavy equipment work year-round through the full length of the project area. Restrictions to blasting activity would apply to only a small percentage of the area.

4) 11/2/11 Juneau Audubon Society Comment Letter (Attachment D).

The Juneau Audubon Society has submitted a comment letter which states, in part, the following:

> "Because we feel the recommendations of the city are a reasonable means to achieve a very worthwhile goal of some protection, we strongly urge the city to grant the variance only with the recommended restrictions. In fact we are very concerned about the disturbances that could amount to the destruction of chicks/eaglets or eggs. We see this as minimal protection, and consistent with what has occurred in the past."

5) 11/3/11 DOT email message with ADF&G comment (Attachment E).

In this message DOT states that, "even though the US Fish and Wildlife Service (FWS) is the primary agency authorizing the 'take' of eagles under the Bald and Golden Eagle Protection Act, the Alaska Department of Fish and Game (ADF&G) has retained management and permitting authority." In this email chain the ADF&G Division of Wildlife Conservation Permits Section has stated that "the USFWS permit looks okay to me." The attached 4/7/11 memo from ADF&G to DOT essentially says that the Division of Wildlife Conservation defers to USFWS.

6) 11/3/11 DOT email message regarding eagle monitor condition (Attachment F).

In this message DOT has agreed to accept staff's recommended condition number two with a modification which references the USFWS monitoring requirement.

Staff has given DOT's suggestion serious consideration and discussed the proposed modification with CBJ Law. We have decided against the modification because DOT's proposed change would indirectly add USFWS' monitoring requirements to CBJ's. Under the USFWS permit these requirements include annual monitoring of nests, nest surveys, and other measures that are beyond the scope of the CBJ eagle variance review. CBJ cannot enforce USFWS conditions and therefore will not include these measures with our recommended conditions.

CBJ's primary interest in adding our own monitoring requirement is two-fold:

1) **To ensure that the eagle monitor has minimum qualifications.** USFWS confirmed in the October 14, 2011, response to the previous staff report that current eagle regulations do not establish professional qualifications for monitors, even though USFWS had such standards in the past (Attachment A, item number 2). The recommended CBJ condition would require the minimum qualifications established in past eagle reviews, as listed in Attachment 12, Section 1.4 of the September 22, 2011, original staff report. These qualifications state only that the eagle monitor must have a Bachelor of Science in biology, environmental science, or ecology and be presently working in that profession, OR have two years experience monitoring and observing eagles or studying their habitat.

2) **To ensure that DOT determines which nests are active, to determine the limits of the second blasting restriction**. The first recommended condition prohibits blasting within 330 feet of **all** nests from March 1 through May 31. The third recommended condition prohibits blasting within 330 feet of only **active** nests, from June 1 through August 31. CBJ's intent in having an eagle monitor is to determine which nests are active. That information will dictate the terms of the second prohibition on blasting.

Because CBJ's interest in using an eagle monitor is different from USFWS', and because CBJ cannot enforce USFWS permit conditions, city staff recommends the original wording of the condition. The city staff condition complements, rather than contradicts, the USFWS monitoring requirement, and DOT could easily combine the USFWS and CBJ conditions in practice without additional burden.

As such, the city staff recommendations from the original 9/22/11 staff report have not changed, and are repeated below:

RECOMMENDATION

Staff recommends that the Board of Adjustment adopt the Director's analysis and findings and grant the requested Variance, which would allow road construction activity within 330-feet of 11 eagle nests on Glacier Highway between approximately mile 29.5 and mile 33.6, with the following condition:

1) Blasting shall be prohibited within 330 feet of eagle nest trees from March 1 through May 31.
2) The applicant shall employ a qualified eagle monitor during the time period of June 1 through August 31, for purposes of monitoring active nests. Eagle Monitor qualifications are included in Attachment 12 under the attached Monitoring Protocol, Section 1.4, Quality Assurance.
3) Blasting shall be prohibited within 330 feet of an eagle nest tree determined to be active by the U.S. Fish and Wildlife Service or a qualified eagle monitor, from June 1 through August 31.

SUMMARY

To summarize, DOT must comply with USFWS regulations, which have changed substantially with the new eagle permit. DOT must also comply with CBJ Code, which has not changed. These are two separate entities with different requirements. Though CBJ considers USFWS comments, as we do those of all agencies during all reviews, USFWS comments and permits do not dictate CBJ recommendations. Until the CBJ code changes, staff's intent is to be consistent with the code and with past reviews, which provide protection for eagles with practicable restrictions while allowing for appropriate development.

Teri Camery

From: Jordan_Muir@fws.gov
Sent: Friday, October 14, 2011 6:13 PM
To: Teri Camery
Cc: jim.scholl@alaska.gov; Scott_Frickey@fws.gov
Subject: Comments on CBJ Variance Report
Attachments: CBJ Variance Report Comments 10-14-2011.docx

Teri,

I appreciate your request for comments on CBJ's eagle variance staff report for phase III of ADOT's Glacier Highway Project. You encapsulated many key elements of the U.S. Fish and Wildlife Service Eagle Permit Program and identified many management changes that have occurred since the Service promulgated new eagle and eagle nest take regulations. However, in reviewing the document I found a couple of entries that I felt needed some clarification. For this purpose I have attached a list of citations and responses that I hope will provide insights to the Service's new Eagle Permit Program and valuable information to CBJ's decision making process.

I recognize USFWS's Eagle Regulations can be difficult to navigate and understand. To facilitate better understanding of the regulations by everyone involved I am CCing Jim Scholl (ADOT) and Scott Frickey (FWS-Juneau) on this e-mail.

