

# STATE OF ALASKA INFORMAL REQUEST FOR PROPOSALS



EXPERT CONSULTATION SERVICES – DONLIN GOLD PROJECT

IRFP 18-363-21

ISSUED SEPTEMBER 28, 2021

THE STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DIVISION OF WATER QUALITY IS SEEKING EXPERT CONSULTATION SERVICES IN SUPPORT OF THE CLEAN WATER ACT, SECTION 401 CERTIFICATE OF REASONABLE ASSURANCE FOR THE DONLIN GOLD PROJECT.

ISSUED BY:  
OFFICE OF PROCUREMENT AND PROPERTY  
MANAGEMENT (OPPM),  
DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION

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**OFFERORS ARE NOT REQUIRED TO RETURN THIS FORM.**

**IMPORTANT NOTICE:** IF YOU RECEIVED THIS SOLICITATION FROM THE STATE OF ALASKA'S "ONLINE PUBLIC NOTICE" WEB SITE, YOU MUST REGISTER WITH THE PROCUREMENT OFFICER LISTED IN THIS DOCUMENT TO RECEIVE NOTIFICATION OF SUBSEQUENT AMENDMENTS. FAILURE TO CONTACT THE PROCUREMENT OFFICER MAY RESULT IN THE REJECTION OF YOUR OFFER.

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## **SECTION 1. INTRODUCTION & INSTRUCTIONS**

### **SEC. 1.01 PURPOSE OF THE IRFP**

The State of Alaska, Office of Procurement and Property Management (OPPM), Department of Environmental Conservation, Division of Water, is soliciting proposals from qualified professionals to provide expert consultation services in support of the Department's decisions of the May 27, 2021 Commissioner's Decision Upholding the Division of Water's Clean Water Act Section 401 Certificate of Reasonable Assurance for Donlin Gold, LLC's – Donlin Gold Project (See Attachment 5); and the corresponding Certificate of Reasonable Assurance, dated April 5, 2019, and subsequent appeal (Superior Court Appeal Case No. 3AN-21-06502 CI) with areas of expertise of regulations requiring full protection of existing uses of the water, 18 AAC 70.015(a)(2)(C), water quality standard for chronic exposure to mercury 40 CFR 131.36(b)(1), and temperature standards for fish egg and fry incubation, spawning, migration, and rearing 18 AAC 70.020(b), Tbl. At (10)(A)(iii), (10)(C).

### **SEC. 1.02 BUDGET**

The Division of Water estimates a budget of between **\$50,000 and \$99,000** for completion of this project. Proposals priced at more than **\$99,000** will be considered non-responsive.

### **SEC. 1.03 DEADLINE FOR RECEIPT OF PROPOSALS**

Proposals must be received no later than **2:00 p.m.** prevailing Alaska Time on **October 20, 2021**. Faxed, oral or emailed proposals are not acceptable.

An Offeror's failure to submit their proposal prior to the deadline will cause the proposal to be disqualified. Late proposals or amendments will not be opened or accepted for evaluation.

### **SEC. 1.04 PRIOR EXPERIENCE**

In order for proposals to be considered responsive, offerors must meet these minimum prior experience requirements:

- (a) Expertise in Alaska Water Quality Standards (WQS) for Temperature, Mercury (Hg), and full protection of uses with a minimum of 3 years' experience in Alaska WQS.
- (b) Familiarity with the Clean Water Act (CWA) §401 regulatory requirements.

An offeror's failure to meet these minimum prior experience requirements will cause their proposal to be considered non-responsive and rejected.

### **SEC. 1.05 REQUIRED REVIEW**

Offerors should carefully review this solicitation for defects and questionable or objectionable material. Comments concerning defects and questionable or objectionable material should be made in writing and received by the procurement officer at least ten days before the deadline for receipt of proposals. This will allow time for the issuance of any necessary amendments. It will also help prevent the opening of a defective proposal and exposure of offeror's proposals upon which award could not be made.

### **SEC. 1.06 QUESTIONS PRIOR TO DEADLINE FOR RECEIPT OF PROPOSALS**

All questions must be in writing and directed to the procurement officer. The interested party must confirm telephone conversations in writing.

Two types of questions generally arise. One may be answered by directing the questioner to a specific section of the IRFP. These questions may be answered over the telephone. Other questions may be more complex and may require a written amendment to the IRFP. The procurement officer will make this decision.

## **SEC. 1.07 RETURN INSTRUCTIONS**

Offerors must submit their proposal electronically to the procurement officer in a single pdf file. The services proposal and cost proposal must be saved as separate PDF documents and emailed to **decidasprocurement@alaska.gov** as separate, clearly labeled attachments, such as “Firm Name – Submittal Form A-E.pdf” and “Firm Name – Cost Proposal.pdf”. The email must contain the IRFP number in the subject line.

The **maximum** size of a single email (including all text and attachments) that can be received by the state is **20mb (megabytes)**. If the email containing the proposal exceeds this size, the proposal must be sent in multiple emails that are each less than 20 megabytes and each email must comply with the requirements described above.

Please note that email transmission is not instantaneous. Like sending a hard copy proposal, if you are emailing your proposal, the state recommends sending it enough ahead of time to ensure the email is delivered by the deadline for receipt of proposals.

It is the offeror’s responsibility to contact the issuing agency via email to **decidasprocurement@alaska.gov** to confirm that the proposal has been received. The state is not responsible for unreadable, corrupt, or missing attachments.

## **SEC. 1.08 PROPOSAL CONTENTS**

The following information must be included in all proposals.

### **(a) AUTHORIZED SIGNATURE**

All proposals must be signed by an individual authorized to bind the offeror to the provisions of the IRFP. Proposals must remain open and valid for at least 90-days from the date set as the deadline for receipt of proposals.

### **(b) OFFEROR'S CERTIFICATION**

By signature on the proposal, offerors certify that they comply with the following:

- A. the laws of the State of Alaska;
- B. the applicable portion of the Federal Civil Rights Act of 1964;
- C. the Equal Employment Opportunity Act and the regulations issued thereunder by the federal government;
- D. the Americans with Disabilities Act of 1990 and the regulations issued thereunder by the federal government;
- E. all terms and conditions set out in this IRFP;
- F. a condition that the proposal submitted was independently arrived at, without collusion, under penalty of perjury; and

G. that the offers will remain open and valid for at least 90 days.

If any offeror fails to comply with [a] through [g] of this paragraph, the state reserves the right to disregard the proposal, terminate the contract, or consider the contractor in default.

**(c) VENDOR TAX ID**

A valid Vendor Tax ID must be submitted to the issuing office with the proposal or within five days of the state's request.

**(d) CONFLICT OF INTEREST**

Each proposal shall include a statement indicating whether or not the firm or any individuals working on the contract has a possible conflict of interest (e.g., currently employed by the State of Alaska or formerly employed by the State of Alaska within the past two years) and, if so, the nature of that conflict. The procurement officer reserves the right to **consider a proposal non-responsive and reject it** or cancel the award if any interest disclosed from any source could either give the appearance of a conflict or cause speculation as to the objectivity of the contract to be performed by the offeror.

**SEC. 1.09 ASSISTANCE TO OFFERORS WITH A DISABILITY**

Offerors with a disability may receive accommodation regarding the means of communicating this IRFP or participating in the procurement process. For more information, contact the procurement officer no later than ten days prior to the deadline for receipt of proposals.

**SEC. 1.10 AMENDMENTS TO PROPOSALS**

Amendments to or withdrawals of proposals will only be allowed if acceptable requests are received prior to the deadline that is set for receipt of proposals. No amendments or withdrawals will be accepted after the deadline unless they are in response to the state's request in accordance with 2 AAC 12.290.

**SEC. 1.11 AMENDMENTS TO THE IRFP**

If an amendment is issued, it will be provided to all who were notified of the IRFP and to those who have registered with the procurement officer after receiving the IRFP from the State of Alaska Online Public Notice website.

**SEC. 1.12 IRFP SCHEDULE**

The IRFP schedule set out herein represents the State of Alaska's best estimate of the schedule that will be followed. If a component of this schedule, such as the deadline for receipt of proposals, is delayed, the rest of the schedule may be shifted by the same number of days. In the event a schedule adjustment, the Procurement Officer will issue the adjustment via a written amendment to the IRFP. All times are Alaska Standard Time (AKST).

Event	Date Due	Time Due
Inquiries	October 8, 2021	
<b>Proposal Due Date</b>	October 20, 2021	<b>2:00 p.m.</b>
Proposal Evaluation	Approximately week of October 25, 2021	
NOIA Issued	Approximately week of October 25, 2021	
Notice to Proceed issued	Approximately week of November 1, 2021	

The estimated Task schedule is as follows. In the event the schedule needs adjusted, DEC Project Manager will communicate the adjustments via written correspondence to the awarded Term Contractor. Upon contract execution, DEC may work with the Term Contractor to determine a firm schedule, and that schedule shall supersede the estimated schedule provided herein. All deliverables or tasks are due by the Close of Business (COB) on the date due noted below.

<b>Deliverable or Task</b>	<b>Date Due</b>
First Contractor Work Period	November 8, 2021 to February 15, 2022
Contractor Submits First Draft	November 30, 2021
First Draft Review by State	November 30, 2021 to December 20, 2021
Draft Report Back to Contractor for Revision	December 20, 2021 to January 31, 2022
Contractor Submits Final Report	February 15, 2022

This IRFP does not, by itself, obligate the State. The State's obligation will commence when the contract is approved by the Department of Environmental Conservation. Upon written notice to the contractor, the State may set a different starting date for the contract. The State will not be responsible for any work done by the contractor, even work done in good faith, if it occurs prior to the contract start date set by the State.

#### **SEC. 1.13      ALTERNATE PROPOSALS**

Offerors may only submit one proposal for evaluation.

In accordance with 2 AAC 12.830 alternate proposals (proposals that offer something different than what is asked for) will be rejected.

