



February 6, 2009

Randy Bates
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Via Email: randy.bates@alaska.gov

RE: Important Habitat Designation of Taku River - Response

Dear Mr. Bates,

This follows up on our call of February 4, 2009. Thank you for making yourself and others available to explain the Important Habitat (IH) designation memorialized in DCOM's January 30, 2009 memorandum. We agreed to provide our initial thoughts on IH and associated issues.

Scope of ACMP Review

Our review of the ACMP program indicates that an IH designation, even if applied to the entirety of the Taku River, would not change the scope of the ACMP review as described on page 3 of DCOM's December 5, 2008 letter.

The underlying statute, AS 46.40.096(k), limits the scope of ACMP review to activities that are "subject to a state resource agency permit, lease, authorization, approval, or certification." The relevant regulations, in turn, clearly state that the scope of ACMP review is "limited to those activities of the project that are ... subject to a [DNR] or Department of Fish and Game authorization identified in the C-List." 11 AAC 110.020(c)(1)(A). In this instance, Redfern has sought coverage under a DNR land use permit and a DFG Fish Habitat Permit, both of which are on the current C-List.

Although an IH designation results in the imposition of an additional statewide standard that applies to the specific activities that are subject to the underlying agency authorizations, the IH designation itself does not change the scope of ACMP review. DCOM earlier confirmed that for the winter season, the scope of ACMP review includes the entire proposed route from tidewater to the border. For the aquatic/summer season, DCOM confirmed that the scope of ACMP is limited to the east channel of Canyon Island. The IH designation, even if were to extend from tidewater to the Canadian Border,



would not be relevant for any activity during the aquatic/summer season except for Redfern's proposed activities on the east Channel of Canyon Island. Other summer activities, such as barging, are not subject to permitting from DNR and DFG and, therefore, are not subject to ACMP review and the requirements that flow from the IH designation. It is important that Redfern, and the public, have a clear understanding of precisely how the IH designation would apply under ACMP. Therefore, we ask that DCOM confirm that the IH designation does not change the scope of review as set forth in the December 5, 2008 letter.

Scope of IH Designation

We agreed to provide our thoughts on the support for the IH designation, specifically as it applies upstream of Taku Lodge, which is the apparent upper limit of coastal waters.

Taku Lodge is located at river mile 16. The distance from Taku Lodge to Canyon Island is approximately 12 miles. The Canadian border is approximately 2 miles above Canyon Island.

To designate IH, DCOM must find that:

- (i) use of habitat has a "direct and significant impact on coastal water", and
- (ii) the habitat is "shown by written scientific evidence to be biologically and significantly productive."

11 AAC 112.300(c)(1)(B)(i)-(ii). "[D]irect and significant impact" is defined as follows

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, would have an adverse effect;

11 AAC 112.990(36); 11 AAC 114.990(13). Read together, the regulations require DNR to make 3 findings:

- (i) use of the habitat will proximately contribute to a material change or alteration of the coastal waters,

(ii) use of the habitat would have one of the 3 types of impacts (adverse effect, limit range of alternatives, or cumulative impacts) on the resources; and

(iii) the habitat is shown to be biologically and scientifically productive.

Analysis

The intent of this message is to focus DCOM's attention solely on the first element and, specifically, the rationale and factual support for DCOM's conclusion that uses of habitat in the upper Taku River, e.g., in the area of Canyon Island, will contribute to a material change or alteration of coastal waters downriver. On page 3, DCOM offers two reasons supporting its conclusion that "use of the habitat has or is likely to have a direct and significant impact on coastal waters."

First, DCOM states that its decision is "based on the **general relationship** between uses of the habitat and the direct significant impact of those uses on coastal waters." You note that the Taku River is a significant spawning, rearing, and overwintering area for fish and serves as habit for other species. You conclude that "any use of the habitat that would limit or displace the anadromous fishes or other species may have a net adverse effect."

Second, DCOM notes that the entirety of the Taku River is within the coastal zone boundaries of both the State and the City and Borough of Juneau. You cite a regulation, 11 AAC 14.220(c), which states that coastal zone boundaries were established to extend inland and seaward to the extent necessary to manage a use or an activity that has or likely to have a direct and significant impact on coastal water.

We address the second point first. The cited regulation is relevant to the establishment of the coastal boundaries. We understand DCOM's argument to be, in effect, that the coastal boundaries were established on the premise that they extend inland (upstream) as necessary to manage uses or activities that have or are likely to have a direct and significant impact on coastal waters. The implication being that any activity in the coastal boundary is presumed to have a direct and significant impact on coastal waters. If that interpretation were correct, there would be no reason to have the regulation at 11 AAC 112.300(c)(1)(B) which require specific findings to be made regarding impacts on coastal waters. The regulation would instead say something along the lines of "DNR may designate important habitat within the coastal zone if the habitat is shown to be biologically and significantly productive." That is not what the regulations say, however. Rather, the relevant regulation requires DCOM to establish a causal link between uses of habitat and downstream impacts to coastal water. The establishment of the coastal boundary does not in any way excuse DCOM from its obligation to make the requisite findings required by 11 AAC 112.300(c)(1)(B).

Regarding the nexus to coastal waters, we strongly believe that DCOM has not shown that "an effect of a use, or an activity associated with the use will proximately contribute to a material change or alteration of the coastal waters."

We make several observations regarding this language.

First, the other IH criteria do not even come into play unless DCOM can first show that a use of habitat will contribute to a material change or alteration of coastal waters.