Thanks again,

Jordan

(See attached file: CBJ Variance Report Comments 10-14-2011.docx)

Jordan J. Muir
USFWS Region 7 Eagle Permit Biologist
1011 East Tudor Road, MS-201
Anchorage, Alaska 99503
Office: 907-786-3503
Fax: 907-786-3927

ATTACHMENT A

1) "Wounding or killing of eaglets would still be subject to prosecution under the Federal Bald Eagle Protection Act" (staff report pg. 5).

Service response: USFWS Eagle Take Permits (50 CFR 22.26) may authorize lethal take of eagle adults, chicks, and/or eggs. However, the USFWS does not believe phase III of ADOT's Glacier Highway Project constitutes a safety emergency and believes lethal take of adults can be practicably avoided. Consequently, the Service does not anticipate authorizing take of active nests or lethal take of adult eagles. The Service does anticipate authorizing disturbance of nesting eagles which may result in decreased productivity resulting from: (1) nest abandonment, (2) adults flushing from nests resulting in cracked, knuckled, or otherwise unviable eggs, (3) reduced food delivery rates to chicks, (4) premature fledging, etc. (see the e-mail I addressed to you on 9/21/2011 below). Permit conditions will be designed to minimize risks to eggs and/or chicks (e.g., take of active nests will not be authorized, guardrail installation shall be conducted outside the breeding season to avoid premature fledging, premature fledglings must be immediately delivered to the Juneau Raptor Center, etc.). However, wounding or killing of eagles is not prohibited in all permit scenarios (e.g., lethal take at wind facilities or along transmission lines) and, consequently, may not always be subject to prosecution.

2) "USFWS has also explained in phone conversations that eagle monitoring is typically a permit requirement. However federal eagle permit regulations do not have any professional standards for eagle monitors, or any requirement that eagle monitors must be an independent third-party. This is a significant departure from USFWS eagle reviews before the new permitting system, which will be discussed in the Analysis section of this report" (staff report pg. 5).

Service response: This is an accurate assessment. Changes in qualification standards stem from significant differences between monitoring objectives prior to and post permit implementation. Prior to promulgation of the Federal Eagle Rule, eagle take could not be authorized. Consequently, it was necessary for project proponents familiar with eagle behavior to determine if their activities were disturbing eagles and subsequently, their compliance with the Bald and Golden Eagle Protection Act. Disturbance can be manifested in very subtle ways that may not be obvious to those unfamiliar with eagles. Consequently, the Service established professional monitoring standards.

U.S. Fish and Wildlife Service's relatively new Eagle Permit Program was designed to allow for take of eagles and/or their nests if the take is compatible with the preservation standard (stable or increasing breeding populations). To assess what level of take is compatible with the preservation threshold the USFWS modeled effects of various levels of take using known eagle demographic data. The USFWS determined that authorizing take up to 1/2 maximum

sustainable yield or 5% annual production was compatible with the preservation standard. In Alaska, this value is equivalent to lethal take of 555 bald eagles annually (different values apply for disturbance and territory loss). Consequently, monitoring objectives shifted from detection of disturbance (which may now be authorized) to measuring the magnitude of take in order to deduct the appropriate value from our annual take threshold. Because impacts may often be measured by presence or absence of eagles in the nesting area, rather than subtle changes in behavior, it was determined special qualifications were not required. However, the Service reserves the right to require special monitoring qualifications for specific research questions associated with permit conditions.

3) "USFWS has two types of permits, one for disturbance and one for take, though technically disturbance is a form of take, and the definitions overlap in many confusing ways" (staff report pg. 6).

Service response: This statement is not entirely correct. Disturbance and all other forms of eagle take are covered by one permit type, specifically, the Eagle Take Permit created under 50 CFR 22.26. In contrast, the Eagle Nest Take Permit created under 50 CFR 22.27 only authorizes nest take (both active and inactive).

4) "However USFWS emphasized that the eagle permit never authorizes kill or wounding of an eagle or chicks except in extreme cases that threaten loss of life or property" (staff report pg. 6).

Service response: This statement is incorrect. The USFWS only authorizes take of **active nests** for imminent safety emergencies. Because the USFWS does not consider phase III of ADOT's Glacier Highway a safety emergency scenario we do not anticipate authorizing take of active eagle nests. Federal regulations allow for take of **inactive nests** for any purpose given the take is deemed compatible with the preservation standard.

The service anticipated that permits issued under 50 CFR 22.26 (Eagle Permit Take Permit) would usually authorize take that occurs in the form of disturbance; however, in some limited cases, a permit may authorize lethal take that results from but is not the purpose of an otherwise lawful activity. As pointed out in my e-mail to you dated 9/21/2011, lethal take or wounding of adults, chicks, or eggs may be authorized under 50 CFR 22.26 for any purpose (e.g., wind facilities, development, alleviate safety hazards, etc.) if the take is compatible with the preservation standard and cannot be practicably avoided.

The Service believes ADOT can practicably avoid lethal take of adult bald eagles during phase III of the Glacier Highway Project and does not anticipate authorizing said take. "Practicable" in this context means "capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles (1) the cost of remedy compared to proponent resources; (2) existing technology; and (3) logistics in light of overall project purposes." However, due to public safety concerns the Service believes it is impracticable for ADOT to avoid disturbing eagles engaged in nesting activities and anticipates issuing an Eagle Take permit authorizing disturbance of nesting eagles that may result in temporary reduction of productivity.

5) "USFWS has also typically required greater restriction on eagle permits. For example, a condition on an eagle permit issued earlier this year for road rehabilitation restricted vegetation removal within 330 feet of nests. This project did not require blasting and impacted fewer eagle nests, yet the conditions of USFWS appear to be stricter" (staff report pg. 7).