## **SECTION 2. BACKGROUND INFORMATION**

### **SEC. 2.01 BACKGROUND INFORMATION**

Donlin Gold LLC (Donlin) proposes to develop an open-pit, hard-rock gold mine in Southwest Alaska on land owned by two Alaska Native Corporations, Calista Corporation and The Kuskokwim Corporation. The proposed mine site is located entirely within the Crooked Creek watershed. Crooked Creek begins at the confluence of Donlin Creek and Flat Creek, and terminates at Crooked Creek's confluence with the Kuskokwim River. The straight-line distance between the start of Crooked Creek and its termination at the Kuskokwim River is 15 miles, or approximately 33 "stream miles." Important components of the Project include the mine site near Crooked Creek, transportation facilities (a port, roads, and an airstrip) and a natural gas pipeline from Cook Inlet to the mine site. The proposed mine site includes the project's open pit and several other major facilities including the waste rock facility, the tailings storage facility, and the plant site. The mine site location is immediately east of Crooked Creek and immediately north of Crevice Creek.

In July 2012, Donlin applied to the U.S. Army Corps of Engineers (Corps) for a permit under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act. The Corps determined that preparation of an Environmental Impact Statement (EIS) was necessary to inform the permit decision. The Corps led the preparation of the EIS. Four federal agencies, the State of Alaska, and six Alaska Native tribal councils participated as cooperating agencies during the Corps' development of the EIS.

The Corps issued a Draft EIS on November 25, 2015 for public notice and comment. The Corps issued the Final EIS (FEIS) on April 27, 2018. On June 5, 2018, Donlin requested that the Alaska Department of Environmental Conservation (DEC), Division of Water (the Division) begin its process to consider issuing a Certificate of Reasonable Assurance (Certificate) required for the proposed §404 permit under the Clean Water Act §401.

The Division issued notice of Donlin's certification materials on June 13, 2018, establishing a public comment period from that date through July 13, 2018. Following public comments and Donlin's response to comments, the Division issued a Certificate, Antidegradation Analysis, and a Response to Comments on August 10, 2018. The Certificate included eleven conditions.

On August 13, 2018, the Corps and the Bureau of Land Management (BLM) issued a joint Record of Decision and Permit Evaluation (ROD), along with a combined Clean Water Act section 404 and Rivers and Harbors Act section 10 permit. The ROD outlines the decision to select Alternative Two as identified in the EIS, subject to special conditions and specific mitigation. The ROD includes the Corps' determinations that impacts to water quality and chemistry are not expected to exceed regulatory limits, that the proposed Project would have minor adverse effects on water quality, and that the Project is not contrary to the public interest.

On August 30, 2018, ONC submitted a request for informal review of the Certificate on behalf of six Alaska Native tribes and organizations amended this request on September 28, 2018. The Division's Director issued a decision on the amended request on October 19, 2018, remanding the Certificate to the Division for further review based on the issues identified by ONC. The Division revised its Response to Comments and reissued the Certificate on April 5, 2019, concluding that "there is reasonable assurance that the proposed activity, as well as any discharge which may result, will comply with the applicable provisions of Section §401 of the Clean Water Act (CWA) and the Alaska Water Quality Standards."



On April 24, 2019, ONC submitted a second request for informal review on behalf of eleven Alaska Native tribes and organizations, raising issues substantially like those identified in its first request. The Division's Director issued a decision on the second request on May 8, 2019, once more remanding the Certificate to the Division in order to address the identified issues. The Division addressed the issues raised by ONC in revised Responses to Comments and affirmed the previously issued Certificate on May 7, 2020. The Certificate did not change as a result of the remand.

On June 5, 2020, ONC submitted a request for an adjudicatory hearing on behalf of several Alaska Native tribes and other organizations. The Department's Commissioner referred the adjudicatory hearing request to the Office of Administrative Hearings. On July 31, 2020, ALJ Sullivan recommended that the Commissioner grant an adjudicatory hearing on three issues: mercury, water temperature, and existing uses.<sup>20</sup>

On September 3, 2020 Administrative Law Judge (ALJ) Kent Sullivan met with Commissioner Brune to discuss the administrative hearing. Based on this discussion, a decision was made determining that only ONC had satisfied the requirements of 18 AAC 15.200(a), entitling it to a hearing on the briefs of the existing record. It was further determined that the remaining requesters specifically failed to meet requirements of 18 AAC 15.200(a) and therefore, were not entitled to an administrative hearing.

The September 3, 2020 meeting between ALJ Sullivan and Commissioner Brune was the sole consultation during this entire administrative process. Parties fully briefed the issues and submitted proposed findings of fact and conclusions of law.

On April 23, 2021, the ALJ issued a notice of his recommended decision, without consulting with Commissioner Brune, giving parties until May 5, 2021, to submit proposals for action.

On May 27, 2021, Commissioner Brune after considering all relevant information, rendered a final agency decision to deny ONC's request to rescind the Certificate issued to Donlin Gold and upheld the Division's issuance of the Certificate to Donlin Gold.

Presently, the Commissioner's decision is being appealed - reference Superior Court Appeal Case No. 3AN-21-06502 CI in regard to protection of existing uses of the water, 18 AAC 70.015(a)(2)(C), water quality standard for chronic exposure to mercury 40 CFR 131.36(b)(1), and temperature standards for fish egg and fry incubation, spawning, migration, and rearing 18 AAC 70.020(b), Tbl. A (10)(A)(iii), (10)(C).

Additional background information regarding Donlin Project - permits issued by various Departments and the Corps & BLM ROD, 401 Certification, and Antidegradation Analysis may be found at the Alaska Department of Natural Resources – Large Mine Permitting – Donlin Mine website <https://dnr.alaska.gov/mlw/mining/large-mines/donlin/>.

## **SECTION 3. SCOPE OF WORK & CONTRACT INFORMATION**

### **SEC. 3.01 SCOPE OF WORK**

The Department of Environmental Conservation, Division of Water, is soliciting proposals for Time and Materials of services.

The Contractor shall provide consultation services in support of the Department's decisions of the May 27, 2021, Commissioner's decision upholding the Division of Water's Clean Water Act Section 401, Certificate of Reasonable Assurance for Donlin Gold, LLC's – Donlin Gold Project (See Attachment 5); and the corresponding Certificate of Reasonable Assurance, dated April 5, 2019, and subsequent appeal (Superior Court Appeal Case No. 3AN-21-06502 CI) in areas of expertise of regulations requiring full protection of existing uses of the water, 18 AAC 70.015(a)(2)(C), water quality standard for chronic exposure to mercury 40 CFR 131.36(b)(1), and temperature standards for fish egg and fry incubation, spawning, migration, and rearing 18 AAC 70.020(b), Tbl. At (10)(A)(iii), (10)(C).

The Contractor shall provide a third-party expert review and analysis and provide written recommendations of the materials and information submitted by DEC and Donlin Gold and Osutsararmut Native Council (ONC) regarding the three above mentioned areas of expertise in support of the Department's decisions.

The Contract must interview the following State agency personnel: Director - Randy Bates, Environmental Program Managers - Gene McCabe and James Rypkema, Water Quality Standards - Brock Tabor.

Other support documentation that can be provided to the consultant includes The Donlin Gold LLC Final Environmental Impact Statement (FEIS) and supporting reference materials.

<https://dnr.alaska.gov/mlw/mining/large-mines/donlin/>

### **SEC. 3.02 CONTRACT TERM**

The length of the contract will be from the date of award, approximately **November 1, 2021**, for approximately **four months** until completion, approximately **February 15, 2022**.

### **SEC. 3.03 DELIVERABLES**

The contractor shall be required to provide the following deliverables:

Written evaluation providing regulatory review and advice regarding the decision of the Division of Water to issue a CWA Section 401 Certificate of Reasonable Assurance for the Donlin Gold, LLC project.

### **SEC. 3.04 CONTRACT TYPE**

This contract is a Firm Fixed Price contract.

The contractor's cost established as a result of this solicitation will remain through January 31, 2022. All price adjustments will be considered in accordance with contract compensation and payment.

### **SEC. 3.05 PROPOSED PAYMENT PROCEDURES**

The state will make a single payment when all of the deliverables are received and the contract is completed and approved by the project director.

**SEC. 3.06      PROMPT PAYMENT FOR STATE PURCHASES**

The state is eligible to receive a **5%** discount for all invoices paid within **15** business days from the date of receipt of the commodities or services and/or a correct invoice, whichever is later. The discount shall be taken on the full invoice amount. The state shall consider payment being made as either the date a printed warrant is issued or the date an electronic funds transfer (EFT) is initiated.

**SEC. 3.07      CONTRACT PAYMENT**

No payment will be made until the contract is approved by the Commissioner of the Department of Environmental Conservation or the Commissioner's designee. Under no conditions will the state be liable for the payment of any interest charges associated with the cost of the contract. The state is not responsible for and will not pay local, state, or federal taxes. All costs associated with the contract must be stated in U.S. currency.

**SEC. 3.08      LOCATION OF WORK**

The location(s) the work is to be performed, completed and managed at the contractor's work location(s).

The state will not provide workspace for the contractor. The contractor must provide its own workspace.

By signature on their proposal, the offeror certifies that all services provided under this contract by the contractor and all subcontractors shall be performed in the United States.

If the offeror cannot certify that all work will be performed in the United States, the offeror must contact the procurement officer in writing to request a waiver at least 10 days prior to the deadline for receipt of proposals.

The request must include a detailed description of the portion of work that will be performed outside the United States, where, by whom, and the reason the waiver is necessary.

Failure to comply with these requirements may cause the state to reject the proposal as non-responsive or cancel the contract.

**SEC. 3.09      THIRD-PARTY SERVICE PROVIDERS**

NOT APPLICABLE

**SEC. 3.10      SUBCONTRACTORS**

Subcontractors will not be allowed.

**SEC. 3.11      JOINT VENTURES**

NOT APPLICABLE

**SEC. 3.12      RIGHT TO INSPECT PLACE OF BUSINESS**

At reasonable times, the state may inspect those areas of the contractor's place of business that are related to the performance of a contract. If the state makes such an inspection, the contractor must provide reasonable assistance.

**SEC. 3.13 CONTRACT PERSONNEL**

Any change of the project team members or subcontractors named in the proposal must be approved, in advance and in writing, by the project director or procurement officer. Changes that are not approved by the state may be grounds for the state to terminate the contract.

**SEC. 3.14 CONTRACT CHANGES - UNANTICIPATED AMENDMENTS**

During the course of this contract, the contractor may be required to perform additional work. That work will be within the general scope of the initial contract. When additional work is required, the project director will provide the contractor a written description of the additional work and request the contractor to submit a firm time schedule for accomplishing the additional work and a firm price for the additional work. Cost and pricing data must be provided to justify the cost of such amendments per AS 36.30.400.