Second, the regulation unquestioningly establishes a high burden for the establishment of IH in the context of a specific project. The regulation requires the establishment of causation that the use "will" contribute to a material change or material alteration coastal waters. There is no room for findings premised on speculation or the belief or supposition that uses may/might/could impact coastal waters. Similarly, the change or alteration in coastal waters must be "material." The term "material" is undefined, but the phrase clearly requires the identification of a change or alteration that is both harmful, and not insignificant.

The bar is set high for a reason. An IH designation changes the rules of ACMP review without any public process. If DCOM intends to impose heightened scrutiny on a project, the regulations appropriately require it to make detailed findings justifying the nexus to coastal waters.

Third, DCOM must make appropriate findings for representative areas of the Taku River. Stated differently, it is not permissible to bootstrap findings relevant to the lower river below Taku Lodge, which are coastal waters, to areas above Taku Lodge, which are not coastal waters. Clearly, DCOM has a much higher and more significant burden when trying to establish IH in habitat that is not itself located in coastal waters. Obviously, the farther a given stretch of habitat is from coastal waters, the greater the burden is on DCOM to justify the nexus to coastal waters.

We are not challenging DCOM's analysis with respect to that part of the Taku River in coastal waters (from Taku Lodge downriver). What we are saying, however, is that DCOM must provide facts, for representative stretches of the river, to support its conclusion that the upstream uses "will" contribute to a "material change or alteration of the coastal waters." There is a point, somewhere above Taku Lodge, where a set of assumed facts, even viewed in the most favorable light to DCOM, cannot support the conclusion that the activities "will" contribute to a "material change or alteration" of downstream coastal waters. Will winter crossings utilizing open leads 3 miles above Taku Lodge contribute to a material alteration of coastal waters at Taku Lodge? If so, what, specifically, is the material change or alteration in waters that will occur? Taking that logic further, the area of Canyon Island is 12 miles or more above coastal waters. What specific activity in this area "will" contribute to a "material change or alteration" of coastal water at Taku Lodge? What is the material change or alteration in coastal waters that would occur? These findings need to be made in light of the fact that the Taku is a large, glacial river. We are highly skeptical that under any reasonable view of the proposed activity, DCOM can conclude that upstream use of habitat will lead to even detectable changes or alterations in coastal waters, let along "material" changes or alterations.

Last, we point out our disagreement with DCOM's analysis on two procedural points. The italicized DFG language on pages 1-2 suggests that DFG considered activities, such as summertime barging, that are outside the scope of the ACMP review. Similarly, on page 3, you state that "there is no regulatory requirement in which requests to designate areas during the course of an ACMP review be 'connected' to potential impacts of the proposed activity on such areas." We believe the IH designation must be made in light of the specific proposed activity and is constrained to those activities that are within the scope of the ACMP review. The requirement to demonstrate that uses of habitat "will proximately contribute to a material change or alteration of coastal waters" confirms that the analysis cannot be undertaken in the abstract based on "general principles" concerning types of uses and impacts. As a practical matter, DCOM did, in fact, appear to focus its analysis on Redfern's proposed activities and not on assumed hypothetical uses of the river. Our primary objection here is your apparent consideration of impacts arising from uses and activities, such as summertime barging, that are outside the scope of the DCOM review.

Finally, we briefly point out the shaky legal foundation upon which the IH regulation rests. First, there is a strong presumption in Alaska that standards governing the public will be promulgated through formal rulemaking under the APA. That ensures public process and input into standards before they are applied to the public. According to the Alaska Supreme Court, an indicia of a regulation is that it implements, interprets or makes specific the law enforced or administered by the state agency. Another indicia of a regulation is that it "affects the public or is used by the agency in dealing with the public." Kenai Peninsula Fisherman's Co-op v. State, 628 P.2d 897 (Alaska 1981). In this instance, there is a regulation, 11 AAC 112.300(c)(1)(B), but it does not itself establish the statewide standard that is employed to regulate the project. Rather, the regulation allows DCOM unilaterally, without any public process, to later establish a standard that is legally binding, and which is used by DCOM in addressing the applicant's ACMP application. We believe that this process is fundamentally flawed in light of the APA.

Second, the underlying statute contemplates the "adoption" of "statewide" habitat standards. See AS 46.40.040(a)(1); see also definition of consistency review at AS 46.40.210(5) (defined as the "evaluation of a proposed project ... against the statewide standards adopted under AS 46.40/040."). Here, the important habitat standard has not been "adopted." Rather, DCOM adopted a process that, on DCOM's election, later leads to the designation of a standard. It is also important to note that the IH regulation does not lead to a statewide standard. Instead, it is a process that allows a standard that is inherently local and project-specific to come into existence. The regulation is unquestionably a distortion of the requirement to adopt, through rulemaking, statewide standards.

RFAI

As discussed, we strongly encourage DCOM to keep separate any RFAIs arising from ACMP from those relating to the DNR permit and/or DFG permit. The programs are different, and the RFAI in the ACMP has consequences that do not arise in the context of the permit actions.

Conclusion

Redfern is extremely troubled by the emergence of the IH issue in the middle of the ACMP review. We understand the reluctance by DCOM to revisit a decision already made. Yet, this is a process that was not vetted with the public and it is not unreasonable to re-assess the decision in light of input from the applicant and any other interested parties. We encourage DCOM to take a fresh look at the IH designation. We believe there is a clear basis for DCOM to distinguish between the IH analysis downstream of Taku Lodge, and those areas upstream. We have not seen a defensible rationale for designation of areas above Taku Lodge as IH, and based on our understanding of our project, cannot envision any reasonable set of facts that would support such a conclusion.

If you have any questions, please direct them to Tim Davies, Manager, Environmental and Regulatory Affairs, at 250 334 0476 or tim.davies@redcorp-ventures.com



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