Service response: USFWS Eagle Permit conditions change as a function of the practicability of avoidance, minimization, rectification, and compensation. If clearing within 330 feet of nests is practicable, the Service may consider it as a permit condition. Due to public safety concerns and the immediate proximity of eagle nests to the existing highway the Service did not consider this condition practicable for phase III of ADOT's Glacier Highway Project. Recognizing that permit conditions change as a function of practicability the Service includes the following standard condition in every permit issued:

"The terms and conditions of this permit that are not specifically prescribed by regulations at 50 CFR parts 10, 13, and 22, should not be construed as precedent and are subject to revision for purposes of any future permit issued under this section."

Furthermore, Federal Eagle Take and Eagle Nest Take Permits do not prohibit the City and Borough of Juneau from requiring greater restrictions to meet their management needs. For this purpose a second standard condition is included in every Eagle Take/Eagle Nest Take permit issued:

"Permittees and subpermittees operating under this permit may not take or disturb eagles contrary to the laws or regulations of any State, Tribal, or Municipal government, and none of the privileges of this authorization are valid unless the permittee possesses the appropriate State permits, or other authorizations, if required."

6) "In the 2001 and 2008 Stablers Point reviews, before USFWS began their new permitting system, USFWS recommended restriction on blasting and required extensive eagle monitoring by a qualified biologist. As noted earlier, USFWS no longer has any minimum qualifications for eagle monitors in the eagle permit regulations" (staff report pg. 7).

Service response: See #2 above

7) "Under the new eagle permit, USFWS eagle protection standards appear to be substantially weaker than they used to be, though it's important to note that the USFWS Draft Permit Conditions are still under review and subject to change" (staff report pg. 7).

Service response: This is an accurate assessment. On August 8, 2007, the bald eagle was removed from the List of Threatened and Endangered Wildlife (72 FR 37346, July 9, 2007). The Service estimated the number of breeding pairs in the 48 contiguous States to be over 9,700. Bald eagles were never listed as threatened or endangered in Alaska, where we currently estimate bald eagles to number between 50,000 and 70,000 birds, including approximately 15,000 breeding pairs.

Under sections 7(b)(4) and 10(a)(1)(B) of the Endangered Species Act the Service may authorize incidental take of listed wildlife that occurs in the course of otherwise lawful activities. Thus, while the bald eagle was listed under the ESA in the lower 48 States, two mechanisms were available to authorize take that was associated with, but not the purpose of, a human activity. Due to a technicality no such mechanism existed for take of bald eagles in Alaska where populations were never listed. Once the bald eagle was delisted (except for the Sonoran Desert population), a mechanism was needed to authorize take of bald eagles pursuant to the Eagle Act.

The Eagle Act provides that the Secretary of the Interior may authorize certain otherwise prohibited activities through promulgation of regulations. The Secretary is authorized to prescribe regulations permitting the "taking, possession, and transportation of [bald or golden eagles] . . . for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or . . . for the protection of wildlife or of agricultural or other interests in any particular locality," provided such permits are "compatible with the preservation of the bald eagle of the golden eagle" (16 U.S.C. 668a). In accordance with this authority, the Secretary promulgated new Eagle Act regulations (50 CFR 22.26 and 50 CFR 22.27) to authorize eagle take "for the protection of . . . other interests in any particular locality." This statutory language accommodates a broad spectrum of public and private interests (such as utility infrastructure development and maintenance, road construction, operation of airports, commercial or residential construction, resource recovery, recreational use, etc." that might "take" eagles as defined under the Eagle Act.

DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE

FEDERAL FISH AND WILDLIFE PERMIT

2. AUTHORITY-STATUTES
16 USC 668a

REGULATIONS
50 CFR 13
50 CFR 22.26
50 CFR 22.27

1. PERMITTEE

ALASKA DEPT. OF TRANSPORTATION
PO BOX 112506
ATTN: JANE GENDRON
JUNEAU, AK 99811-2506
U.S.A.

3. NUMBER
MB53155A-0

4. RENEWABLE	5. MAY COPY
[X] YES	[ ] YES
[ ] NO	[ ] NO
6. EFFECTIVE 10/21/2011	7. EXPIRES 09/15/2013

8. NAME AND TITLE OF PRINCIPAL OFFICER *(If #1 is a business)*
GARY L DAVIS
REGIONAL DIRECTOR

9. TYPE OF PERMIT
EAGLE TAKE ASSOCIATED WITH BUT NOT THE PURPOSE OF AN ACTIVITY / NEST TAKE

10. LOCATION WHERE AUTHORIZED ACTIVITY MAY BE CONDUCTED

Milepost 29.5 - 33.6 of Glacier Highway, Juneau, AK

11. CONDITIONS AND AUTHORIZATIONS:

A. GENERAL CONDITIONS SET OUT IN SUBPART D OF 50 CFR 13, AND SPECIFIC CONDITIONS CONTAINED IN FEDERAL REGULATIONS CITED IN BLOCK #2 ABOVE, ARE HEREBY MADE A PART OF THIS PERMIT. ALL ACTIVITIES AUTHORIZED HEREIN MUST BE CARRIED OUT IN ACCORD WITH AND FOR THE PURPOSES DESCRIBED IN THE APPLICATION SUBMITTED. CONTINUED VALIDITY, OR RENEWAL, OF THIS PERMIT IS SUBJECT TO COMPLETE AND TIMELY COMPLIANCE WITH ALL APPLICABLE CONDITIONS, INCLUDING THE FILING OF ALL REQUIRED INFORMATION AND REPORTS.

B. THE VALIDITY OF THIS PERMIT IS ALSO CONDITIONED UPON STRICT OBSERVANCE OF ALL APPLICABLE FOREIGN, STATE, LOCAL, TRIBAL, OR OTHER FEDERAL LAW.