The contractor will not commence additional work until the procurement officer has secured any required state approvals necessary for the amendment and issued a written contract amendment, approved by the Commissioner of the Department of Environmental Conservation or the Commissioner's designee.

**SEC. 3.15 NONDISCLOSURE AND CONFIDENTIALITY**

The contractor agrees that all confidential information shall be used only for purposes of providing the deliverables and performing the services specified herein and shall not disseminate or allow dissemination of confidential information except as provided for in this section. The contractor shall hold as confidential and will use reasonable care (including both facility physical security and electronic security) to prevent unauthorized access by, storage, disclosure, publication, dissemination to and/or use by third parties of, the confidential information. "Reasonable care" means compliance by the contractor with all applicable federal and state law, including the Social Security Act and HIPAA. The contractor must promptly notify the state in writing if it becomes aware of any storage, disclosure, loss, unauthorized access to or use of the confidential information.

Confidential information, as used herein, means any data, files, software, information or materials (whether prepared by the state or its agents or advisors) in oral, electronic, tangible or intangible form and however stored, compiled or memorialized that is classified confidential as defined by State of Alaska classification and categorization guidelines provided by the state to the contractor or a contractor agent or otherwise made available to the contractor or a contractor agent in connection with this contract, or acquired, obtained or learned by the contractor or a contractor agent in the performance of this contract. Examples of confidential information include, but are not limited to: technology infrastructure, architecture, financial data, trade secrets, equipment specifications, user lists, passwords, research data, and technology data (infrastructure, architecture, operating

If confidential information is requested to be disclosed by the contractor pursuant to a request received by a third party and such disclosure of the confidential information is required under applicable state or federal law, regulation, governmental or regulatory authority, the contractor may disclose the confidential information after providing the state with written notice of the requested disclosure (to the extent such notice to the state is permitted by applicable law) and giving the state opportunity to review the request. If the contractor receives no objection from the state, it may release the confidential information within 30 days. Notice of the requested disclosure of confidential information by the contractor must be provided to the state within a reasonable time after the contractor's receipt of notice of the requested disclosure and, upon request of the state, shall seek to obtain legal protection from the release of the confidential information.

The following information shall not be considered confidential information: information previously known to be public information when received from the other party; information freely available to the general public; information which now is or hereafter becomes publicly known by other than a breach of confidentiality hereof; or information which is disclosed by a party pursuant to subpoena or other legal process and which as a result becomes lawfully obtainable by the general public.

### **SEC. 3.16 INDEMINIFICATION**

The contractor shall indemnify, hold harmless, and defend the state from and against any claim of, or liability for error, omission or negligent act of the contractor, its agents, under this agreement. The contractor shall not be required to indemnify the contracting agency for a claim of, or liability for, the independent negligence of the state. If there is a claim of, or liability for, the joint negligent error or omission of the contractor and the independent negligence of the state, the indemnification and hold harmless obligation shall be apportioned on a comparative fault basis. “Contractor” and “state”, as used within this and the following article, include the employees, agents and other contractors who are directly responsible, respectively, to each. The term “independent negligence” is negligence other than in the contracting agency’s selection, administration, monitoring, or controlling of the contractor and in approving or accepting the contractor’s work.

### **SEC. 3.17 INSURANCE REQUIREMENTS**

Without limiting contractor's indemnification, it is agreed that contractor shall purchase at its own expense and maintain in force at all times during the performance of services under this agreement the following policies of insurance. Where specific limits are shown, it is understood that they shall be the minimum acceptable limits. If the contractor's policy contains higher limits, the state shall be entitled to coverage to the extent of such higher limits.

Certificates of Insurance must be furnished to the contracting officer prior to beginning work and must provide for a notice of cancellation, non-renewal, or material change of conditions in accordance with policy provisions. Failure to furnish satisfactory evidence of insurance or lapse of the policy is a material breach of this contract and shall be grounds for termination of the contractor's services. All insurance policies shall comply with and be issued by insurers licensed to transact the business of insurance under AS 21.

**Workers' Compensation Insurance:** The contractor shall provide and maintain, for all employees engaged in work under this contract, coverage as required by AS 23.30.045, and; where applicable, any other statutory obligations including but not limited to Federal U.S.L. & H. and Jones Act requirements. The policy must waive subrogation against the State.

**Commercial General Liability Insurance:** covering all business premises and operations used by the contractor in the performance of services under this agreement with minimum coverage limits of \$300,000 combined single limit per claim.

**Commercial Automobile Liability Insurance:** covering all vehicles used by the contractor in the performance of services under this agreement with minimum coverage limits of \$300,000 combined single limit per claim.

**Professional Liability Insurance:** covering all errors, omissions or negligent acts in the performance of professional services under this agreement with minimum coverage limits of \$300,000 per claim /annual aggregate.

**SEC. 3.18      TERMINATION FOR DEFAULT**

If the project director determines that the contractor has refused to perform the work or has failed to perform the work with such diligence as to ensure its timely and accurate completion, the state may, by providing written notice to the contractor, terminate the contractor's right to proceed with part or all of the remaining work.

This clause does not restrict the state's termination rights under the contract provisions of Appendix A, attached in Section 8 (See Attachment 2).

## SECTION 4. PROPOSAL FORMAT AND CONTENT

### SEC. 4.01 PROPOSAL FORMAT AND CONTENT

This IRFP contains Submittal Forms, which must be completed by the offeror and submitted as their proposal. An electronic copy of the forms is posted along with this IRFP. Offerors shall not re-create these forms, create their own forms, or edit the format structure of the forms unless permitted to do so.

Unless otherwise specified in this IRFP, the Submittal Forms shall be the offeror's entire proposal. Do not include any marketing information in the proposal.

**Any proposal that does not follow these requirements may be deemed non-responsive and rejected.**

### SEC. 4.02 SPECIAL FORMATTING REQUIREMENTS

The offeror must ensure that their proposal meets all special formatting requirements identified in this section.

**Documents and Text:** All attachment documents must be written in the English language, be single sided, and be single spaced with a minimum font size of 10. Pictures or graphics may be used if the offeror feels it is necessary to communicate their information, however, be aware of the below requirements for page limits.

**Anonymity:** Some Submittal Forms listed below must not contain any names that can be used to identify who the offeror is (such as company names, offeror name, company letterhead, personnel names, project names, sub consultant names, manufacturer or supplier names, or product names).

**Page Limits:** Some Submittal Forms listed below have maximum page limit requirements. Offerors must not exceed the maximum page limits. Note, the page limit applies to the front side of a page only (for example, '1 Page' implies that the offeror can only provide a response on one side of a piece of paper).

Submittal Form	Anonymous Document	Maximum Page Limits
Submittal Form A – Offeror Information and Certifications		
<b>Submittal Form B – Experience and Qualifications</b>	<b>YES</b>	<b>5</b>
<b>Submittal Form C – Understanding of the Project</b>	<b>YES</b>	<b>5</b>
<b>Submittal Form D – Methodology Used for the Project</b>	<b>YES</b>	<b>5</b>
<b>Submittal Form E – Management Plan for the Project</b>	<b>YES</b>	<b>5</b>
Submittal Form G – Cost Proposal		

Any Submittal Form that is being evaluated and does not follow these instructions may receive a '1' score for the evaluated Submittal Form, or the entire response may be deemed non-responsive and rejected. Failure to submit any of the Submittal Forms will result in the proposal being deemed non-responsive and rejected.

### SEC. 4.03 OFFEROR INFORMATION AND CERTIFICATIONS (SUBMITTAL FORM A)

The offeror must complete and submit this Submittal Form. The form must be signed by an individual authorized to bind the offeror to the provisions of the IRFP.

By signature on the form, the offeror certifies they comply with the following:

- a) the laws of the State of Alaska;

- b) the applicable portion of the Federal Civil Rights Act of 1964;
- c) the Equal Employment Opportunity Act and the regulations issued thereunder by the Federal government;
- d) the Americans with Disabilities Act of 1990 and the regulations issued thereunder by the Federal government;
- e) all terms and conditions set out in this IRFP;
- f) a condition that the proposal submitted was independently arrived at, without collusion, under penalty of perjury; and
- g) that the offers will remain open and valid for at least 90 days.

If any offeror fails to comply with [a] through [g] of this paragraph, the State reserves the right to disregard the proposal, terminate the contract, or consider the Contractor in default.

The Submittal Form also requests the following information:

- a) The complete name and address of offeror's firm along with the offeror's Tax ID.
- b) Information on the person the State should contact regarding the proposal.
- c) Names of critical team members/personnel.
- d) Addenda acknowledgement.
- e) Conflict of interest Statement.
- f) Federal requirements.
- g) Alaska preference qualifications.

An offeror's failure to address/respond/include these items may cause the proposal to be determined to be non-responsive and the proposal may be rejected.

#### **SEC. 4.04 EXPERIENCE AND QUALIFICATIONS (SUBMITTAL FORM B)**

Offerors must provide detail on the personnel instead (use example word: "Title", "Position") assigned to accomplish the work called for in this IRFP; illustrate the lines of authority; designate the individual responsible and accountable for the completion of each component and deliverable of the IRFP.

Offerors must provide a narrative description of the organization instead (use example word: "Title", "Position", "The Company") of the project team and personnel instead (use example word: "Title", "Position") roster that identifies each person instead (use example word: "Title", "Position") who will actually contract along with their titles and location(s) where work will be performed.

**Offerors must provide resumes for those personnel with names and title that will be assigned to complete the project as a separate attachment to Submittal Form B.**

**SPECIAL NOTE:** The offeror shall not disclose their costs in this Submittal Form. This Submittal Form **shall be kept anonymous and must not contain any names instead** (use example word: "Title", "Position", "The Company") that can be used to identify who the offeror is and cannot exceed the page limit (as described in Section 4.02).



**SEC. 4.05 UNDERSTANDING OF THE PROJECT (SUBMITTAL FORM C)**

Offerors must provide comprehensive narrative statements that illustrate their understanding of the requirements of the project and the project schedule.

SPECIAL NOTE: The offeror shall not disclose their costs in this Submittal Form. This Submittal **Form shall be kept anonymous and must not contain any names instead** (use example word: “Title”, “Position”, “The Company”) that can be used to identify who the offeror is and cannot exceed the page limit (as described in Section 4.02).

