



MEMORANDUM

STATE OF ALASKA

Department of Natural Resources
Division of Coastal and Ocean Management

TO: Kerry Howard
Director
Division of Habitat
Department of Fish and Game

DATE: February 23, 2009

TELEPHONE: 465-8797

FROM: Randy Bates *RJB*
Director
Division of Coastal and Ocean Management
Department of Natural Resources

SUBJECT: DFG Important Habitat
Designation Request –
Taku River
(Tulsequah Mine Barging
Project), AK 0801-08J

In a memorandum dated January 30, 2009, I approved the Department of Fish and Game's (DFG) request to designate the entire mainstem of the Taku River below the ordinary high water mark, including the east channel around Canyon Island, as an important habitat area under 11 AAC 112.300(c)(1)(B). However, after further review and consideration, I must amend that approval as follows:

1. The DFG request to designate the Taku River as important habitat from the mouth of the river to the extent of tidal influence near the Taku Lodge, about 16 miles upstream of the river mouth, and below the high water mark, remains approved.
2. The DFG request to designate the Taku River as important habitat from the Taku Lodge to the U.S./Canadian border is no longer approved. However, if DFG were to provide the necessary information as described in the discussion below, DCOM will reconsider the request to designate this portion of the river as important habitat.

My decision to amend the approval of the important habitat designation is based on a legal review and analysis of whether the regulatory requirements to designate the area as important habitat have been met. That analysis follows.

Under 11 AAC 112.300(c), the department (i.e., the Department of Natural Resources) may designate important habitat within the context of an Alaska Coastal Management Program (ACMP) consistency review:

“For purposes of this section,

(1) “important habitat” means habitats listed in (a)(1) – (8) of this section and other habitats in the coastal area that are

(A) designated under 11 AAC 114.250(h);

(B) identified by the department as a habitat

(i) the use of which has a direct and significant impact on coastal water; and

(ii) that is shown by written scientific evidence to be biologically and significantly productive; or

(C) identified as state game refuges, state game sanctuaries, state range areas, or fish and game critical habitat areas under AS 16.20.” (Emphasis added).

The terms “coastal water” and “direct and significant impact” are terms defined in 11 AAC 112.990(6) and 11 AAC 114.990(13), respectively, to mean:

“coastal water” means those waters, adjacent to the shorelines, that contain a measurable quantity or percentage of sea water, including sounds, bays, lagoons, ponds, estuaries, and tidally influenced waters. (Emphasis added).

“direct and significant impact” means an effect of a use, or an activity associated with the use, that will proximately contribute to a material change or alteration of the coastal waters, and in which

(A) the use, or activity associated with the use, would have a net adverse effect on the quality of the resources;

(B) the use, or activity associated with the use, would limit the range of alternative uses of the resources; or

(C) the use would, of itself, constitute a tolerable change or alteration of the resources but which, cumulatively, could have an adverse effect. (Emphasis added).

Within your original memorandum dated December 17, 2008 and your January 15, 2009 follow-up response to DCOM’s request, DFG presented ample written scientific evidence to suggest that the Taku River is biologically and significantly productive. The evidence included studies that were specific to the scope of the project subject to the consistency review. The requirement at 11 AAC 112.300(c)(1)(ii) has been met.

Specifically within the January 15, 2009 memorandum, DFG presented evidence that tidal influence occurs up to or near Taku Lodge – approximately 16 miles upstream of the river mouth. The habitat in this portion of the river is considered coastal water due to the tidal influence. The use of the habitat from the mouth of the Taku River up to the Taku Lodge may proximately contribute to a material change or alteration of the coastal waters (e.g., the use of the tracked vehicles in the winter may scour the stream bed, may ridge the ice, or may disrupt sediments and create turbid conditions). DFG included an analysis that the use and material change or alteration of the coastal waters could have a net adverse effect on the quality of the resources (i.e., limit or displace the anadromous fishes or other species). For the lower portion of the lower Taku River from the mouth of the river to the Taku Lodge, the requirement at 11 AAC 112.300(c)(1)(i) has been met.

Based on the above discussion, the important habitat designation for the mainstem of the Taku River below the ordinary high water mark from the mouth of the river up to the Taku Lodge is justifiable and remains approved.

For the portion of the Taku River above the Taku Lodge to the U.S.-Canadian border, the department (i.e., the Department of Natural Resources) must determine whether the use of that habitat will proximately contribute to a material change or alteration of the coastal waters (i.e., the waters from the Taku Lodge downstream). Based on the evidence and analysis that DFG has submitted to date, it does not appear that the use of this portion of the habitat has been demonstrated to proximately contribute to a material change or alteration of the coastal waters. To address this causal connection, DCOM initially

asserted that the founding principles on which the coastal zone boundaries were originally established were reason enough to approve the designation (i.e., coastal zone boundaries included areas necessary to manage a use or an activity that has or is likely to have a direct and significant impact on coastal waters – see the January 30, 2009 memorandum from me to Erin Allee). However, after further review and consideration, I recognize that the mere establishment of the coastal zone boundaries in 1978 did not sufficiently address the causal connection between uses of the upstream habitat and the downstream material change or alteration of coastal waters.

Although not specifically requested by DCOM, the connection between the use of the river between Taku Lodge and the U.S.-Canadian border and the impact to coastal waters was not clearly articulated and was not direct. Therefore, I have subsequently determined that the designation of this portion of the river as important habitat is not justified and is not appropriate. If DFG has additional information, evidence, or an analysis that you believe would demonstrate how the use of that upstream portion of the river could change coastal water quality (turbidity, pH, etc.), salinity, flow, or hydrography, thus impacting coastal waters, DCOM could approve this portion of the river as important habitat (the above discussion of net adverse effects on the quality of the resources would apply to this portion of the river).

It is important to also note that the scope of the project subject to the consistency review *does not change* with this or any other designation. The designation of any portion of the river requires that the applicant simply demonstrate that the proposed action "...avoid, minimize, or mitigate significant adverse impacts to the special productivity of the habitat" within the context of the scope of the project being reviewed. In this case, the designation affects only a portion of the overall project activities included within the scope of the project subject to the ACMP consistency review.

By the close of business (i.e., 5:00 PM) on March 2, 2009, please provide DCOM with the additional information, evidence, or analysis demonstrating how the use of that upstream portion of the river would result in a material change or alteration to coastal waters. If DFG does not have that additional information, or does not intend to pursue the important habitat designation for that portion of the Taku River upstream from the Taku Lodge to the U.S./Canadian Border, please let me know immediately but no later than the close of business March 2.

At your request, DCOM is also preparing a one-page fact sheet that addresses additional questions regarding this important habitat designation.

If you have any questions, please do not hesitate to contact me.

CC:

Charles Swanton, DFG, Director, Sport Fish Division
John Hilsinger, DFG, Director, Division of Commercial Fisheries
Tom Crafford, DNR, Large Mine Project Manager, OPMP