



VIA EMAIL ONLY

March 22, 2019

Corri Feige, Commissioner
Department of Natural Resources
550 West 7th Avenue, Suite 1400
Anchorage, Alaska 99508

Doug Vincent-Lang, Commissioner
Alaska Department of Fish & Game
Post Office Box 115526
Juneau, AK 99811-5526

Re: ADL 231908 Donlin Pipeline Right-of-Way

Dear Commissioners:

I. Introduction

Cook Inletkeeper (Inletkeeper) is a public interest organization formed in 1995 to protect the Cook Inlet watershed and the life it sustains. Below find comments on the above-referenced matter on behalf of Inletkeeper and its more than 8000 members and supporters in southcentral Alaska.

II. Comments

A. Failure to Analyze Cumulative Impacts

The Commissioner's Proposed Decision attempts to address the impacts of pipeline construction alone. In so doing, the Commissioner has improperly segmented and deferred substantive analysis of several aspects of the Donlin Pipeline Right-of-Way (ROW) project including:

- (1) airstrips necessary for pipeline construction (ADL232199);
- (2) seven material sales/sites necessary for pipeline construction (ADL232334/ADL 232360; ADL 232335/ADL 232361; ADL 232336/ADL 232362; ADL 232337/ADL 232363; ADL 232338/ADL 232364; ADL 232339/ADL 232365; ADL 232340/ADL 232366);
- (3) access road easements (ADL 232346) and temporary access roads (LAS 31107 and LAS 31108), all of which are necessary for pipeline construction.

By segmenting the pipeline project into separate components, DNR has failed to take a hard look at impacts of all elements of the pipeline project, and of related projects that—together with the pipeline—will have cumulative effects on the State's resources. Furthermore, the Proposed Decision fails to take a hard look at the types of impacts reasonably expected to flow from the various elements of the pipeline project, including but not limited to impacts to fish and wildlife, water quality and quantity, air quality, and soils and vegetation. Finally, the Proposed Decision wholly neglects to address the anticipated effects of climate change, including but not limited to warming stream and air temperatures, reduced ice and snow coverage, ecosystem regimes shifts and changing precipitation patterns.

This Proposed Decision, if finalized, represents a functionally irrevocable disposal of an interest in state land.¹ Under AS 38.35.100, the Commissioner is tasked with determining whether the ROW will serve the present or future public interest, whether the state's property interests will be protected, and whether the applicant will ensure that there will be no significant adverse environmental impact to the State's public trust resources including fish, wildlife, vegetation, biotic resources, subsistence resources, land and water resources. This duty of the Commissioner is rooted in Article VIII of the Alaska Constitution, which requires that natural resources be made available for maximum use, consistent with the public interest, and that wherever occurring in their natural state, fish wildlife and waters are reserved to the people for common use.²

The Proposed Decision fails to protect the public interest because there is no analysis of the cumulative impacts of the Donlin ROW on resources protected in Article VIII. The ROW Proposed Decision does not mention the word cumulative impacts, nor contain any analysis that could be deemed a cumulative impact analysis. As enumerated above, there are multiple aspects of the Donlin ROW project that have not been analyzed in the Proposed Decision, and will likely never have a cumulative impact analysis of the kind the Alaska Supreme Court has found to be mandatory under the principles of Article VIII.

In *Sullivan v. Resisting Oil Destruction of Indigenous Lands (REDOIL)*³ the Alaska Supreme Court discussed cumulative impacts analysis required under Article VIII:

We are, however, tasked with the duty to ensure that constitutional principles are followed. A bedrock principle in Article VIII of the Alaska Constitution mandates that the State's natural resources are to be made “available for maximum use consistent with the public interest.” The constitution entrusts the legislature with the discretion to determine how to ensure that use of these natural resources are “for the maximum benefit of its people.” We have said that to ensure these principles are followed, it is necessary for the State to take a “hard look” at all factors material

¹ The Commissioner's Proposed Decision states that it is a grant of a "revocable" interest in state land. Proposed Decision at p. 8. This is inconsistent with the Alaska Supreme Court's decision in *Northern Alaska Environmental Center v. State, Dept. of Nat. Res.* 2 P. 2d 629 (Alaska 2000), which held a right-of-way permit for a 65-mile electrical transmission line, with far fewer impacts and significantly fewer miles in length than the proposed pipeline, was functionally irrevocable. The Donlin ROW is, likewise, a functionally irrevocable disposal of an interest in State land.

² Alaska Cont. Art. VIII, sections, 1, 3.

³ 311 P. 2d. 625 (Alaska 2013) (emphasis added).

and relevant to the public interest: this “hard look” necessarily includes considering the cumulative impacts of a project.