**SEC. 4.06 METHODOLOGY USED FOR THE PROJECT (SUBMITTAL FORM D)**

Offerors must provide comprehensive narrative statements that set out the methodology they intend to employ and illustrate how the methodology will serve to accomplish the work and meet the state’s project schedule.

SPECIAL NOTE: The offeror shall not disclose their costs in this Submittal Form. This Submittal **Form shall be kept anonymous and must not contain any names instead** (use example word: “Title”, “Position”, “The Company”) that can be used to identify who the offeror is and cannot exceed the page limit (as described in Section 4.02).

**SEC. 4.07 MANAGEMENT PLAN FOR THE PROJECT (SUBMITTAL FORM E)**

Offerors must provide comprehensive narrative statements that set out the management plan they intend to follow and illustrate how the plan will serve to accomplish the work and meet the state's project schedule.

SPECIAL NOTE: The offeror shall not disclose their costs in this Submittal Form. This Submittal **Form shall be kept anonymous and must not contain any names instead** (use example word: “Title”, “Position”, “The Company”) that can be used to identify who the offeror is and cannot exceed the page limit (as described Section 4.02).

**SEC. 4.08 COST PROPOSAL (SUBMITTAL FORM G)**

Offerors must complete and submit the Submittal Form G.

Proposed costs must include all direct and indirect costs associated with the performance of the contract, including, but not limited to, total number of hours at various hourly rates, direct expenses, payroll, supplies, overhead assigned to each person working on the project, percentage of each person's time devoted to the project, and profit. The costs identified on the cost proposal are the total amount of costs to be paid by the State. No additional charges shall be allowed.

**SEC. 4.09 EVALUATION CRITERIA**

All proposals will be reviewed to determine if they are responsive. Proposals determined to be responsive will be evaluated using the criterion that is set out in **Section 5. Evaluation Criteria and Contractor Selection**.

An evaluation may not be based on discrimination due to the race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, disability, or political affiliation of the offeror.

Overall Criteria		Weight
Responsiveness		Pass/Fail
Qualifications Criteria		Weight
Experience and Qualifications		150
Understanding of the Project		150
Methodology Used for the Project		100
Management Plan for the Project		100
Total		500
Cost Criteria		Weight
Cost Proposal		400
Total		400
Preference Criteria		Weight
Alaska Offeror Preference (if applicable)		100
Total		100

**TOTAL EVALUATION POINTS AVAILABLE: 1000**

## **SECTION 5. EVALUATION CRITERIA AND CONTRACTOR SELECTION**

### **SEC. 5.01 UNDERSTANDING OF THE PROJECT**

**Proposals will be evaluated against the questions set out below:**

- 1) How well has the offeror demonstrated a thorough understanding of the purpose and scope of the project?
- 2) How well has the offeror identified pertinent issues and potential problems related to the project?
- 3) To what degree has the offeror demonstrated an understanding of the deliverables the state expects it to provide?
- 4) Has the offeror demonstrated an understanding of the state's time schedule and can meet it?

### **SEC. 5.02 METHODOLOGY USED FOR THE PROJECT**

**Proposals will be evaluated against the questions set out below:**

- 1) How comprehensive is the methodology and does it depict a logical approach to fulfilling the requirements of the IRFP?
- 2) How well does the methodology match and achieve the objectives set out in the IRFP?
- 3) Does the methodology interface with the time schedule in the IRFP?

**SEC. 5.03 MANAGEMENT PLAN FOR THE PROJECT**

**Proposals will be evaluated against the questions set out below:**

- 1) How well does the management plan support all of the project requirements and logically lead to the deliverables required in the IRFP?
- 2) Is accountability defined clearly?
- 3) Is the organization of the project team clear?
- 4) How well does the management plan illustrate the lines of authority and communication?
- 5) To what extent does the offeror already have the hardware, software, equipment, and licenses necessary to perform the contract?
- 6) Does it appear that the offeror can meet the schedule set out in the IRFP?
- 7) Has the offeror gone beyond the minimum tasks necessary to meet the objectives of the IRFP?
- 8) To what degree is the proposal practical and feasible?
- 9) To what extent has the offeror identified potential problems?

**SEC. 5.04 EXPERIENCE AND QUALIFICATIONS**

**Proposals will be evaluated against the questions set out below:**

***1) Questions regarding the personnel:***

- a) Do the individuals assigned to the project have experience on similar projects?
- b) Are resumes complete and do they demonstrate backgrounds that would be desirable for individuals engaged in the work the project requires?
- c) How extensive is the applicable education and experience of the personnel designated to work on the project?

***2) Questions regarding the firm and subcontractor (if used):***

- a) How well has the firm demonstrated experience in completing similar projects on time and within budget?
- b) How successful is the general history of the firm regarding timely and successful completion of projects?
- c) Has the firm provided letters of reference from previous clients?
- d) If a subcontractor will perform work on the contract, how well do they measure up to the evaluation used for the offeror?

## SEC. 5.05 CONTRACT COST

### Converting Cost to Points

Overall, a minimum of **40%** of the total evaluation points will be assigned to cost. After the procurement officer applies any applicable preferences, the offeror with the lowest total cost will receive the maximum number of points allocated to cost per 2 AAC 12.260(c). The point allocations for cost on the other proposals will be determined using the following formula:

$$[(\text{Price of Lowest Cost Proposal}) \times (\text{Maximum Points for Cost})] \div (\text{Cost of Each Higher Priced Proposal})$$

### Example (Max Points for Contract Cost = 400):

#### Step 1

List all proposal prices, adjusted where appropriate by the application of applicable preferences claimed by the offeror.

Offeror #1	\$40,000
Offeror #2	\$42,750
Offeror #3	\$47,500

#### Step 2

In this example, the IRFP allotted 40% of the available 1,000 points to cost. This means that the lowest cost will receive the maximum number of points.

**Offeror #1 receives 400 points.**

The reason they receive that amount is because the lowest cost proposal, in this case \$40,000, receives the maximum number of points allocated to cost, 400 points.

**Offeror #2 receives 374.3 points.**

$$\$40,000 \text{ lowest cost} \times 400 \text{ maximum points for cost} = 16,000,000 \div \$42,750 \text{ cost of Offeror \#2's proposal} = 374.3$$

**Offeror #3 receives 336.8 points.**

$$\$40,000 \text{ lowest cost} \times 400 \text{ maximum points for cost} = 16,000,000 \div \$47,500 \text{ cost of Offeror \#3's proposal} = 336.8$$

## SEC. 5.06 ALASKA OFFEROR PREFERENCE

If an offeror qualifies for the Alaska Bidder Preference, the offeror will receive an Alaska Offeror Preference. The preference will be 10% of the total available points. This amount will be added to the overall evaluation score of each Alaskan offeror.

## **SECTION 6. GENERAL PROCESS INFORMATION**

### **SEC. 6.01 ALASKA BUSINESS LICENSE AND OTHER REQUIRED LICENSES**

Prior to the award of a contract, an offeror must hold a valid Alaska business license. However, in order to receive the Alaska Bidder Preference and other related preferences, such as the Alaska Veteran Preference and Alaska Offeror Preference, an offeror must hold a valid Alaska business license prior to the deadline for receipt of proposals. Offerors should contact the **Department of Commerce, Community and Economic Development, Division of Corporations, Business, and Professional Licensing, PO Box 110806, Juneau, Alaska 99811-0806**, for information on these licenses. Acceptable evidence that the offeror possesses a valid Alaska business license may consist of any one of the following:

- copy of an Alaska business license;
- certification on the proposal that the offeror has a valid Alaska business license and has included the license number in the proposal;
- a canceled check for the Alaska business license fee;
- a copy of the Alaska business license application with a receipt stamp from the state's occupational licensing office; or
- a sworn and notarized statement that the offeror has applied and paid for the Alaska business license.

You are not required to hold a valid Alaska business license at the time proposals are opened if you possess one of the following licenses and are offering services or supplies under that specific line of business:

- fisheries business licenses issued by Alaska Department of Revenue or Alaska Department of Fish and Game,
- liquor licenses issued by Alaska Department of Revenue for alcohol sales only,
- insurance licenses issued by Alaska Department of Commerce, Community and Economic Development, Division of Insurance, or
- Mining licenses issued by Alaska Department of Revenue.

Prior the deadline for receipt of proposals, all offerors must hold any other necessary applicable professional licenses required by Alaska Statute.

### **SEC. 6.02 SITE INSPECTION**

The state may conduct on-site visits to evaluate the offeror's capacity to perform the contract. An offeror must agree, at risk of being found non-responsive and having its proposal rejected, to provide the state reasonable access to relevant portions of its work sites. Individuals designated by the procurement officer at the state's expense will make site inspection.

### **SEC. 6.03 CLARIFICATION OF OFFERS**

In order to determine if a proposal is reasonably susceptible for award, communications by the procurement officer or the proposal evaluation committee (PEC) are permitted with an offeror to clarify uncertainties or eliminate confusion concerning the contents of a proposal. Clarifications may not result in a material or

substantive change to the proposal. The evaluation by the procurement officer or the PEC may be adjusted as a result of a clarification under this section.

#### **SEC. 6.04 DISCUSSIONS WITH OFFERORS**

The state may conduct discussions with offerors in accordance with AS 36.30.240 and 2 AAC 12.290. The purpose of these discussions will be to ensure full understanding of the requirements of the IRFP and proposal. Discussions will be limited to specific sections of the IRFP or proposal identified by the procurement officer. Discussions will only be held with offerors who have submitted a proposal deemed reasonably susceptible for award by the procurement officer. Discussions, if held, will be after initial evaluation of proposals by the procurement officer or the PEC. If modifications are made as a result of these discussions they will be put in writing. Following discussions, the procurement officer may set a time for best and final proposal submissions from those offerors with whom discussions were held. Proposals may be reevaluated after receipt of best and final proposal submissions.

If an offeror does not submit a best and final proposal or a notice of withdrawal, the offeror's immediate previous proposal is considered the offeror's best and final proposal.

Offerors with a disability needing accommodation should contact the procurement officer prior to the date set for discussions so that reasonable accommodation can be made. Any oral modification of a proposal must be reduced to writing by the offeror.

#### **SEC. 6.05 EVALUATION OF PROPOSALS**

The procurement officer, or an evaluation committee made up of at least three state employees or public officials, will evaluate proposals. The evaluation will be based solely on the evaluation factors set out in SECTION 5. EVALUATION CRITERIA AND CONTRACTOR SELECTION.

