

**MARTIN COUNTY, FLORIDA  
SUPPLEMENTAL MEMORANDUM**

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**TO:** Honorable Members of the Board of County Commissioners      **DATE:** February 9, 2016

**VIA:** Taryn Kryzda  
County Administrator

**FROM:** Amy Taylor Petrick  
Senior Assistant County Attorney

**REF:** 80737eed

**SUBJECT:** ALL ABOARD FLORIDA STATUS UPDATE AND REQUEST FOR DIRECTION ON HIRING LEGAL COUNSEL REGARDING ALL ABOARD FLORIDA (“AAF”) MATTERS, REQUEST FOR APPROVAL TO INITIATE LEGAL AND OTHER ACTION, IF NECESSARY, AND REQUEST APPROVAL TO TRANSFER NECESSARY FUNDS FOR PAYMENT OF LEGAL EXPENSES

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## I. INTRODUCTION

The purpose of this Memorandum is fourfold: 1) to explain the history of the AAF Project and the County's efforts to ensure the safety, health, and welfare of its citizens in light of the Project; 2) to summarize the current litigation and agency coordination efforts with respect to the Project; 3) to identify the current budget status; 4) to outline potential avenues for litigation and/or agency coordination and the corresponding budgetary impacts of such efforts. Staff seeks Board direction on current and potential litigation and administrative engagement efforts, and Board approval for the expenditure of funds related to those efforts.

## II. HISTORY OF COUNTY EFFORTS RELATING TO ALL ABOARD FLORIDA

In March of 2012, Florida East Coast Industries (FECI) announced the All Aboard Florida (AAF) Project (a.k.a. Brightline.) The Project has been separated into two phases, which AAF characterizes as including the following: Phase I purportedly includes the construction of 3 new stations (West Palm Beach, Fort Lauderdale, and Miami,) acquisition of five train sets, construction of a second track along most of the 66.5 mile corridor, and operation of 16 new round-trip intercity passenger train trips (32 one-way trips) on the West Palm Beach to Miami section of the Florida East Coast Railroad (FECR) corridor; Phase II of the Project purportedly includes, in substantial part, the construction of additional tracks extending the new passenger rail service from West Palm Beach to Orlando, Florida, and the construction of a new rail station at Orlando International Airport.

The rail service is expected to travel at significantly greater speeds and with greater frequency through nearly 250 at-grade crossings along the FECR corridor than the frequency and speed of existing freight service; 29 of those crossings are located in Martin County. The Project in general, and the crossings in particular, present the potential for collisions between trains and cars, trains and people, and trains and wildlife. Likewise, both the initial construction and operation present the potential for noise and vibration that may have a deleterious effect on the unique and treasured quality of life, cultural resources, and natural systems in Martin County. The construction and increased train traffic will also have an affect on navigational traffic by impacting the operation of bridges in Martin County.

Fortunately, the Project requires AAF to seek local, state, and federal approvals that offer an opportunity for the County to represent the interests of its citizens in the regulatory review process. A summary of the County's efforts to engage state and federal regulatory decision-makers and to protect the citizens' interests through litigation, where appropriate, is detailed below:

### A. U.S. Department of Transportation/Florida Development Finance Corporation

Early in the Project, AAF sought government assistance in the financing of its project through an application to both the federal Department of Transportation ("DOT") and the Florida Development Finance Corporation ("FDFC") for private activity bonds ("PABs"),

which are tax exempt and, therefore, able to be offered at lower interest rates than market bonds. AAF also initially applied for \$1.6 billion in federal funds through the Railroad Rehabilitation and Improvement Financing (RRIF) program, which is administered by the Federal Railroad Administration (FRA). The RRIF loan application was placed on hold. However, the PABs were pursued at both the state and federal level. On August 15, 2014, AAF submitted an application to DOT, requesting an allocation of \$1.75 billion in PABs to finance the AAF Project.

On September 24, 2014, AAF submitted a PAB application to FDFC and submitted the same material to DOT to supplement its August 15, 2014 application. FDFC Board Members had initially voted on August 20, 2014, in favor of AAF's PAB allocation request, but the August vote was determined to be invalid, because the terms of the voting FDFC Board members at the time had expired.

