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US Army Corps of Engineers
Don Kuhle, Project Manager
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907---753---2780

Re: Scoping Comments on the Proposed Donlin Gold Project

On behalf of the undersigned organizations, I am submitting these comments as part of the proposed Donlin Gold Mine Environmental Impact Statement (EIS) Scoping process. In general, we are concerned that the approval of the Donlin Applications will negatively impact the public interest, harm fish and wildlife habitat and violate the Alaska Water Use Code. The groups have concerns about one of the world's largest proposed mega-gold mines whose 16,300 acre wetland footprint extends into the Alaska marine transportation corridor.

Our specific concerns include the following:

I. The Use of Water Related to the TWUPs Issued by DNR is Significant

Commenters are concerned about the Temporary Water Use Permits (TWUPs) Applications awarded to Donlin Gold (Donlin) by the Department of Natural Resources (DNR) in March 2012. Specifically, under the Alaska Water Use Code:

Anyone who diverts, impounds, or withdraws a significant amount of water for use, without a permit, certificate, or authorization is guilty of a misdemeanor (AS 46.15.180). A significant amount of water is defined... as:

- the consumptive use of more than 5,000 gallons of water from a single source in a single day;
- the regular daily or recurring consumptive use of more than 500 gpd from a single source for more than 10 days per calendar year;
- the non-consumptive use of more than 30,000 gpd (0.05 cubic feet per second) from a single source; or

- any water use that may adversely affect the water rights of other appropriators or the public interest.¹

The Department's issuance of TWUP A2012-024 to Donlin on March 2, 2012 however, appears to be contrary to 11 AAC 93.035 because it authorizes the withdrawal of up to a combined total of 8,000 GPD from 1 Source.² The amount of consumptive use from the source under A2012-128, therefore, could not be less than the prescribed 5,000 gpd.

In addition, regardless of the fact that the "Commissioner will issue a permit only if he/she "finds that... the proposed appropriation is in the public interest,"³ it is likely that the TWUP will negatively impact the water rights of other appropriators and/or the public interests. Based on the fact that the TWUPs will be used to develop coal resources on the Kuskokwim River Watershed. The primary impact of granting the Application would be to the local residents who live in the vicinity of the Mining operations and fish and wildlife habitat in the vicinity of the water withdrawals. The Mine which would be the world's largest proposed mega-gold mine would have 16,300 acre wetland footprint extending into the Alaska marine transportation corridor.

The proposed mine's impacts will result in permanent changes to the Kuskokwim River's Yup'ik peoples' cultural survival, subsistence resources, and health. "The increased dredging, ports and barges carrying toxic materials in our Kuskokwim river will negatively impact our coastal and river villages' salmon fishing, food security, drinking water, future generations and cultural traditions," says Ole Lake of Alaska's Big Village Network.

In determining the public interest in relation to TWUPs 2012-128 & 168, therefore, the Commissioner must comply with the following provisions of the Alaska Water Use Code:

a) Detriments to Fish and Game Resources

"In determining the public interest, the commissioner shall consider...the effect on fish and game resources and on public recreational opportunities..."⁴ The Mine will bring enormous cost to water, fish, wildlife, peoples and migratory animal pathways with massive amounts of contaminants such as mercury, arsenic and selenium, that will permanently leach into the Kuskokwim watershed.⁵

Detriments to Public Health

¹ <http://dnr.alaska.gov/mlw/water/wrfact.cfm>. See, 11 AAC 93.035(a) and (b)

² Alaska DNR Case Abstract TWUP A2012-024 (March 2, 2012).

http://dnr.alaska.gov/projects/las/Case_Abstract.cfm?FileType=TWUP&FileNumber=A2012-128&LandFlag=y

³ AS 45.015.080(34).

⁴ AS 45.015.080(b)(3).

⁵ ["Dirty Metals: Mining, Communities and the Environment," A report by Earthworks and Oxfam America, 2004]

“In determining the public interest, the commissioner shall consider...the effect on public health...”⁶ Donlin Gold is equally owned and supported by Barrick Gold Corp. and Nova Gold Resources. Barrick and NovaGold both have a history of contaminating peoples' water supply on a global scale. NovaGold has a history of mishaps in Alaska including the complete shutdown of the Rock Creek mine in Nome, Alaska, in which "streamlined permitting" killed 2 workers and resulted in terrible planning for the water balance of the mining operation in 2007-8.⁷

Similarly, Acid Mine Drainage (AMD) is a major concern related to the proposed Donlin Gold mine, which can cause severe health, reproductive and developmental impacts to living organisms; including humans. Some of these concerns have been discussed extensively in the EPA's draft Bristol Bay Watershed Assessment of the Pebble Mine project. In addition, Donlin proposes to install a 313-mile, 14-inch gas pipeline from Cook Inlet to the middle of a Kuskokwim wilderness area, an area with no infrastructure. The municipality of Anchorage predicts a Southcentral Alaska natural gas supply crisis in Cook Inlet region by 2014.

c) *Harm to other Persons*

“In determining the public interest, the commissioner shall consider...harm to other persons resulting from the proposed appropriation.”⁸ As in this case:

the impact from the removal of large volumes of water from hydrological systems could stress drinking water supplies and existing water rights and water uses. This could lead to lowering of water tables or dewatering of drinking water aquifers, decreased stream flows, and reduced volumes of water in surface water reservoirs and impact the availability of water for drinking. The lowering of water levels in aquifers can necessitate the lowering of pumps or the deepening or replacement of wells...⁹

In addition, to the extent that there are individual water right permittees who retain water rights or applicants who have applied for water rights in the same general location as the Donlin Mining operations related to TWUPs A2012-024. If such individual applications retain an earlier priority date than the Donlin TWUPs in question and the point of diversion is from the same or a hydrologically connected source, this would be clearly contrary to the public interest standard of AS 45.015.080 and therefore, a violation of the significant use provisions of 11 AAC 93.035.