C. VALID FOR USE BY PERMITTEE NAMED ABOVE.

D. This permit is only valid with authorization from Alaska Department of Fish and Game. Contact:

Alaska Department of Fish and Game
Division of Wildlife Conservation
PO Box 115526
Juneau, AK 99811-5526
(907) 465-4148
Dfg.dwc.permits@alaska.gov

E. **(50 CFR 22.26)** - You are authorized to disturb bald eagles nesting among eleven nests (coordinates provided below) for purpose of rehabilitating the Glacier Highway between mileposts 29.5 and 33.6 in Juneau, Alaska from October 21, 2011 - September 15, 2013. Potential impacts to bald eagles include loss of two year's productivity for up to eleven breeding pairs. Authorized construction activities include:

i. Clearing and grubbing
vi. Haul and placing fill

[ ] ADDITIONAL CONDITIONS AND AUTHORIZATIONS ALSO APPLY

12. REPORTING REQUIREMENTS
See conditions G and H

ISSUED BY	TITLE	DATE
Russell M. Oates	Chief, Division of Migratory Bird Management	10/21/2011

ATTACHMENT B

ii. Drilling for blasting	vii. Ditch reconditioning
iii. Blasting	viii. Grind and milling
iv. Excavating and loading material	ix. Place and grade of surface
v. Replacing culverts	x. Pave and compacting surface

E. (50 CFR 22.27) - Incidental take of seven inactive bald eagle nests (see coordinates below) is also authorized for the purpose of rehabilitating milepost 29.5 - 33.6 of the Glacier Highway in Juneau, Alaska from October 21, 2011 - September 15, 2013. This permit does NOT authorize take of active nests. A nest is determined to be inactive by the continuing absence of any adult, egg, or dependent young at the nest for at least 10 consecutive days immediately prior to, and including, at present.

F. You must comply with the following avoidance, minimization, or other mitigation measures:

i. ADOT shall minimize the footprint of the proposed improvements to the minimum necessary to bring the highway to current safety standards.

ii. ADOT shall make the minimum shifts necessary to realign curvature of the road to meet current safety standards.

iii. The Contractor shall work with the Project Engineer to limit time necessary within the 330' primary zone of nests only to that required for completion of the project.

iv. Guardrails shall be installed outside the bald eagle breeding season (March 1 - August 31).

v. To avoid unauthorized take, blasting within 330 feet of any eagle nesting tree must be conducted using an ADOT employee to monitor:

a. for eagles in danger of flying debris. This employee will shut down blasting activity if any adult eagles are in the area and could be injured by flying debris;

b. for chicks prematurely fledging from active eagle nests within 330 feet of blasting activities . This employee will immediately deliver said chicks to the Juneau Raptor Center; and

c. for damage, or other take, of eagle nests resulting from flyrock or other blasting activities.

vi. The Alaska Department of Transportation shall donate $15,000 to The Conservation Fund for the incidental take of (including damage to) each high quality inactive bald eagle nest (nests # 14, 103, 15, and 57) identified for take under this permit. Funds shall be donated by December 31, of the year in which the take occurred.

vii. The Alaska Department of Transportation shall donate $5,000 to The Conservation Fund for the incidental take of (including damage to) each medium quality inactive bald eagle nest (nests # 79, 14A, and 77) identified for take under this permit. Funds shall be donated by December 31, of the year in which the take occurred. Contact:

The Conservation Fund
Brad A. Meiklejohn
Alaska Representative
2727 Hiland Road
Eagle River, AK 99577
(907) 694-9060

G. You are required to conduct annual monitoring of nests identified in Condition D until September 15, 2014. Monitoring must consist of:

i) April 15 - May 1, 2012 and 2013, conduct nest surveys to determine status (active vs. inactive) and occupancy (presence or absence of eggs and chicks) of each nest. To avoid disturbing eagles during the clutch initiation period, this survey may be conducted by boat and occupancy determined by adult behavior (e.g., incubating posture, food delivery, etc).

ii) July 15 - July 31, 2012 and 2013, conduct nest surveys to determine status (active or inactive), and occupancy

(presence or absence of eggs and chicks) of each nest identified as active in part i above.

iii) July 2014, conduct nest surveys to determine status (active vs. inactive) and occupancy (presence or absence of eggs or chicks) of each nest.

You must submit an annual report summarizing the information you obtained through monitoring to the Migratory Bird Permit Office by December 31, 2011-2014. Reports shall be submitted to:

U.S. Fish and Wildlife Service
Migratory Bird Management
ATTN: Jordan Muir
1011 E Tudor Road MS-201
Anchorage, AK 99503, 907-786-3503

H. You must submit a nest take report to the Migratory Bird Permit Office within 10 days following the take of any eagle nest or of the expiration of this permit whichever occurs first. Form 3-202-16 (Eagle Nest Take Report) can be found online at www.fws.gov/forms/3-202-16.pdf

I. This permit does not authorize intentional lethal take or injury of eagles or eggs, nor does it authorize take of the nest in the event an eagle occupies the nest prior to nest destruction.

J. You must contact the Migratory Bird Permit Office (**907-786-3503** or **907-786-3693**) immediately upon discovery of unanticipated take.

K. You must immediately notify the Migratory Bird Permit Office (**907-786-3503** or **907-786-3693**) regarding any apparent injury or death occurring to any eagle, including viable eggs, during project activities. You must immediately transport any injured eagle to the **Juneau Raptor Center** (**907-790-5424** or **907-586-8393** or by **emergency pager at 907-790-5424**).