After receipt of proposals, if there is a need for any substantial clarification or material change in the IRFP, an amendment will be issued. The amendment will incorporate the clarification or change, and a new date and time established for new or amended proposals. Evaluations may be adjusted as a result of receiving new or amended proposals.

#### **SEC. 6.06 CONTRACT NEGOTIATION**

After final evaluation, the procurement officer may negotiate with the offeror of the highest-ranked proposal. Negotiations, if held, shall be within the scope of the request for proposals and limited to those items which would not have an effect on the ranking of proposals. If the highest-ranked offeror fails to provide necessary information for negotiations in a timely manner, or fails to negotiate in good faith, the state may terminate negotiations and negotiate with the offeror of the next highest-ranked proposal. If contract negotiations are commenced, they may be held via WebEx, Teams, or teleconference.

#### **SEC. 6.07 FAILURE TO NEGOTIATE**

If the selected offeror:

- fails to provide the information required to begin negotiations in a timely manner; or
- fails to negotiate in good faith; or
- indicates they cannot perform the contract within the budgeted funds available for the project; or

- if the offeror and the state, after a good faith effort, simply cannot come to terms,

the state may terminate negotiations with the offeror initially selected and commence negotiations with the next highest ranked offeror.

## **SEC. 6.08 OFFEROR NOTIFICATION OF SELECTION**

After the completion of contract negotiation, the procurement officer will issue a written Notice of Intent to Award (NOIA) and send copies to all offerors. The NOIA will set out the names of all offerors and identify the proposal selected for award.

## **SEC. 6.09 PROTEST**

AS 2 AAC 12.695 provides that an interested party may protest the content of the IRFP or the award of a contract.

An interested party is defined in 2 AAC 12.990(a)(7) as “an actual or prospective bidder or offeror whose economic interest might be affected substantially and directly the issuance of a contract solicitation, the award of a contract, or the failure to award a contract.”

Per 2 AAC 12.695, an interested party must first attempt to informally resolve the dispute with the procurement officer. If that attempt is unsuccessful, the interested party may file a written protest to the solicitation or the award of the contract. The protest must be filed with the Commissioner of the purchasing agency or the Commissioner’s designee. The protester must also file a copy of the protest with the procurement officer. The protest must include the following information:

- the name, address, and telephone number of the protester;
- the signature of the protester or the protester's representative;
- identification of the contracting agency and the solicitation or contract at issue;
- a detailed statement of the legal and factual grounds of the protest including copies of relevant documents; and
- the form of relief requested.

If an interested party wishes to protest the content of a solicitation, the protest must be filed before the date and time that proposals are due.

If an offeror wishes to protest the award of a contract not greater than \$50,000, the protest must be filed within 10 days from the date of the solicitation or award, whichever is later.

If an offeror wishes to protest the award of a contract greater than \$50,000, the protest must be filed within 10 days from the date that notice of award is made.

A protester must have submitted a proposal in order to have sufficient standing to protest the award of a contract.

The procurement officer shall immediately give notice of the protest to the contractor or, if no award has been made, to all offerors who submitted proposals.

If the protestor agrees, the Commissioner of the purchasing department or the Commissioner's designee may assign the protest to the procurement officer or other state official for alternate dispute resolution. In other cases, the Commissioner or the Commissioner's designee may issue a decision denying the protest and stating the reasons for denial, issue a decision sustaining the protest, in whole or in part, and instruct the procurement officer to implement an appropriate remedy, or conduct a hearing using procedures set out in AS 36.30.670(b).

## **SEC. 6.10 APPLICATION OF PREFERENCES**

Certain preferences apply to all contracts for professional services, regardless of their dollar value. The Alaska Bidder, Alaska Veteran, and Alaska Offeror preferences are the most common preferences involved in the IRFP process. Additional preferences that may apply to this procurement are listed below. Guides that contain excerpts from the relevant statutes and codes, explain when the preferences apply and provide examples of how to calculate the preferences are available at the **Department of Administration, Division of Shared Service's** web site:

<http://doa.alaska.gov/dgs/pdf/pref1.pdf>

- Alaska Products Preference - AS 36.30.332
- Recycled Products Preference - AS 36.30.337
- Local Agriculture and Fisheries Products Preference - AS 36.15.050
- Employment Program Preference - AS 36.30.321(b)
- Alaskans with Disabilities Preference - AS 36.30.321(d)

The Division of Vocational Rehabilitation in the Department of Labor and Workforce Development keeps a list of qualified employment programs and individuals who qualify as persons with a disability. As evidence of a business' or an individual's right to the Employment Program or Alaskans with Disabilities preferences, the Division of Vocational Rehabilitation will issue a certification letter. To take advantage of these preferences, a business or individual must be on the appropriate Division of Vocational Rehabilitation list prior to the time designated for receipt of proposals. Offerors must attach a copy of their certification letter to the proposal. **An offeror's failure to provide this certification letter with their proposal will cause the state to disallow the preference.**

## **Sec. 6.11 ALASKA BIDDER PREFERENCE**

An Alaska Bidder Preference of 5% will be applied to the price in the proposal. The preference will be given to an offeror who:

- 1) holds a current Alaska business license prior to the deadline for receipt of proposals;
- 2) submits a proposal for goods or services under the name appearing on the offeror's current Alaska business license;
- 3) has maintained a place of business within the state staffed by the offeror, or an employee of the offeror, for a period of six months immediately preceding the date of the proposal;
- 4) is incorporated or qualified to do business under the laws of the state, is a sole proprietorship and the proprietor is a resident of the state, is a limited liability company (LLC) organized under AS 10.50 and



all members are residents of the state, or is a partnership under AS 32.06 or AS 32.11 and all partners are residents of the state; and

- 5) if a joint venture, is composed entirely of ventures that qualify under (1)-(4) of this subsection.

### **Alaska Bidder Preference Certification Form**

In order to receive the Alaska Bidder Preference, the proposal must include the Alaska Bidder Preference Certification Form attached to this IRFP. An offeror does not need to complete the Alaska Veteran Preference questions on the form if not claiming the Alaska Veteran Preference. An offeror's failure to provide this completed form with their proposal will cause the state to disallow the preference.

### **SEC. 6.12 ALASKA VETERAN PREFERENCE**

An Alaska Veteran Preference of 5%, not to exceed \$5,000, will be applied to the price in the proposal. The preference will be given to an offeror who qualifies under AS 36.30.990(2) as an Alaska bidder and is a:

- A. sole proprietorship owned by an Alaska veteran;
- B. partnership under AS 32.06 or AS 32.11 if a majority of the partners are Alaska veterans;
- C. limited liability company organized under AS 10.50 if a majority of the members are Alaska veterans;  
or
- D. corporation that is wholly owned by individuals, and a majority of the individuals are Alaska veterans.

In accordance with AS 36.30.321(i), the bidder must also add value by actually performing, controlling, managing, and supervising the services provided, or for supplies, the bidder must have sold supplies of the general nature solicited to other state agencies, other government, or the general public.

### **Alaska Veteran Preference Certification**

In order to receive the Alaska Veteran Preference, the proposal must include the Alaska Bidder Preference Certification Form attached to this IRFP. An offeror's failure to provide this completed form with their proposal will cause the state to disallow the preference.

### **SEC. 6.13 ALASKA OFFEROR PREFERENCE**

2 AAC 12.260(e) provides Alaska offerors a 10% overall evaluation point preference. Alaska bidders, as defined in AS 36.30.990(2), are eligible for the preference. An Alaska offeror will receive 10 percent of the total available points added to their overall evaluation score as a preference.

### **SEC. 6.14 FORMULA USED TO CONVERT COST TO POINTS**

The distribution of points based on cost will be determined as set out in 2 AAC 12.260(c). The lowest cost proposal will receive the maximum number of points allocated to cost. The point allocations for cost on the other proposals will be determined using the formula:

$$[(\text{Price of Lowest Cost Proposal}) \times (\text{Maximum Points for Cost})] \div (\text{Cost of Each Higher Priced Proposal})$$

**SEC. 6.15 EXAMPLES: CONVERTING COST TO POINTS & APPLYING PREFERENCES****(a) FORMULA USED TO CONVERT COST TO POINTS**

The PEC will evaluate responses against the questions set out in Sections 5.01 through 5.04 and assign a single score for each section. Offerors' responses for each section will be rated comparatively against one another with each PEC member assigning a score of 1, 5, or 10 (with 10 representing the highest score, 5 representing the average score, and 1 representing the lowest score). Responses that are similar or lack dominant information to differentiate the offerors from each other will receive the same score. Therefore, it is the offeror's responsibility to provide dominant information and differentiate themselves from their competitors.

After the PEC has scored each section, the scores for each section will be totaled and the following formula will be used to calculate the number of points awarded for that section:

$$\frac{\text{Offeror Total Score}}{\text{Highest Total Score Possible}} \times \text{Max Points} = \text{Points Awarded}$$

**Example (Max Points for the Section = 100):**

	PEC Member 1 Score	PEC Member 2 Score	PEC Member 3 Score	PEC Member 4 Score	Combined Total Score	Points Awarded
<b>Offeror 1</b>	10	5	5	10	30	75
<b>Offeror 2</b>	5	5	5	5	20	50
<b>Offeror 3</b>	10	10	10	10	40	100

**Offeror 1** was awarded 75 points:

$$\frac{\text{Offeror Total Score (30)}}{\text{Highest Total Score Possible (40)}} \times \text{Max Points (100)} = \text{Points Awarded (75)}$$

**Offeror 2** was awarded 50 points:

$$\frac{\text{Offeror Total Score (20)}}{\text{Highest Total Score Possible (40)}} \times \text{Max Points (100)} = \text{Points Awarded (50)}$$

**Offeror 3** was awarded 100 points:

$$\frac{\text{Offeror Total Score (40)}}{\text{Highest Total Score Possible (40)}} \times \text{Max Points (100)} = \text{Points Awarded (100)}$$

## **SECTION 7. GENERAL LEGAL INFORMATION**

### **SEC. 7.01 STANDARD CONTRACT PROVISIONS**

The contractor must be required to sign and submit the State's Standard Agreement Form for Professional Services Contracts (form SAF.DOC/Appendix A). This form is attached in **SECTION 8. ATTACHMENTS** for your review (See Attachment 2). The contractor must comply with the contract provisions set out in this attachment. No alteration of these provisions will be permitted without prior written approval from the Department of Law. Objections to any of the provisions in Appendix A must be set out in the offeror's proposal in a separate document. Please include the following information with any change that you are proposing:

1. Identify the provision the offeror takes exception with.
2. Identify why the provision is unjust, unreasonable, etc.
3. Identify exactly what suggested changes should be made.