On December 22, 2014, DOT provisionally approved issuance of \$1.75 billion in PABs to finance AAF, and set a July 1, 2015 deadline for the bonds to be issued. The deadline was extended by the FRA until January 2016, without notice to Martin County. The January 2016 deadline was recently extended again to 2017.

On April 20, 2015, the FDFC held a public meeting in Tallahassee to receive comments regarding the allocation of PABs to AAF. The meeting was limited to two hours and comments were limited to three minutes each. The FDFC Board Members were not present to hear those comments. Martin County was represented by Stephen M. Ryan, Special Counsel, and Commissioner Haddox at this meeting.

The FDFC hearing set for April 28, 2015 in Orlando to determine whether the PABs should be approved was canceled. The hearing was rescheduled for June 10, 2015 in Orlando, but was again canceled. The FDFC Board ultimately approved the issuance of \$1.75 billion in PABs on August 5, 2015. Martin County, Indian River County and other opposition groups were present at this hearing and were allocated 40 minutes to collectively present their concerns.

The County filed a lawsuit contesting both DOT's approval of the PABs and the FDFC's approval of the PABs in the federal D.C. circuit court, and the Florida Orange County circuit court, respectively. Each lawsuit is discussed in more detail in the litigation section, below.

## **B. Federal Rail Administration**

The Federal Rail Administration is an operating administration within DOT, and has been assigned to serve as the "lead agency" for the AAF project, for purposes of complying with the National Environmental Policy Act of 1969 ("NEPA"). NEPA requires that an environmental impact analysis be performed by federal agencies for all major federal action, which is memorialized in an Environmental Impact Statement ("EIS"). The EIS must consider reasonable alternatives to the proposed project, and must consider evaluation of the environmental consequences of the Project, including impacts to the following: Transportation and Safety; Navigation; Air Quality, Noise and Vibration,

Natural Resources, Cultural Resources, Social and Economic considerations; Environmental Justice populations; and the cumulative impacts of the Project. The EIS must also evaluate appropriate measures to mitigate for identified impacts.

The FRA published its Draft Environmental Impact Statement (“DEIS”) on September 19, 2014. The County commissioned the development of data and analysis for submittal in response to the DEIS on a broad range of topics, such as safety and traffic impacts, navigation, environmental impacts including air quality, noise and vibration, impacts to water resources, floodplain and wetlands, threatened and endangered species, environmental justice populations, fiscal and economic impacts. This comprehensive undertaking included an extensive summary letter and attached reports/analyses<sup>1</sup>, which were packaged together and sent to the FRA on July 28, 2015. The reports included:

- **St. Lucie River Railroad Bridge Boat Count Project Update.** This report included important new data and information about the number of vessels transiting the St. Lucie River at the Florida East Coast Railway Bascule Bridge. The bottom line was that the new data indicated there is far more vessel traffic than projected in the Draft Environmental Impact Statement (DEIS). Thus, the expected increase in bridge closures is an even more serious problem, due to the larger number of vessels.
- **Railcar Chemical Release Vulnerability Study.** The Martin County Fire Rescue Department conducted an extensive risk assessment of the potential release of chemicals being transported on FEC rail cars, to assess increased risks and gaps in capabilities. The Department concluded that the increase in freight rail will increase the County’s risk of a life threatening chemical release event occurring. The increase in potential risk is unquantifiable, but with an up to 300 percent increase in trains traveling through the County’s 28 crossings, a chemical release incident at any of these locations has the potential to rapidly exceed the County’s public safety response system.
- **Traffic Engineer Report on Rail Crossings – Effects on Vehicular Delay and Fuel Costs.** The County—in collaboration with Indian River County and St. Lucie County—retained a traffic engineer to study the effects of additional rail crossings on vehicular delay, including time and fuel costs. Using the estimated time delays and fuel costs for the two Martin County crossings that were included in the report, the County then used that data to estimate total impacts on all 28 crossings in Martin County, using conservative estimates, and concluded that over \$1 million of time and money will be lost annually.
- **Collection of Bicycle and Pedestrian Counts at FEC Railroad Crossings.** The County examined the effects that rail traffic has on individuals and families who have to transit the tracks via alternative forms of transportation beyond standard