L. If a nest is destroyed you are authorized to salvage any eagle carcasses, feathers and parts including nonviable eggs found in or around the nest. All eagle carcasses must be immediately frozen and shipped along with molted feathers and parts within 10 days of salvage to the National Eagle Repository. All eagle carcasses, molted feathers and parts should be shipped overnight shipping and shipped only on Monday - Wednesday. Contact: **U.S. Fish and Wildlife Service National Eagle and Wildlife Repository, 5650 Havana St., Building 128, RMA, Commerce City, Colorado, 80022, (303) 287-2110.**

Nonviable eagle eggs must be delivered to the Migratory Bird Management Office of the U.S. Fish and Wildlife Service. Contact: **Stephen B. Lewis, Migratory Bird Management, U.S. Fish and Wildlife Service, 3000 Vintage Boulevard, Suite 201, Juneau, Alaska 99801, (907) 780-1163.**

M. You may delegate the authority granted in this permit to the following subpermittee(s): any other person who is (1) employed by or under contract to you for the activities specified in this permit, or (2) otherwise designated a subpermittee by you in writing. Any subpermittee who has been delegated this authority may not-re-delegate to another individual/business.

N. Subpermittees must be at least 18 years of age. You are responsible for ensuring that your subpermittees are qualified to perform the work and adhere to the terms of your permit. You are also responsible for maintaining current records of designated subpermittees. As the permittee, you are ultimately legally responsible for compliance with the terms and conditions of this permit and that responsibility may not be delegated.

O. You and any subpermittees must carry a legible copy of this permit and display it upon request whenever exercising its authority.

P. All of the provisions and conditions of the governing regulations at 50 CFR part 13, 50 CFR 22.26 and 50 CFR 22.27 are conditions of your permit. Failure to comply with the conditions of your permit could be cause for suspension of the permit and/or citation. For copies of the regulations, visit: www.fws.gov/permits/mbpermits/birdbasics.html.

Q. This permit does not authorize you to conduct activities on Federal, State, or other public or private property without additional prior written permits or permission from the agency/landowner.

R. Permittees and subpermittees operating under this permit may not take or disturb eagles contrary to the laws or regulations of any State, Tribal, or Municipal government, and none of the privileges of this authorization are valid unless the

permittee possesses the appropriate State permits, or other authorizations, if required.

S. You must maintain records as required in 50 CFR 13.46. All records relating to the permitted activities must be kept at the location indicated in writing by you to the migratory bird permit issuing office.

T. Acceptance of this permit authorizes the U.S. Fish and Wildlife Service to inspect any wildlife held, and to audit or copy any permits, books or records required to be kept by the permit and governing regulations (50 CFR 13.46, 50 CFR 22.26, and 50 CFR 22.27).

U. You may not conduct the activities authorized by this permit if doing so would violate the laws of the applicable State, county, municipal or tribal government or any other applicable law.

V. The U.S. Fish and Wildlife Service is not liable for any damage or injury to any person, wildlife, or property that occurs as the result of carrying out the activities associated with this permit.

W. The authorizations granted by permits issued under this section apply only to take that results from activities conducted in accordance with the description contained in the permit application and the terms of the permit. If the permitted activity changes, you must immediately contact the Service to determine whether a permit amendment is required in order to retain take authorization.

X. The terms and conditions of this permit that are not specifically prescribed by regulations at 50 CFR parts 10, 13, and 22 should not be construed as precedent and are subject to revision for purposes of any future permit issued under this section.

Y. You remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for take that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

Nest site coordinates for 11 bald eagle nests authorized for disturbance and/or incidental take by this permit:

Nest #	Coordinates (NAD83)	
79*	N 58.54361	W 134.85682
104	N 58.54964	W 134.85794
14A*	N 58.55618	W 134.87063
14*	N 58.5583	W 134.86732
91	N 58.56129	W 134.87191
103*	N 58.56733	W 134.88116
77A	N 58.57376	W 134.88565
77*	N 58.5764	W 134.89258
15*	N 58.58264	W 134.89504
57*	N 58.58435	W 134.89875
73	N 58.5911	W 134.90413

* denotes the nest is also authorized for incidental take per Condition E (22.27).

Teri Camery

From: Scholl, James W (DOT) [jim.scholl@alaska.gov]
Sent: Tuesday, November 01, 2011 7:46 AM
To: Teri Camery
Cc: Taylor, Jill A (DOT)
Subject: 67526 JUN: Glacier Highway, Eagle Beach Kayak Launch to Bessie Creek / Staff report concerning VAR 20110011

Teri, DOT&PF respectfully disagrees with the CBJ staff recommendations for the subject variance because:

1. If implemented, the recommendations would unnecessarily delay the project at least one year, and
2. Variance Eagle monitors would perform no useful tasks e.g. tasks no longer required by the US Fish and Wildlife Service (FWS) under the new Bald Eagle permitting regulations (50 CFR 22.26 and 50 CFR 22.27)

Item 1

The project's purpose is, primarily, to upgrade the existing roadway to current safety standards. The accident rate of this stretch of highway is over twice the predicted rate. The highway does not meet current safety standards for combined lane and shoulder widths and the horizontal curves are substandard. The distance between the edge of the travel lane and guardrail is too narrow. The purpose of this project is to replace pavement, improve highway safety, and widen the paved portion to accommodate bicycles and pedestrians. DOT&PF plans to begin construction in November 2011 and complete construction by July 1, 2013.

Staff recommendations 1 and 3,

- Blasting shall be prohibited between March 1st and May 31st and
- blasting shall be prohibited within 330' of an active nest between June 1st and August 31st

are unecessarily restrictive because they prevent DOT&PF from performing work permitted by the FWS under permit number
MB53155A-0. Blasting is permitted during those periods. If CBJ adopts staff recommendations 1 and 3 it would prevent the Contractor from performing permitted blasting during the stated periods and, consequently, delay construction one year to July 1, 2014.