⁶ AS 45.015.080(b)(4).

⁷ “Rock Creek Mine Problems,” report by Center for Science in Public Participation, April 2012.

⁸ AS. 45.015.080(b)(6).

⁹ EPA Plan p. 25.

II. Issuance of the TWUPs is Contrary to Basic Human Rights

Based on the fact that issuance of the Donlin TWUP would result in negative impacts to human health, environmental impacts and the public interest, approval of these TWUPs impacts the basic human rights as recognized in Alaska state law including the general reservation of surface and subsurface waters for fish and game and the protection of due process under the Alaska Constitution, violations of the Public Trust Doctrine and water rights.

b. Alaska Constitution

The Alaska Supreme Court has stated that the state “Constitution can offer broader protections than corresponding provisions of the United States Constitution.”¹⁰ In this regard, the Constitution provides that “[e]xcept for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, *and to the general reservation for fish and wildlife.*”¹¹

The TWUP is potentially contrary, therefore, to the Constitution’s general reservation for fish and wildlife because it would deprive the public of the right to ground and surface water necessary to maintain economic, subsistence, commercial and sport resources¹² and, potentially interferes with the interests existing water right permittees and applicants in retention of the original priority date over any potential conflicting water uses.¹³ Indeed, as the Alaska Supreme Court states:

[n]atural resources are of prime importance to the public. Water is a key natural resource, listed in article VIII, sections 2 and 13 of the Alaska Constitution. Likewise, concepts of fairness underlying the right to procedural due process are important.¹⁴

c. The Public Trust Doctrine

The TWUP is contrary to Alaska’s Public Trust Doctrine which calls for protection of instream flows and subsistence uses for state citizens. The U.S. Supreme Court, for example, concludes that “the ownership and dominion and sovereignty over lands...with...states, belong to the respective states...to use or dispose of any portion, thereof, when that can be done without substantial impairment of the interest of the

10. State Dep’t of Natural Res. v. Green Peace, Inc., 96 P.3d 1056, 1064 (citing Baker v. City of Fairbanks, 471 P.2d 386, 401–02 (Alaska 1970)). The Alaska Constitution also provides “no person shall...be deprived of life, liberty or property without due process of law.” ALASKA CONST. art I, §7 (alteration added).

11. ALASKA CONST. art VIII, § 13 (emphasis added).

12. *Id.* at 14.

13. *Id.* at 14–15. “Under the principle of ‘prior appropriation,’ when more than one application for water use competes for the same flow of water, whichever application was received by the administering agency earliest will be senior to the later application, and the junior user cannot use any water that would adversely affect the senior user.” See Robert E. Beck & Owen L. Anderson, *Elements of Prior Appropriation*, in WATERS AND WATER RIGHTS § 12.01.

14. *State v. Greenpeace, Inc.*, 96 P.3d 1056, 1062–63 (finding the DNR violated an organization’s due process rights when it lifted a stay of a temporary water use Permit with only a one-day notice).

public...”¹⁵ That the Doctrine applies to the application, therefore, is illustrated by the fact that “there can be no irrevocable contract in conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.”¹⁶

Similarly, the public trust doctrine is implicitly supported by the Alaska Constitution which provides “[w]herever occurring in their natural state, fish, wildlife and waters are reserved to people for common use.”¹⁷ In addition, since statehood, decisions by the Alaska Supreme Court has recognized the force of the Public Trust Doctrine, has expanded its scope removing any question that the Doctrine and its role in the preservation of Alaska’s natural resources is implicit in the Constitution. These implications are illustrated by the fact that the Alaska Supreme Court concludes that the “common use” clause was unique in relation to other state constitutions and was established to avoid exclusive control over resources by the State by imposing a public trust duty to prevent such control.¹⁸

The State, therefore, does not have the right to manage resources as if it were a private owner seeking to maximize income.¹⁹ Instead, the State must manage for the benefit of the beneficiary of the trust – all people of Alaska.²⁰

Conclusion

For the above reasons we believe that DNR’s issuance of TWUP 2012-024 on March 2, 2012 to Donlin is likely in violation of the Alaska State Water Use Code and request that the Corp consider approval of such Permit in it’s environmental impact analysis. Similarly, any issuance of the TWUP 2012-would be in violation of state law and we request that the application for such TWUP be denied. In addition, the CORP should: 1) conduct a watershed assessment with a scientific report on the potential impacts of Donlin Gold Mining Developments on the Kuskokwim River and Kuskolwim Bay fisheries, wildlife and the Alaskan Native cultures in the region; 2) additional longitudinal analysis social, cultural and environmental impacts of the Mine in a comparative analysis with other large scale mines of similar magnitude; 3) a comprehensive risk assessment of heavy metals such as mercury, selenium and arsenic from cradle to grave is also needed for adequate risk evaluations. Please contact Hal Shepherd with CWA (waterlaw@uci.net) if you have any questions regarding this letter or these requests.

s/Harold Shepherd
Harold Shepherd, Director
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¹⁵ *Illinois Cent Co v. State of Illinois City of Chicago v. Illinois Cent Co State of Illinois v. Illinois Cent*, 146 U.S. 387, 465 (1892). (emphasis added).

¹⁶ *Id.*

¹⁷ Article VIII, Section 3.

¹⁸ *Owsichuk v. State, Guide Licensing and Control Bd.*, 763 P.2d 488, 491 (Alaska, 1988).

¹⁹ *Metlakatla Indian Cmty., Annette Island Reserve v. Egan*, 362 P.2d 901, 913 (Alaska 1961).

²⁰ *Id.*

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