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<sup>1</sup> These reports and analyses were summarized via Powerpoint slides presented to the County’s Board of County Commissioners on August 4, 2015.

automobiles. Some of these residents are on foot, some are on bicycles, some parents have children in tow, some are carrying groceries or other goods, some are commuting to work, some taking their children to school. Regardless of the particulars, Community Redevelopment Area (CRA) residents and other citizens are accustomed to the current freight rail traffic, its frequency and, most importantly, its average speed of 32 miles per hour in Martin County. Should the AAF project and related increases in FEC freight rail move forward, the current experiences that these CRA pedestrians and bicyclists have in safely transiting the tracks will not have prepared them for the new high speed world they will face.

- **Wetland and Listed Species Assessment.** The County—along with Indian River County and St. Lucie County—commissioned a wetlands and listed species assessment of the DEIS. The assessment noted threatened and endangered plant species omitted from the DEIS and reviewed the Florida scrub jay surveys provided in the DEIS. The assessment concluded that DEIS does not provide a full alternatives analysis and additional study is warranted for the alternative corridors located west of the FEC. It also concluded that the DEIS does not adequately characterize the threatened and endangered species within the alternative corridors and the potential direct and indirect impacts to wetlands and listed species, and does not adequately address listed plant and animal species in the analysis.
- **FEC Corridor Research and Mapping Update.** The County consulted with a surveying and mapping contractor for the purpose of researching and mapping FEC corridor ownership in the County. This project included the compilation and review of many documents of record identifying deeds, condemnations, fee simple and grants of permissions, along with other instruments, within the FEC right-of-way corridor. The work revealed missing sections of the FEC corridor in which the County could not properly verify ownership, and the County has been seeking documented proof that FEC or its sister companies do, in fact, own the areas for which the County's research could not produce the relevant public documents.
- **Report on Property Values.** The County commissioned a study to measure the short-term, perceived impacts of the AAF announcement on residential property values, which showed that the AAF announcement had the greatest negative impact on smaller homes (homes less than 1,532 square feet) within 400 feet as well as from 400 feet to 1,000 feet of the FEC tracks. The typical impact on sales prices for smaller homes that sold after the AAF announcement was -\$16,681 for homes within 400 feet of the rail and -\$10,502 for homes from 400 feet to 1,000 feet.
- **Cultural and Historical Impacts.** The County commissioned a cultural resources assessment that found insufficient compliance with consulting procedures under Section 106 of the National Historic Preservation Act (NHPA). In addition, the assessment found that the DEIS and related documents failed to address and assess the adverse impacts to historic districts and structures—such as downtown Stuart and the Lyric Theater—with regard to indirect effects such as vibration, noise, visual changes and heritage tourism.

- **Rail Safety.** The County sent a follow up letter to the FRA on August 11, 2015, containing a rail safety report from a nationally-recognized rail safety expert. The report demonstrated that the projected increase in the number and speed of FEC freight trains—as well as the introduction of AAF passenger rail—will affect the safety of the citizens of the County.

The FRA issued its Final Environmental Impact Statement (“FEIS”) on August 4, 2015. After the FEIS was issued, the County continued to communicate its position to both AAF and the FRA on necessary safety measures for AAF’s project within the County’s jurisdictional limits. The FRA has not issued a Record Of Decision on the FEIS to date and, to the County’s knowledge, continues its determination of the minimum safety standards necessitated by the AAF project.

#### **A. Section 106 Consultation**

Section 106 of the National Historic Preservation Act regulates cultural resources, which includes historic properties, historic districts, and archaeological resources. The FRA is obligated under Section 106 to determine whether there are adverse impacts from the Project, and to identify appropriate mitigation measures for those impacts, in consultation with the Florida State Historic Preservation Officer (“SHPO.”)

The County, along with Indian River County and other interested parties, have taken a series of actions to protect the County’s cultural resources in the Section 106 process. The County commissioned a Desktop Analysis for Cultural Resources within 1,000 feet of the FECR Right-of-Way in Martin County, which reflected 470 cultural, historic, and archaeological resources, approximately 1/3 of which were in the area of potential effect (APE) emanating from the Project. The study also identified a high probability that unidentified subsurface archaeological resources exist within the Project’s APE. Martin County also retained archaeologist Robert Carr to evaluate and report the effects of Phase II on Martin County’s cultural resources; his report and the Desktop Analysis were provided to the FRA and the SHPO as part of the Section 106 consultation process.