The staff recommendation relies on a variance issued for a project before FWS implemented new Bald Eagle "take" regulations. DOT requests CBJ base its decision on current federal regulations. **DOT requests CBJ issue a variance without Staff recommendations 1 and 3 and instead adopts the conditions of the FWS permit.**

Item 2

Variance Eagle monitors watch for eagle disturbance whereas monitors required by FWS permit watch and record nest "take" or eagle "disturbance".
Professional requirements for variance Eagle Monitors are different than those required by FWS. To quote the FWS response to the CBJ staff recommendation,

ATTACHMENT C

"...Changes in qualification standards stem from significant differences between monitoring objectives prior to and post permit implementation. Prior to promulgation of the Federal Eagle Rule, eagle take could not be authorized. Consequently, it was necessary for project proponents familiar with eagle behavior to determine if their activities were disturbing eagles and subsequently, their compliance with the Bald and Golden Eagle Protection Act. Disturbance can be manifested in very subtle ways that may not be obvious to those unfamiliar with eagles. Consequently, the Service established professional monitoring standards.

U.S. Fish and Wildlife Service's relatively new Eagle Permit Program was designed to allow for take of eagles and/or their nests if the take is compatible with the preservation standard (stable or increasing breeding populations). To assess what level of take is compatible with the preservation threshold the USFWS modeled effects of various levels of take using known eagle demographic data. The USFWS determined that authorizing take up to 1/2 maximum sustainable yield or 5% annual production was compatible with the preservation standard. In Alaska, this value is equivalent to lethal take of 555 bald eagles annually (different values apply for disturbance and territory loss). Consequently, monitoring objectives shifted from detection of disturbance (which may now be authorized) to measuring the magnitude of take in order to deduct the appropriate value from our annual take threshold. Because impacts may often be measured by presence or absence of eagles in the nesting area, rather than subtle changes in behavior, it was determined special qualifications were not required. However, the Service reserves the right to require special monitoring qualifications for specific research questions associated with permit conditions."

Both nest "take" and eagle "disturbance" (under 50 CFR 22.26 and 50 CFR 22.27) are authorized and restricted by the FWS permit conditions. DOT requests CBJ base its decision on current federal regulations. **DOT requests CBJ issues a variance without Staff recommendation 2 and instead adopts the conditions of the FWS permit.**

As a note, there may be some confusion about the two different kinds of activities (eagle nest take and eagle disturbance) permitted by FWS. DOT will supply a graphic to CBJ this morning that shows those two different activities to aid CBJ decision.

Jim Scholl
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(907) 465 4498
(907) 465 3506 FAX

SHEET E1

FWS 91

FWS 104

FWS 73

FWS 74

FWS 79

700+00 695+00 690+00 685+00 680+00 675+00 670+00 665+00 660+00 655+00 650+00 645+00 640+00 635+00 630+00 625+00 620+00 615+00 610+00 605+00

BOP STA. 604+30.00

50 CFR 22.27
EAGLE NEST "TAKE"
PERMITTED SEPT 1ST TO
FEB 28TH/29TH

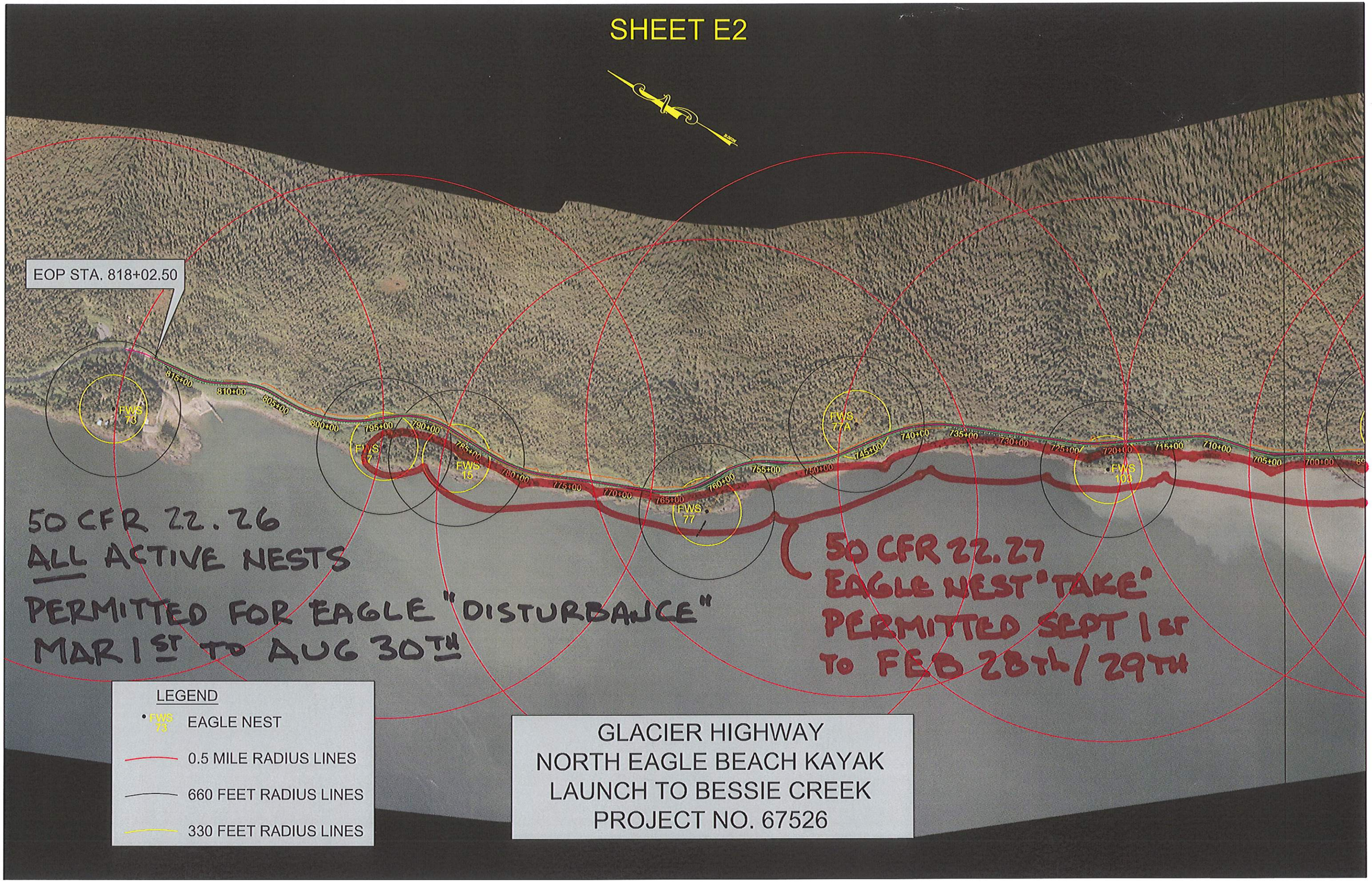
50 CFR 22.26
ALL ACTIVE NESTS
PERMITTED FOR
EAGLE "DISTURBANCE"
MAR 1ST TO AUG 30TH