### **SEC. 7.02 QUALIFIED OFFERORS**

Per 2 AAC 12.875, unless provided for otherwise in the IRFP, to qualify as an offeror for award of a contract issued under AS 36.30, the offeror must:

- 1) Add value in the contract by actually performing, controlling, managing, or supervising the services to be provided; or
- 2) Be in the business of selling and have actually sold on a regular basis the supplies that are the subject of the IRFP.

If the offeror leases services or supplies or acts as a broker or agency in providing the services or supplies in order to meet these requirements, the procurement officer may not accept the offeror as a qualified offeror under AS 36.30.

### **SEC. 7.03 PROPOSAL AS PART OF THE CONTRACT**

Part of all of this IRFP and the successful proposal may be incorporated into the contract.

### **SEC. 7.04 ADDITIONAL TERMS AND CONDITIONS**

The state reserves the right to add terms and conditions during contract negotiations. These terms and conditions will be within the scope of the IRFP and will not affect the proposal evaluations.

### **SEC. 7.05 HUMAN TRAFFICKING**

By signature on their proposal, the offeror certifies that the offeror is not established and headquartered or incorporated and headquartered in a country recognized as Tier 3 in the most recent United States Department of State's Trafficking in Persons Report.

The most recent United States Department of State's Trafficking in Persons Report can be found at the following website: <https://www.state.gov/trafficking-in-persons-report/>

Failure to comply with this requirement will cause the state to reject the proposal as non-responsive or cancel the contract.

**SEC. 7.06 RIGHT OF REJECTION**

Offerors must comply with all of the terms of the IRFP, the State Procurement Code (AS 36.30), and all applicable local, state, and federal laws, codes, and regulations. The procurement officer may reject any proposal that does not comply with all of the material and substantial terms, conditions, and performance requirements of the IRFP.

Offerors may not qualify the proposal nor restrict the rights of the state. If an offeror does so, the procurement officer may determine the proposal to be a non-responsive counter-offer and the proposal may be rejected.

Minor informalities that:

- do not affect responsiveness;
- are merely a matter of form or format;
- do not change the relative standing or otherwise prejudice other offers;
- do not change the meaning or scope of the IRFP;
- are trivial, negligible, or immaterial in nature;
- do not reflect a material change in the work; or
- do not constitute a substantial reservation against a requirement or provision;

may be waived by the procurement officer.

The state reserves the right to refrain from making an award if it determines that to be in its best interest.

**A proposal from a debarred or suspended offeror shall be rejected.**

**SEC. 7.07 STATE NOT RESPONSIBLE FOR PREPARATION COSTS**

The state will not pay any cost associated with the preparation, submittal, presentation, or evaluation of any proposal.

**SEC. 7.08 DISCLOSURE OF PROPOSAL CONTENTS**

All proposals and other material submitted become the property of the State of Alaska and may be returned only at the state's option. AS 40.25.110 requires public records to be open to reasonable inspection. All proposal information, including detailed price and cost information, will be held in confidence during the evaluation process and prior to the time a Notice of Intent to Award is issued. Thereafter, proposals will become public information.

Trade secrets and other proprietary data contained in proposals may be held confidential if the offeror requests, in writing, that the procurement officer does so, and if the procurement officer agrees, in writing, to do so. The offeror's request must be included with the proposal, must clearly identify the information they wish to be held confidential, and include a statement that sets out the reasons for confidentiality. Unless the procurement officer agrees in writing to hold the requested information confidential, that information will also become public after the Notice of Intent to Award is issued.

**SEC. 7.09 ASSIGNMENTS**

Per 2 AAC 12.480, the contractor may not transfer or assign any portion of the contract without prior written approval from the procurement officer. Proposals that are conditioned upon the state's approval of an assignment will be rejected as non-responsive.

**SEC. 7.10 DISPUTES**

A contract resulting from this IRFP is governed by the laws of the State of Alaska. If the contractor has a claim arising in connection with the agreement that it cannot resolve with the state by mutual agreement, it shall pursue the claim, if at all, in accordance with the provisions of AS 36.30.620 – AS 36.30.632. To the extent not otherwise governed by the preceding, the claim shall be brought only in the Superior Court of the State of Alaska and not elsewhere.

**SEC. 7.11 SEVERABILITY**

If any provision of the contract is found to be invalid or declared by a court to be illegal or in conflict with any law, the validity of the remaining terms and provisions will not be affected; and, the rights and obligations of the parties will be construed and enforced as if the contract did not contain the particular provision held to be invalid.

**SEC. 7.12 SUPPLEMENTAL TERMS AND CONDITIONS**

Proposals must comply with **SEC. 7.06 RIGHT OF REJECTION**. However, if the state fails to identify or detect supplemental terms or conditions that conflict with those contained in this IRFP or that diminish the state's rights under any contract resulting from the IRFP, the term(s) or condition(s) will be considered null and void. After award of contract:

if conflict arises between a supplemental term or condition included in the proposal and a term or condition of the IRFP, the term or condition of the IRFP will prevail; and

if the state's rights would be diminished as a result of application of a supplemental term or condition included in the proposal, the supplemental term or condition will be considered null and void.

**SEC. 7.13 FEDERALLY IMPOSED TARRIFFS**

Changes in price (increase or decrease) resulting directly from a new or updated Federal Tariff, excise tax, or duty, imposed after contract award may be adjusted during the contract period or before delivery into the United States via contract amendment.

- **Notification of Changes:** The contractor must promptly notify the procurement officer in writing of any new, increased, or decreased Federal excise tax or duty that may result in either an increase or decrease in the contract price and shall take appropriate action as directed by the procurement officer.
- **After-imposed or Increased Taxes and Duties:** Any Federal excise tax or duty for goods or services covered by this contract that was exempted or excluded on the contract award date but later imposed on the contractor during the contract period, as the result of legislative, judicial, or administrative action may result in a price increase provided:
  - a) The tax or duty takes effect after the contract award date and isn't otherwise addressed by the contract;
  - b) The contractor warrants, in writing, that no amount of the newly imposed Federal excise tax or duty or rate increase was included in the contract price, as a contingency or otherwise.

- **After-relieved or Decreased Taxes and Duties:** The contract price shall be decreased by the amount of any decrease in Federal excise tax or duty for goods or services under the contract, except social security or other employment taxes, that the contractor is required to pay or bear, or does not obtain a refund of, through the contractor's fault, negligence, or failure to follow instructions of the procurement officer.
- **State's Ability to Make Changes:** The State reserves the right to request verification of Federal excise tax or duty amounts on goods or services covered by this contract and increase or decrease the contract price accordingly.
- **Price Change Threshold:** No adjustment shall be made in the contract price under this clause unless the amount of the adjustment exceeds \$250.

## SECTION 8. ATTACHMENTS

### SEC. 8.01 ATTACHMENTS

#### Attachments:

- 1) Cost Proposal Form G (one page);
- 2) Sample Standard Agreement Form - Appendix A (three pages);
- 3) Submittal Forms A-E;
- 4) Alaska Bidder Preference Certification Form (three pages); and
- 5) Commissioner's Decision to Uphold Issuance of Certificate to Donlin Gold, LLC, dated May 27, 2021 (50 pages).

**STANDARD AGREEMENT FORM FOR PROFESSIONAL SERVICES**

The parties' contract comprises this Standard Agreement Form, as well as its referenced Articles and their associated Appendices

1. Agency Contract Number	2. Contract Title	3. Agency Fund Code	4. Agency Appropriation Code
5. Vendor Number	6. IRIS GAE Number (if used)	7. Alaska Business License Number	
<b>This contract is between the State of Alaska,</b>			
8. Department of Environmental Conservation		Division of	hereafter the State, and
9. Contractor		hereafter the contractor	
Mailing Address	Street or P.O. Box	City	State ZIP+4
<p>10. <b>ARTICLE 1. Appendices:</b> Appendices referred to in this contract and attached to it are considered part of it.</p> <p><b>ARTICLE 2. Performance of Service:</b></p> <p>2.1 Appendix A (General Provisions), Articles 1 through 16, governs the performance of services under this contract.</p> <p>2.2 Appendix B sets forth the liability and insurance provisions of this contract.</p> <p>2.3 Appendix C sets forth the services to be performed by the contractor.</p> <p><b>ARTICLE 3. Period of Performance:</b> The period of performance for this contract begins _____, and ends _____.</p> <p><b>ARTICLE 4. Considerations:</b></p> <p>4.1 In full consideration of the contractor's performance under this contract, the State shall pay the contractor a sum not to exceed _____ in accordance with the provisions of Appendix D.</p> <p>4.2 When billing the State, the contractor shall refer to the Authority Number or the Agency Contract Number and send the billing to:</p>			
11. Department of		Attention: Division of	
Mailing Address		Attention:	
<b>12. CONTRACTOR</b>		<p>14. <b>CERTIFICATION:</b> I certify that the facts herein and on supporting documents are correct, that this voucher constitutes a legal charge against funds and appropriations cited, that sufficient funds are encumbered to pay this obligation, or that there is a sufficient balance in the appropriation cited to cover this obligation. I am aware that to knowingly make or allow false entries or alternations on a public record, or knowingly destroy, mutilate, suppress, conceal, remove or otherwise impair the verity, legibility or availability of a public record constitutes tampering with public records punishable under AS 11.56.815-.820. Other disciplinary action may be taken up to and including dismissal.</p>	
Name of Firm			
Signature of Authorized Representative	Date		
Typed or Printed Name of Authorized Representative			
Title			
<b>13. CONTRACTING AGENCY</b>		Signature of Head of Contracting Agency or Designee	
Department/Division	Date	Date	
Signature of Project Director		Typed or Printed Name	
Typed or Printed Name of Project Director		Title	
Title			

NOTICE: This contract has no effect until signed by the head of contracting agency or designee.