Martin County attended a meeting on October 19, 2015, hosted by FRA, along with Indian River County, Indian River County Historical Society, St. Lucie Village, and the Old Vero Ice Age Sites Committee. The County objected to FRA’s summary conclusion that it had completed the Section 106 process and called for a Programmatic Agreement tailored to allow for the meaningful participation of the Consulting Parties in decision-making and future investigation. The Counties also sought the advice and involvement of the Advisory Council on Historic Preservation, which sent a letter on October 23, 2015, to the FRA generally supporting the position of the Counties.

FRA is now working on a Programmatic Agreement for the Project that will address the concerns of the Counties and provide greater protection for the unique cultural resources in the Treasure Coast area.

## **B. U.S. Coast Guard**

The U.S. Coast Guard has jurisdiction over navigable water crossings, including but not limited to the St. Lucie Bridge in Martin County and the New River Bridge in Broward County. The U.S. Coast Guard is charged under the NEPA process with determining that the Project does not unreasonably interfere with navigation as a result of its impact on bridges like the ones over the St. Lucie and the New River. Prior to the AAF Project, the U.S. Coast Guard did not have a formal rule regarding the amount of time that the bridges could be closed to watercraft traffic.

As part of its review of the AAF Project, the U.S. Coast Guard initiated formal rulemaking, first for the New River Bridge and then for the St. Lucie Bridge, to identify minimum amounts of time that the bridges must be open, so that watercraft traffic can traverse the bridge. As noted above, Martin County commissioned a boat count, as part of the development of appropriate data for the navigation issue to be considered by the Coast Guard. Martin County is currently working on additional boat data.

Martin County also sent a letter to the Coast Guard, to advocate for a minimum bridge open time of 30 minutes out of every hour, rather than the 60 minutes out of every 2 hours currently proposed by the Coast Guard. Martin County also requested that the minimum bridge open time be identified as specific to the AAF project, and that the Coast Guard require the bridges to be operated in such a way that bridges are closed for the minimum amount of time necessary to accommodate rail traffic, regarding of whether the traffic is Project-based or not. Additionally, Martin County asked that the closure times be measured from the time that the bridges begin to close until the bridges are completely locked in the open position, and that the public be given additional information on bridge closure schedules. A final rule for the St. Lucie Bridge has not been issued.

## **C. U.S. Army Corps of Engineers**

The United States Army Corps of Engineers (ACOE) has jurisdiction for all construction that impacts the jurisdictional waters of the United States, a category that includes wetlands. ACOE received a permit application for directional drilling of fiber optic relocation at several locations along the proposed AAF project corridor (Regional General Permit SAJ-14).

ACOE has also received environmental resource permit application for a segment referred to as D08, which is located within the FECR right-of-way from State Road 528 to the Indian River/St. Lucie Line (Permit File No. SAJ-2015-03903). AAF seeks a Nationwide Permit for this work, rather than an individual permit. AAF also attempted to segment its north/south activities from its east/west activities to hasten an ACOE decision on the project and to further limit review of the project's impacts.

On January 7, 2016, ACOE issued a letter to AAF explaining that AAF's Segment D08, which stretches from the State Road 528 to the Indian River/St. Lucie County Line (Mile Posts 166.9 to 233.4), was determined to not have independent utility from east-west

project segments “P01-04,” which stretch from Cocoa to Orlando International Airport. While opining that the North-West segments may qualify for a nationwide permit, ACOE advised that the permit application for Segment D08 would be placed in abeyance, because the FRA had not completed its Section 106 consultation and issued its ROD, and ACOE had not completed its evaluation of the East-West Segments. ACOE advised AAF that commencement of the proposed work while the permit applications were pending would constitute a violation of federal law, and that receipt of state permits did not obviate the federal permitting requirements.