LEGEND

- FWS 73 EAGLE NEST
- 0.5 MILE RADIUS LINES
- 660 FEET RADIUS LINES
- 330 FEET RADIUS LINES

GLACIER HIGHWAY
NORTH EAGLE BEACH KAYAK
LAUNCH TO BESSIE CREEK
PROJECT NO. 67526

SHEET E2


EOP STA. 818+02.50
FWS 73
FWS 7
FWS 15
FWS 77
FWS 77A
FWS 103
815+00
810+00
805+00
800+00
795+00
790+00
785+00
780+00
775+00
770+00
765+00
760+00
755+00
750+00
745+00
740+00
735+00
730+00
725+00
720+00
715+00
710+00
705+00
700+00
50 CFR 22.26
ALL ACTIVE NESTS
PERMITTED FOR EAGLE "DISTURBANCE"
MAR 1ST TO AUG 30TH
50 CFR 22.27
EAGLE NEST 'TAKE'
PERMITTED SEPT 1ST
TO FEB 28TH / 29TH
LEGEND
EAGLE NEST
0.5 MILE RADIUS LINES
660 FEET RADIUS LINES
330 FEET RADIUS LINES
GLACIER HIGHWAY
NORTH EAGLE BEACH KAYAK
LAUNCH TO BESSIE CREEK
PROJECT NO. 67526

JUNEAU AUDUBON SOCIETY
P. O. Box 21725 Juneau, Alaska 99802

November 2, 2011

City/Borough of Juneau
Planing Commission
City Hall
Juneau, Alaska 99801

RE: VAR 20110011 DOT Bald Eagles Mile 29.5 - 33.6

Dear Planning Commission:

Juneau Audubon Society (JAS) is a non-profit organization whose mission is, "to conserve the natural ecosystems of Southeast Alaska, focusing on birds, and other wildlife and their habitats for the benefit and enjoyment of current and future generations."

JAS is concerned about the road widening project as it affects eagles, their nests and eggs, and eagle offspring. First, we want to express our support for the city code restrictions that address eagle nests and development. Second, as to this project we feel that the city staff position, to grant a variance regarding what could be serious disturbance to eagles is acceptable. But we also believe the attendant restrictions are reasonable, and are for a valid reason. Because we feel that the recommendations of the city are a reasonable means to achieve a very worth goal of some protection, we strongly urge the city to grant the variance only with the recommended restrictions. In fact we are very concerned about disturbances that could amount to the destruction of chicks/eaglets or eggs. We see this as minimal protection, and consistent with what has occurred in the past.

In conclusion we support restrictions addressing blasting during nest selection times and blasting during active nesting. Thank you for the opportunity to be heard on this issue.

Sincerely,

Jeffrey Sauer
Vice President Juneau Audubon

ATTACHMENT D

Teri Camery

From: Scholl, James W (DOT) [jim.scholl@alaska.gov]
Sent: Thursday, November 03, 2011 8:28 AM
To: PC_Comments; Teri Camery
Cc: Dunn, Arthur C (DOT)
Subject: FW: 67526 JUN: Glacier Hwy, Eagle Beach Kayak Launch to Bessie Creek / VAR 20110011
Attachments: Luiken_ADOTPF_EagleTakeAuthorization_2011pdf.pdf

Planning Commission Members and Teri,

As I understand it, it may be too late to include this message in the package you will receive for the November 8, 2011 meeting. Consequently, we are sending each of you this e-mail for consideration of the subject variance.

Even though the US Fish and Wildlife Service (FWS) is the primary agency authorizing the "take" of eagles under the Bald and Golden Eagle Protection Act, the Alaska Department of Fish and Game (ADF&G) has retained management and permitting authority. ADF&G has reviewed the FWS permit for the subject project and their comments are in this e-mail string below. The referenced ADF&G memorandum is attached.

Jim Scholl
Environmental Analyst
ADOT&PF SE Region
6860 Glacier Highway
POB 112506
Juneau Alaska 99811-2506

jim.scholl@alaska.gov

(907) 465 4498
(907) 465 3506 FAX

From: Schumacher, Thomas V (DFG)
Sent: Wednesday, November 02, 2011 4:08 PM
To: Scholl, James W (DOT)
Cc: Dunn, Arthur C (DOT)
Subject: RE: 67526 JUN: Glacier Hwy, Eagle Beach Kayak Launch to Bessie Creek / Eagle permit

Hi Jim,

The USFWS permit looks okay to me, and the memorandum from ADF&G, DWC to ADOT&PF Commissioner Luiken includes both disturbance and take. ADF&G's current memorandum to ADOT&PF is valid for calendar year 2011 and will need to be renewed for 2012, but at this time I anticipate it will be renewed with a similar authorization. Consequently, I believe you have the necessary authorization from ADF&G to continue moving forward with the project. Please let me know if there is anything else I can do.