## APPENDIX A

### GENERAL PROVISIONS

#### Article 1. Definitions.

- 1.1 In this contract and appendices, "Project Director" or "Agency Head" or "Procurement Officer" means the person who signs this contract on behalf of the Requesting Agency and includes a successor or authorized representative.
- 1.2 "State Contracting Agency" means the department for which this contract is to be performed and for which the Commissioner or Authorized Designee acted in signing this contract.

#### Article 2. Inspections and Reports.

- 2.1 The department may inspect, in the manner and at reasonable times it considers appropriate, all the contractor's facilities and activities under this contract.
- 2.2 The contractor shall make progress and other reports in the manner and at the times the department reasonably requires.

#### Article 3. Disputes.

- 3.1 If the contractor has a claim arising in connection with the contract that it cannot resolve with the State by mutual agreement, it shall pursue the claim, if at all, in accordance with the provisions of AS 36.30.620 – 632.

#### Article 4. Equal Employment Opportunity.

- 4.1 The contractor may not discriminate against any employee or applicant for employment because of race, religion, color, national origin, or because of age, disability, sex, marital status, changes in marital status, pregnancy or parenthood when the reasonable demands of the position(s) do not require distinction on the basis of age, disability, sex, marital status, changes in marital status, pregnancy, or parenthood. The contractor shall take affirmative action to insure that the applicants are considered for employment and that employees are treated during employment without unlawful regard to their race, color, religion, national origin, ancestry, disability, age, sex, and marital status, changes in marital status, pregnancy or parenthood. This action must include, but need not be limited to, the following: employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship. The contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting out the provisions of this paragraph.
- 4.2 The contractor shall state, in all solicitations or advertisements for employees to work on State of Alaska contract jobs, that it is an equal opportunity employer and that all qualified applicants will receive consideration for employment without regard to race, religion, color, national origin, age, disability, sex, and marital status, changes in marital status, pregnancy or parenthood.
- 4.3 The contractor shall send to each labor union or representative of workers with which the contractor has a collective bargaining agreement or other contract or understanding a notice advising the labor union or workers' compensation representative of the contractor's commitments under this article and post copies of the notice in conspicuous places available to all employees and applicants for employment.
- 4.4 The contractor shall include the provisions of this article in every contract, and shall require the inclusion of these provisions in every contract entered into by any of its subcontractors, so that those provisions will be binding upon each subcontractor. For the purpose of including those provisions in any contract or subcontract, as required by this contract, "contractor" and "subcontractor" may be changed to reflect appropriately the name or designation of the parties of the contract or subcontract.
- 4.5 The contractor shall cooperate fully with State efforts which seek to deal with the problem of unlawful discrimination, and with all other State efforts to guarantee fair employment practices under this contract, and promptly comply with all requests and directions from the State Commission for Human Rights or any of its officers or agents relating to prevention of discriminatory employment practices.
- 4.6 Full cooperation in paragraph 4.5 includes, but is not limited to, being a witness in any proceeding involving questions of unlawful discrimination if that is requested by any official or agency of the State of Alaska; permitting employees of the contractor to be witnesses or complainants in any proceeding involving questions of unlawful discrimination, if that is requested by any official or agency of the State of Alaska; participating in meetings; submitting periodic reports on the equal employment aspects of present and future employment; assisting inspection of the contractor's facilities; and promptly complying with all State directives considered essential by any office or agency of the State of Alaska to insure compliance with all federal and State laws, regulations, and policies pertaining to the prevention of discriminatory employment practices.
- 4.7 Failure to perform under this article constitutes a material breach of contract.

#### Article 5. Termination.

The Project Director, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the State. In the absence of a breach of contract by the contractor, the State is liable only for payment in accordance with the payment provisions of this contract for services rendered before the effective date of termination.

#### Article 6. No Assignment or Delegation.

The contractor may not assign or delegate this contract, or any part of it, or any right to any of the money to be paid under it, except with the written consent of the Project Director and the Agency Head.

#### Article 7. No Additional Work or Material.

No claim for additional services, not specifically provided in this contract, performed or furnished by the contractor, will be allowed, nor may the contractor do any work or furnish any material not covered by the contract unless the work or material is ordered in writing by the Project Director and approved by the Agency Head.



**Article 8. Independent Contractor.**

The contractor and any agents and employees of the contractor act in an independent capacity and are not officers or employees or agents of the State in the performance of this contract.

**Article 9. Payment of Taxes.**

As a condition of performance of this contract, the contractor shall pay all federal, State, and local taxes incurred by the contractor and shall require their payment by any Subcontractor or any other persons in the performance of this contract. Satisfactory performance of this paragraph is a condition precedent to payment by the State under this contract.

**Article 10. Ownership of Documents.**

All designs, drawings, specifications, notes, artwork, and other work developed in the performance of this agreement are produced for hire and remain the sole property of the State of Alaska and may be used by the State for any other purpose without additional compensation to the contractor. The contractor agrees not to assert any rights and not to establish any claim under the design patent or copyright laws. Nevertheless, if the contractor does mark such documents with a statement suggesting they are trademarked, copyrighted, or otherwise protected against the State's unencumbered use or distribution, the contractor agrees that this paragraph supersedes any such statement and renders it void. The contractor, for a period of three years after final payment under this contract, agrees to furnish and provide access to all retained materials at the request of the Project Director. Unless otherwise directed by the Project Director, the contractor may retain copies of all the materials.

**Article 11. Governing Law; Forum Selection**

This contract is governed by the laws of the State of Alaska. To the extent not otherwise governed by Article 3 of this Appendix, any claim concerning this contract shall be brought only in the Superior Court of the State of Alaska and not elsewhere.

**Article 12. Conflicting Provisions.**

Unless specifically amended and approved by the Department of Law, the terms of this contract supersede any provisions the contractor may seek to add. The contractor may not add additional or different terms to this contract; AS 45.02.207(b)(1). The contractor specifically acknowledges and agrees that, among other things, provisions in any documents it seeks to append hereto that purport to (1) waive the State of Alaska's sovereign immunity, (2) impose indemnification obligations on the State of Alaska, or (3) limit liability of the contractor for acts of contractor negligence, are expressly superseded by this contract and are void.

**Article 13. Officials Not to Benefit.**

Contractor must comply with all applicable federal or State laws regulating ethical conduct of public officers and employees.

**Article 14. Covenant against Contingent Fees.**

The contractor warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee except employees or agencies maintained by the contractor for the purpose of securing business. For the breach or violation of this warranty, the State may terminate this contract without liability or in its discretion deduct from the contract price or consideration the full amount of the commission, percentage, brokerage or contingent fee.

**Article 15. Compliance.**

In the performance of this contract, the contractor must comply with all applicable federal, state, and borough regulations, codes, and laws, and be liable for all required insurance, licenses, permits and bonds.

**Article 16. Force Majeure:**

The parties to this contract are not liable for the consequences of any failure to perform, or default in performing, any of their obligations under this Agreement, if that failure or default is caused by any unforeseeable Force Majeure, beyond the control of, and without the fault or negligence of, the respective party. For the purposes of this Agreement, Force Majeure will mean war (whether declared or not); revolution; invasion; insurrection; riot; civil commotion; sabotage; military or usurped power; lightning; explosion; fire; storm; drought; flood; earthquake; epidemic; quarantine; strikes; acts or restraints of governmental authorities affecting the project or directly or indirectly prohibiting or restricting the furnishing or use of materials or labor required; inability to secure materials, machinery, equipment or labor because of priority, allocation or other regulations of any governmental authorities.



## Attachment 4

# ALASKA BIDDER PREFERENCE CERTIFICATION

## AS 36.30.321(A) / AS 36.30.990(2)

BUSINESS NAME: [Click or tap here to enter text.](#)

<b>Alaska Bidder Preference:</b> Do you believe that your firm qualifies for the Alaska Bidder Preference?	<input type="checkbox"/> Yes <input type="checkbox"/> No				
<b>Alaska Veteran Preference:</b> Do you believe that your firm qualifies for the Alaska Veteran Preference?	<input type="checkbox"/> Yes <input type="checkbox"/> No				
Please list any additional Alaska Preferences below that you believe your firm qualifies for.					
1.	2.	3.	4.	5.	6.

To qualify for and claim the Alaska Bidder Preference you must answer **YES** to all questions below in the Alaska Bidder Preference Questions section. To qualify for and claim the Alaska Veteran Preference, you must answer **YES** to these questions as well as answer **YES** to all the questions in the Alaska Veteran Preference section. A signed copy of this form must be included with your bid or proposal no later than the deadline set for receipt of bids or proposals.

If you are submitting a bid or proposal as a **JOINT VENTURE**, all members of the joint venture must complete and submit this form before the deadline set for receipt of bids or proposals. [AS 36.30.990\(2\)\(E\)](#)

**If the procuring agency is unable to verify a response, the preference may not be applied.** Knowingly or intentionally making false or misleading statements on this form, whether it succeeds in deceiving or misleading, constitutes misrepresentation per [AS 36.30.687](#) and may result in criminal penalties.

### Alaska Bidder Preference Questions:

1) Does your business hold a current Alaska business license per [AS 36.30.990\(2\)\(A\)](#)?

☐ YES ☐ NO

If **YES**, enter your current **Alaska business license number**: [Click or tap here to enter text.](#)

2) Is your business submitting a bid or proposal under the name appearing on the Alaska business license noted in **Question 1** per [AS 36.30.990\(2\)\(B\)](#)?

☐ YES ☐ NO

3) Has your business maintained a **place of business** within the state **staffed by the bidder or offeror** or an employee of the bidder or offeror for a period of six months immediately preceding the date of the bid or proposal per [AS 36.30.990\(2\)\(C\)](#)?

☐ YES ☐ NO

If **YES**, please complete the following information:

#### A. Place of Business

Street Address: [Click or tap here to enter text.](#)

City: [Click or tap here to enter text.](#)

ZIP: [Click or tap here to enter text.](#)

“Place of business” is defined as a location at which normal business activities are conducted, services are rendered, or goods are made, stored, or processed; a post office box, mail drop, telephone, or answering service does not, by itself, constitute a place of business per [2 AAC 12.990\(b\)\(3\)](#).

Do you certify that the **Place of Business** described in **Question 3A** meets this definition?

☐ YES ☐ NO

B. The bidder or offeror, or at least one employee of the bidder or offeror, must be a resident of the state under [AS 16.05.415\(a\)](#) per [2 AAC 12.990\(b\)\(7\)](#).