The January 7, 2016, letter represents a positive step in ensuring that the AAF Project receives a hard look by the federal regulatory bodies. Martin County has been working with Indian River County and consultants to ensure that ACOE has accurate information regarding potential Project impacts during its permit review process.

#### **D. South Florida Water Management District**

For the AAF Project, a Special Case Agreement was executed between the South Florida Water Management District (SFWMD), the St. Johns Water Management District (SJWMD), and the Florida Department of Environmental Protection (DEP), granting the SFWMD the authority to review and process a request for a *de minimus* exemption. AAF applied for and received a *de minimus* exemption permit from the South Florida Water Management District on October 10, 2013.

AAF applied for an environmental resource permit for Segment D09, the North-South Rail Corridor, on September 22, 2015. The permit application is currently under review, with a 30 day review deadline of February 10, 2016. The Martin County team has communicated with SFWMD staff on the Project, and intends to meet with SFWMD to discuss the County’s concerns with the application on February 4, 2016.

#### **E. St. Johns Water Management District**

AAF applied for an environmental resource permit from the SJWMD under Permit Number 135214-2 for Segment D08 in the FEC Railroad Right-of-Way from Mile Post 166.9 to Mile Post 233.4. The permit application states that AAF received an exemption for the replacement of approximately 51 miles of rail, as well as for the installation of 74,250 linear feet of track to ostensibly restore historic double track, and for the installation of approximately 3.2 miles of upland train crossovers for pedestrians.

The SJWMD noticed the permit application on December 25, 2015, and provided a 14 day comment period. Indian River has submitted comments to the District on the application. SJWMD requested additional information from AAF; AAF has until March 10, 2016, to respond.

AAF also applied for an Environmental Resource General Permit for the installation of 67 miles of fiber optic cable from Fort Pierce to Cocoa Beach, including 9 subaqueous crossings. The permit was issued on October 28, 2015, and expires October 15, 2020.

### **III. CURRENT LITIGATION/ADVOCACY EFFORTS**

#### **A. Martin County, et al. v. US Dept. of Transportation, et al., Case No. 15-632.**

On April 27, 2015, Martin County filed a Complaint for Injunctive and Declaratory Relief in the United States District Court for the District of Columbia against DOT. The Complaint challenges DOT's allocation of PABs for AAF as unlawful under Title 23 of the United States Code. Title 23 states that bonds are to be issued for highway projects, not railroad projects. The Complaint also challenges the issuance of the PABs, because they were issued prior to the completion of the NEPA process.

On June 10, 2015, the Court denied Martin County's motion for preliminary injunction based on AAF's assertion that it would proceed with the Project, whether or not the PABs were authorized, but granted the County the right to conduct discovery on the subject.

Thereafter, on June 29, 2015, AAF and DOT filed separate Motions to Dismiss. On July 6, 2015, a status hearing was held with Judge Cooper. The Judge denied AAF's and DOT's Motions to Dismiss without prejudice, subject to renewal after completion of jurisdictional discovery. The County engaged in discovery in late 2015. The County has been served with the renewed Motions to Dismiss, and is required to respond by February 6, 2016.

#### **B. Martin County v. Florida Development Finance Corporation and All Aboard Holdings, LLC, Case No. 2015CA008256-O.**

A Petition for Writ of Certiorari was filed in Orange County, Florida, on September 3, 2015, against the FDFC and AAF. The Petition seeks to quash FDFC's August 5, 2015 Resolution approving the issuance of \$1.75 billion in PABs. A Request for Oral Argument was filed on September 9, 2015, and a Request to Expedite the case was filed on September 14, 2015.

Martin County's Petition contends that the FDFC sat in a quasi-judicial capacity on August 5, 2015, and did not afford Martin County procedural due process, follow the essential requirements of law, or base their findings on competent, substantial evidence. For example, the FDFC did not provide Martin County with sufficient notice and opportunity to be heard when it limited Martin County's time to make a presentation on the PAB application, required Martin County to share the limited time offered with other opposition groups, and engaged in ex-parte communications with AAF and its affiliates prior to the August 5, 2015 meeting.