Tom Schumacher
ADF&G, Division of Wildlife Conservation
Permits Section
(907) 465-4148

ATTACHMENT E

From: Scholl, James W (DOT)
Sent: Wednesday, November 02, 2011 11:25 AM
To: Schumacher, Thomas V (DFG)
Cc: Dunn, Arthur C (DOT)
Subject: 67526 JUN: Glacier Hwy, Eagle Beach Kayak Launch to Bessie Creek / Eagle permit

Tom, Attached is a copy of the permit FWS recently issued. It is somewhat uncommon because it combines a "take" permit for nests outside the breeding season (for 7 of 11 nests) with an eagle "disturbance" permit (for all 11 nests) during the breeding season.

I know we have blanket approval for eagle "disturbance" from F&G if we have a valid FWS permit, but I'd like you to look this one over and let me know if it fits F&G approval for two reasons:

1. It is a non-standard permit, and
2. I have a variance application pending with CBJ. The hearing to approve the variance is next Tuesday evening, Nov. 8th. It would be good to hear from the agency that shares jurisdiction with FWS.

Hope all is well; thanks in advance.

Jim Scholl
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(907) 465 4498
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STATE OF ALASKA

SEAN PARNELL, GOVERNOR

P.O. BOX 115526
JUNEAU, AK 99811-5526
PHONE: (907) 465-4190
FAX: (907) 465-6142

DEPARTMENT OF FISH AND GAME

DIVISION OF WILDLIFE CONSERVATION

MEMORANDUM

TO: Marc A. Luiken
Commissioner
Department of Transportation and Public Facilities

FROM: Dale Rabe
Deputy Director

DATE: April 7, 2011

SUBJECT: Authorization to take bald eagles during 2011

In 2007 the United States Fish and Wildlife Service (FWS) removed bald eagles from the list of threatened and endangered species, and the Bald and Golden Eagle Protection Act (BAGEPA) became the primary federal law protecting eagles. In 2009 the FWS published a rule under the BAGEPA authorizing a permit program that allows take of eagles under certain circumstances. The FWS has primary jurisdiction over eagles throughout the United States. However, Alaska also retains management and permitting authority, and eagle take as defined in the BAGEPA requires written authorization from both the FWS and the Department of Fish and Game (DFG).

The DFG, Division of Wildlife Conservation (DWC) recognizes that the Department of Transportation and Public Facilities (DOT&PF) commonly undertakes projects that are in the public's interest, but also have the potential to take or disturb bald eagles. We further recognize that DOT&PF staff expend considerable effort to minimize effects of projects on eagles and to acquire FWS Eagle Take permits. Because DOT&PF projects already undergo review by the FWS and the public, we have determined that additional review of individual projects by DWC is unnecessary. Consequently, DWC authorizes take or disturbance of bald eagles associated with all projects for which DOT&PF has acquired a FWS permit. This authorization is valid through December 31, 2011 and may be renewed by submitting a request (paper or e-mail) to the DWC, Permits Section at dfg.dwc.permits@alaska.gov or P.O. Box 115526 Juneau, AK 99811-5526.

Teri Camery

From: Scholl, James W (DOT) [jim.scholl@alaska.gov]
Sent: Thursday, November 03, 2011 8:41 AM
To: PC_Comments; Teri Camery
Cc: Dunn, Arthur C (DOT); Gehring, Loren K (DOT)
Subject: FW: 67526 JUN: Glacier Highway, Eagle Beach Kayak Launch to Bessie Creek / Staff report concerning VAR 20110011

Planning Commission Members and Teri,

As we understand it, it may be too late to include this message in the package you will receive for the November 8, 2011 meeting. Consequently, we are sending each of you this e-mail for consideration of the subject variance.

We gave the staff report a review this morning and wish to modify our position. We would accept staff recommendation #2 as follows:

Change the staff recommendation from,

" The applicant will employ a qualified monitor during the time period June 1st through August 31st for purposes of monitoring active eagle nests. Eagle Monitor qualifications are included in Attachment 12 under the attached Monitoring Protocol." to:

"The applicant will employ an Eagle Monitor during the time period June 1st through August 31st and during blasting activities for the entire project. The eagle Monitor will be in responsible charge of a qualified Eagle Monitor. Qualifications are included in Attachment 12 under the Eagle Monitoring Protocol. The purpose of the monitor is given in items F. v. and G. of the Federal Fish and Wildlife Permit MB53155A-0"

Thank you for your consideration.

Jim Scholl
Environmental Analyst
ADOT&PF SE Region
6860 Glacier Highway
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Juneau Alaska 99811-2506

jim.scholl@alaska.gov

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From: Scholl, James W (DOT)
Sent: Tuesday, November 01, 2011 7:46 AM
To: teri_camery@ci.juneau.ak.us
Cc: Taylor, Jill A (DOT)
Subject: 67526 JUN: Glacier Highway, Eagle Beach Kayak Launch to Bessie Creek / Staff report concerning VAR 20110011

ATTACHMENT F

Teri, DOT&PF respectfully disagrees with the CBJ staff recommendations for the subject variance because:

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> *"...Changes in qualification standards stem from significant differences between monitoring objectives prior to and post permit implementation. Prior to promulgation of the Federal Eagle Rule, eagle take could not be authorized. Consequently, it was necessary for project proponents familiar with eagle behavior to determine if their activities were disturbing eagles and subsequently, their compliance with the Bald and Golden Eagle Protection Act. Disturbance can be manifested in very subtle ways that may not be obvious to those unfamiliar with eagles. Consequently, the Service established professional monitoring standards.*
>
> *U.S. Fish and Wildlife Service's relatively new Eagle Permit Program was designed to allow for take of eagles and/or their nests if the take is compatible with the preservation standard (stable or increasing*