The Commissioner's responsibilities under AS 38.35.100 specifically reflect the requirement that Article VIII resources are protected. Likewise, the Proposed Decision cites the Public Trust Doctrine, acknowledging the Commissioner's duty to protect public trust resources.⁴ Yet, by failing to conduct a cumulative impacts analysis, the Commissioner failed to carry out her statutory and Constitutional responsibilities. For this reason, the Proposed Decision fails to pass Constitutional muster and must be revised to take a hard look and analyze the cumulative impacts of the Donlin ROW project.

C. Failure to Show Technical Capacity to Protect Fish Resources

In making a determination on a ROW application, the Commissioner has an affirmative duty to find “the applicant has the technical and financial capability to take action to the extent reasonably practical to ...prevent any significant adverse environmental impact, including but not limited to erosion of the surface of the land and damage to fish and wildlife and their habitat.”⁵

As a threshold matter, it’s difficult if not impossible for Alaskans to understand how many streams the pipeline and associated activities will cross, and how many of those crossings have resident and/or anadromous fish in them. The Final Environmental Impact Statement (EIS) for the Donlin Gold Project lists 452 stream crossings for the 100 foot-wide pipeline construction corridor; of these streams, the EIS identifies 163 as fish bearing, with 72 fish bearing streams supporting one or more species of salmon.⁶ The EIS then goes on to state “[f]ish presence was documented at 178 of the 574 crossings assessed,”⁷ which creates one level of confusion.

The Proposed Decision, however, muddles the issue even further, stating the “proposed pipeline is expected to cross approximately 300 streams and rivers.”⁸ This figure expressly contradicts the ADFG memo accompanying the Proposed Decision, which states “[c]onsultants for Donlin Gold, LLC identified fish presence in 174 of the 576 stream crossing sites assessed across the entire proposed pipeline route.”⁹ As a result of these significant disparities, it’s virtually impossible to conclude DNR truly has taken a hard look at potential impacts to fish resources from pipeline construction and operation, or has adequately assessed the technical capacity of the applicant to protect these public trust resources.

Furthermore, ADF&G predicts potentially significant impacts to fish and fish habitat during construction from the open-cut trenching of hundreds of streams, including stream sedimentation, bank erosion, disruption to migration, mortality to fish eggs in gravel, loss of riparian vegetation and changes to overwintering areas.¹⁰ Likewise, ADFG finds the withdrawal of water needed for

⁴ Proposed Decision, p. 11.

⁵ AS 38.35.100(a)(3)(A)(emphasis added).

⁶ Donlin EIS, p. 3.13-57.

⁷ Id. at p.3.13-61.

⁸ Proposed Decision, p. 19.

⁹ Proposed Decision, Attachment E, p. 4 (ADFG Memo).

¹⁰ Id. at 17.

pipeline construction may result in loss of fish habitat and impingement or entrainment of fish in water withdrawal equipment. Furthermore, the disposal of large amounts of water in buried ditches and after pipeline hydrotesting may lead to increased downstream erosion, sedimentation and turbidity in fish streams. Finally, ADFG found that blasting activities, and construction of bridges/culverts, could cause injury and mortality to fish and fish eggs, and the construction of ice bridges in winter could lead to ponding or damming during break-up, leading to downstream erosion and negative impacts to fish passage.

Despite these various and significant risks and impacts to Alaska's prized fish resources, the Commissioner's Proposed Decision makes zero effort to assess whether the applicant does in fact possess the technical capacity to protect fish and water resources. Instead, the Proposed Decision simply points to different plans the applicant must submit, laws and rules it must adhere to, or stipulations it must meet. None of this, however, provides the basis to determine that Donlin has the technical capacity and know-how to trench through hundreds of fish streams with back hoes, or to directionally drill under flowing fish streams, without significant adverse environmental impacts.

Although the ADFG memo accompanying the Proposed Decision highlights a variety of significant concerns, it does so in less than two pages. Regardless whether the number of streams crossings is 300 or 600, this is an unusually superficial review which cannot approach the level of site specific detail needed to assess whether the applicant has the technical capacity to meet the standard in AS 38.35.100(a)(3)(a). Under current laws and rules in Alaska, the only way DNR may permissibly meet the statutory standard in AS 38.35.100 is to review and approve the Title 16 Fish Habitat Permits under the Anadromous Fish Act¹¹ for each crossing prior to issuing a final ROW determination.

III. Conclusion

Alaska boasts some of the last wild salmon runs in the world. Yet piecemeal development and poor agency oversight increasingly fragment the habitat we know salmon need to survive. This "death by a thousand cuts" phenomenon has played out from Europe to New England to the Pacific Northwest, yet Alaska continues to repeat the mistakes made elsewhere.

ADFG & DNR have an opportunity to hold Donlin to a higher standard. But both agencies need to take a harder look at the project, address cumulative impacts, and ensure Donlin has the scientific and the technical capacity to do pipeline construction and operation right.

Until that time, DNR must withdrawal the Proposed Decision, and correct the flaws identified.

Yours for Cook Inlet,



Bob Shavelson
Inletkeeper

¹¹ AS 16.05.871 et. seq.