Further, the FDFC Board did not follow the essential requirements of law when it improperly applied Chapter 288, Florida Statutes. Chapter 288 allows issuance of tax exempt bonds only for projects that "promote economic development within the state, thereby benefiting the citizens of the state." Issuance of the PAB bonds in this case actually harms rather than benefits Martin County, its citizens, and the state. Finally, the the FDFC did not base its findings on competent substantial evidence; AAF's presentation on August 5, 2015 consisted of one speaker, rather than expert testimony and reports.

Indian River County filed a similar Petition in Leon County, Florida, on August 28, 2015, against the FDFC. AAF moved to intervene in that lawsuit. The Court issued an Order to Show Cause in that case on September 15, 2015, to which FDFC responded on November 16, 2015. Both FDFC and AAF filed Motions to Dismiss, which have not been decided by the Court to date. A hearing on Indian River County’s Petition for Writ of Certiorari is scheduled to be held in Tallahassee on April 15, 2016, at 9:00 a.m.

**IV. CURRENT BUDGET STATUS**

The Board initially authorized \$1.4 million for the multi-platform AAF Project effort. To date, \$1,132,985.31 has been spent. There are open purchase orders of \$7,320.75, and pending invoices of \$45,104.16. Based on the above, the unallocated balance of the original \$1.4 million allocation is \$177,840.17. If unused balances for tasks that were completed under budget were re-appropriated, the remaining funds for AAF expenditures would be \$217,798.72. Balances for tasks that were completed under cost are set forth in the table below.

<b>TABLE 2</b>			
<b>BOCC APPROPRIATIONS FORM RESERVE</b>	<b>AMOUNT</b>	<b>SPENT</b>	<b>TASK BUDGET BALANCE</b>
Initial Legal Counsel: Nabors, Acton	15,000	(10,761.54)	4,238.46
Eminent Domain: Caldwell Pacetti	25,000	(11,976.09)	13,023.91
Scouring: Bridge Design Assoc.	40,000	(16,725.00)	23,275.00
Alternative Transportation Impact: Wantman Group	20,000	(15,240.00)	4,760.00
Mapping Railroad Corridor: Civil Survey	30,000	(24,600.00)	5,400.00
Historical Report - Bob Carr	2,000	(1,960.00)	40.00
<b>TASKS COMPLETED UNDER BUDGET BALANCE:</b>			<b>50,737.37</b>
Court Reporting Services and Misc	5,000	(2,726.55)	2,273.45
Other - Travel	5,000	(2,595.83)	2,404.17
McDermott - Rail Safety Counsel	745,043	(743,804.26)	1,238.78
Cultural Resources, Bob Carr, T. Schober	30,000	(4,800.00)	25,200.00
			<b>31,116.40</b>
		<b>TOTAL UNSPENT TASK BUDGET:</b>	<b>81,853.77</b>

**V. WHAT’S NEXT AND BUDGETARY IMPACTS**

In 2016, if County staff is directed by the Board to continue the County’s engagement efforts with the state and federal regulatory agencies, seeing the pending cases to completion and evaluating the need for filing additional cases to protect the public health, safety, and welfare, additional resources will be needed. Below is an estimate of the costs associated with those needed resources and actions. Staff recommends that the Board fund, at minimum, the activities indicated in Paragraphs A through C, below; the

approximate amount of such funding is **\$670,000**. The actions indicated in Paragraph D, below, would be brought for consideration by the Board separately, if and when such action is deemed necessary.

**A. Completion of the federal DOT case - \$250,000 - \$400,000.**

As noted above, briefing on Respondents' Motions to Dismiss is currently being done in the DOT case. McDermott Will & Emery estimates that completion of the Motion to Dismiss process will cost approximately \$150,000. Depending on the outcome of the Motions to Dismiss and depending on whether the County chooses to appeal any potential adverse ruling, the remainder of the case may cost between \$100,000 and \$250,000.

**B. Continued Engagement with State and Federal Regulatory Agencies - \$245,000.00**

**1. SFWMD – Oertel Fernandez Bryant & Atkinson, P.A. - \$50,000.**

To that end, the County has received a proposal from the firm of Oertel Fernandez Bryant & Atkinson, P.A., to assist specifically with the South Florida Water Management District permitting discussions. Oertel Fernandez will oversee the work of a biologist who will be retained to perform an analysis of the data submitted to SFWMD, and will communicate with SFWMD on the legal requirements applicable to the permit applications. Oertel Fernandez has estimated that its work with SFWMD will cost approximately \$25,000. The biologist's work is estimated to cost the same amount. County staff will continue to staff the matter and provide substantive work product, as needed.

**2. Project Management - \$195,000.00.**

More globally, the same firm that has represented the County in the federal case against DOT, above, has been providing general project management assistance. While the County staff will assume a greater project management role in coming months, County staff still believes that the project management services of McDermott Will & Emery will be beneficial during the agency engagement phase of the County's efforts relative to AAF. McDermott Will & Emery has estimated that project management costs over the next year will be approximately \$100,000.

Further, in 2016, County staff recommends re-engagement with public information efforts. For this aspect of project management, staff estimates a cost of \$30,000.

County administration also engaged an engineering firm to provide technical external project management; that effort will need to continue, especially if the County intends to continue its engagement with various permitting agencies. County staff projects an estimated cost for technical engineering external project management of \$65,000.

**C. Miscellaneous Costs - \$25,000**

County staff has and will continue to provide in-house services, where feasible, as part of the agency engagement effort and in conjunction with various legal actions. The County departments incur ancillary expenses in that process, which is estimates will cost approximately \$25,000 in the coming year.

**D. Potential Litigation:**

**1. Administrative Challenge to the SFWMD ERP Permits under Chapter 120, Florida Statutes - \$150,000 - \$200,000.**

The environmental resource permit (ERP) applications being considered by the SFWMD could be administratively challenged. To challenge an ERP, the County would file an administrative petition, pursuant to Chapter 120, Florida Statutes (the “Florida Administrative Procedures Act”) within 21 days after the SFWMD issues its Notice of Intent to issue the permit. The petition would be heard by an administrative law judge at the Division of Administrative Hearings. Both expert and factual testimony would likely be required for such a hearing.

Any administrative challenge to the environmental resource permits could be handled either by the County Attorney’s Office or by outside counsel, Oertel Fernandez Bryant & Atkinson, P.A. While a specific proposal has not been developed for such a case, Oertel Fernandez has advised that a typical 120 hearing is likely to cost between \$150,000 and \$200,000. This work may be performed in-house with current staff at the current workload. However, this is a moving target.

**2. Litigation of the Final Environmental Impact Statement (“FEIS”) and/or the Army Corps of Engineer Permits - \$300,000 - \$500,000**

NEPA requires the federal government to meet certain substantive and procedural environmental requirements when it takes “major federal action,” which is memorialized in a FEIS and a ROD. Examples of major federal action in this case would be the DOT’s decision on AAF’s pending RRIF loan application, and the ACOE’s granting of an individual permit for AAF’s project. The FEIS could be administratively challenged if/when major federal agency action occurs and a ROD is issued.

If a NEPA challenge were to be brought against the pending ACOE permit, the County could retain the firm of Oertel Fernandez Bryant & Atkinson, P.A., which has experience with NEPA challenges. As to DOT action, a NEPA challenge could be brought either as an independent action, or as an amendment to the pending DOT case. The County could retain McDermott Will & Emery, the firm handling the current DOT case, to bring such a challenge or modification to the present case. Neither firm has provided a specific proposal for a NEPA challenge, however, a rough estimate for a NEPA challenge ranges from \$300,000 to \$500,000.

**VI. CONCLUSION**

Staff has worked hard over the last year to respond to the AAF Project with comprehensive, fact-based, information that accurately depicts the impacts of the Project on the citizens of Martin County, while still respecting the Board’s concerns about controlling costs in the multi-jurisdictional, multi-disciplinary undertaking. Staff is very proud of the identifiable improvements in both the plan and the agencies’ responses to

**BCC MEETING DATE:** February 9, 2016  
**AGENDA ITEM:** 8B2

AAF's applications. Staff stands ready to implement the Board's direction on future efforts to ensure that AAF's Project, if built, responds appropriately to safety concerns, pays its fair share of Project-related costs, and minimizes potential for harm to unique physical and cultural resources that make Martin County such a special place to live and work.

ATP/mh