1) Do you certify that the bidder or offeror OR at least one employee of the bidder or offeror is physically present in the state with the intent to remain in Alaska indefinitely and to make a home in the state per [AS 16.05.415\(a\)\(1\)](#)?

☐ YES ☐ NO

2) Do you certify that the resident(s) used to meet this requirement has maintained their domicile in Alaska for the 12 consecutive months immediately preceding the deadline set for receipt of bids or proposals per [AS 16.05.415\(a\)\(2\)](#)?

☐ YES ☐ NO

3) Do you certify that the resident(s) used to meet this requirement is claiming residency ONLY in the state of Alaska per [AS 16.05.415\(a\)\(3\)](#)?

☐ YES ☐ NO

4) Do you certify that the resident(s) used to meet this requirement is NOT obtaining benefits under a claim of residency in another state, territory, or country per [AS 16.05.415\(a\)\(4\)](#)?

☐ YES ☐ NO

4) Per [AS 36.30.990\(2\)\(D\)](#), is your business (**CHOOSE ONE**):

A. **Incorporated or qualified to do business under the laws of the state?**

☐ YES ☐ NO

If YES, enter your current **Alaska corporate entity number**: [Click or tap here to enter text.](#)

B. **A sole proprietorship** AND the proprietor is a resident of the state?

☐ YES ☐ NO

C. **A limited liability company** organized under AS 10.50 **AND** all members are residents of the state?

☐ YES ☐ NO

Please identify each member by name: [Click or tap here to enter text.](#)

D. **A partnership** under former AS 32.05, AS 32.06, or AS 32.11 **AND** all partners are residents of the state?

☐ YES ☐ NO

Please identify each partner by name: [Click or tap here to enter text.](#)

#### **Alaska Veteran Preference Questions:**

1) Per [AS 36.30.321\(F\)](#), is your business (**CHOOSE ONE**):

A. **A sole proprietorship** owned by an Alaska veteran?

☐ YES ☐ NO

- B. A **partnership** under AS 32.06 or AS 32.11 **AND** a majority of the partners are Alaska veterans?  
☐ YES ☐ NO
- C. A **limited liability company** organized under AS 10.50 **AND** a majority of the members are Alaska veterans?  
☐ YES ☐ NO
- D. A **corporation** that is wholly owned by individuals, **AND** a majority of the individuals are Alaska veterans?  
☐ YES ☐ NO

Per [AS 36.30.321\(F\)\(3\)](#) “**Alaska veteran**” is defined as an individual who:

(A) Served in the

- (i) Armed forces of the United States, including a reserve unit of the United States armed forces; or
- (ii) Alaska Territorial Guard, the Alaska Army National Guard, the Alaska Air National Guard, or the Alaska Naval Militia; and

(B) Was separated from service under a condition that was not dishonorable.

Do you certify that the individual(s) indicated in **Question 1A, 1B, 1C, or 1D** meet this definition and can provide documentation of their service and discharge if necessary?

☐ YES ☐ NO

### SIGNATURE

By signature below, I certify under penalty of law that I am an authorized representative of [Click or tap here to enter text.](#) and all information on this form is true and correct to the best of my knowledge.

Printed Name \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

Signature \_\_\_\_\_

# Attachment 5

law.oah.ecf@alaska.gov

## BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION

ORUTSARARMIUT NATIVE COUNCIL, et al.

Requestors,

v.

ALASKA DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,  
DIVISION OF WATER, and DONLIN GOLD  
LLC,

Respondents.

OAH No. 20-0536-DEC

### COMMISSIONER'S DECISION

The request by Orutsararmiut Native Council (ONC) to rescind the Section 401 Certificate of Reasonable Assurance is denied. Because the decision of the Alaska Department of Environmental Conservation's Division of Water (the Division) under the Clean Water Act to issue the Certificate is supported by a reasonable basis in law and substantial evidence in the record, it is therefore upheld. This decision constitutes the final agency decision in this matter under AS 44.64.060(e)(3)-(5).

### FINDINGS OF FACT

The Department accepts the Division's findings of fact. Relevant facts are repeated below, supplemented by the Department.

#### **I. Findings of fact related to all claims.**

- A. Donlin Gold LLC proposes to develop an open-pit, hard-rock gold mine in Southwest Alaska on land owned by two Alaska Native Corporations,

Calista Corporation and The Kuskokwim Corporation.

- B. The proposed mine site is located entirely within the Crooked Creek watershed. Crooked Creek begins at the confluence of Donlin Creek and Flat Creek and terminates at Crooked Creek's confluence with the Kuskokwim River. The straight-line distance between the start of Crooked Creek and its termination at the Kuskokwim River is 15 miles, or approximately 33 "stream miles."
- C. Important components of the Project include the mine site near Crooked Creek, transportation facilities (a port, roads, and an airstrip) and a natural gas pipeline from Cook Inlet to the mine site.
- D. The proposed mine site includes the Project's open pit and several other major facilities, including the waste rock facility, the tailings storage facility, and the plant site. The mine site location is immediately east of Crooked Creek and immediately north of Crevice Creek.
- E. In July 2012, Donlin applied to the U.S. Army Corps Engineers (Corps) for a permit under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act.<sup>1</sup> The Corps determined that preparation of an Environmental Impact Statement (EIS) was necessary to inform the permit decision. The Corps led the preparation of the EIS.<sup>2</sup> Four federal agencies, the State of Alaska, and six Alaska Native tribal councils participated as cooperating agencies during the Corps' development of the EIS.<sup>3</sup>
- F. The Corps issued a Draft EIS on November 25, 2015 for public notice and comment. The Corps issued the Final EIS (FEIS) on April 27, 2018.<sup>4</sup>
- G. On June 5, 2018, Donlin requested that the Alaska Department of Environmental Conservation (Department) Division of Water begin its process to consider issuing a Certificate of Reasonable Assurance

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<sup>1</sup> U.S. Army Corps of Engineers & U.S. Bureau of Land Management, Donlin Gold Project Joint Record of Decision and Permit Evaluation (ROD), DEC 002671.

<sup>2</sup> ROD, DEC 002672.

<sup>3</sup> ROD, DEC 002672.

<sup>4</sup> ROD, DEC 002672.

(Certificate) required for the proposed 404 permit under Clean Water Act section 401.<sup>5</sup>

- H. The Division issued notice of Donlin's certification materials on June 13, 2018, establishing a public comment period from that date through July 13, 2018.<sup>6</sup> Following public comments and Donlin's response to public comments,<sup>7</sup> the Division issued a Certificate, Antidegradation Analysis, and a Response to Comments on August 10, 2018.<sup>8</sup> The Certificate included eleven conditions.
- I. On August 13, 2018, the Corps and the Bureau of Land Management (BLM) issued a joint Record of Decision and Permit Evaluation (ROD),<sup>9</sup> along with a combined Clean Water Act section 404 and Rivers and Harbors Act section 10 permit.<sup>10</sup> The ROD outlines the decision to select Alternative Two as identified in the EIS, subject to special conditions and specific mitigation. The ROD includes the Corps' determinations that impacts to water quality and chemistry are not expected to exceed regulatory limits, that the proposed Project would have minor adverse effects on water quality, and that the Project is not contrary to the public interest.<sup>11</sup>
- J. On August 30, 2018, ONC submitted a request for informal review of the Certificate on behalf of six Alaska Native tribes and organizations.<sup>12</sup> ONC amended this request on September 28, 2018.<sup>13</sup> The Division's Director issued a decision on the amended request on October 19, 2018, remanding the Certificate to the Division for further review based on the issues

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<sup>5</sup> Email from Donlin to Department of Environmental Conservation (DEC), DEC 000078.

<sup>6</sup> Notice of Application for State Water Quality Certification, DEC 002008–09.

<sup>7</sup> Letter from Donlin to DEC, DEC 002605–19.

<sup>8</sup> DEC Certificate of Reasonable Assurance, DEC 003706–10; DEC Response to Comments, DEC 003719–31.

<sup>9</sup> ROD, DEC 002659–3053.

<sup>10</sup> Department of the Army Permit POA-1995-120, DEC 003691–97.

<sup>11</sup> ROD, DEC 008343.

<sup>12</sup> Letter from Earthjustice to DEC, DEC 003101–19.

<sup>13</sup> Letter from Earthjustice to DEC, DEC 002639–58.

identified by ONC.<sup>14</sup>

- K. The Division revised its Response to Comments and reissued the Certificate on April 5, 2019,<sup>15</sup> concluding that “there is reasonable assurance that the proposed activity, as well as any discharge which may result, will comply with the applicable provisions of Section 401 of the Clean Water Act (CWA) and the Alaska Water Quality Standards.”
- L. On April 24, 2019, ONC submitted a second request for informal review on behalf of eleven Alaska Native tribes and organizations, raising issues substantially like those identified in its first request.<sup>16</sup> The Division’s Director issued a decision on the second request on May 8, 2019, once more remanding the Certificate to the Division in order to address the identified issues.<sup>17</sup> The Division addressed the issues raised by ONC in revised Responses to Comments and affirmed the previously issued Certificate on May 7, 2020.<sup>18</sup> The Certificate did not change as a result of the remand.
- M. On June 5, 2020, ONC submitted a request for an adjudicatory hearing on behalf of several Alaska Native tribes and other organizations.<sup>19</sup> The Department’s Commissioner referred the adjudicatory hearing request to the Office of Administrative Hearings. On July 31, 2020, ALJ Sullivan recommended that the Commissioner grant an adjudicatory hearing on three issues: mercury, water temperature, and existing uses.<sup>20</sup>
- N. On September 3, 2020 Administrative Law Judge (ALJ) Kent Sullivan met with Commissioner Brune to discuss the administrative hearing. Based on this discussion, a decision was made determining that only ONC had satisfied the requirements of 18 AAC 15.200(a), entitling it to a hearings on the briefs of the existing record. It was further determined that the

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<sup>14</sup> Letter from DEC to Earthjustice, DEC 003099–100.

<sup>15</sup> DEC Certificate of Reasonable Assurance, DEC 000016–23.

<sup>16</sup> Letter from Earthjustice to DEC, DEC 003312–28.

<sup>17</sup> Letter from DEC to Earthjustice, DEC 003585–86.

<sup>18</sup> Letter from DEC to Earthjustice, DEC 003590–91.

<sup>19</sup> DEC 000062–77.

<sup>20</sup> Decision on Recommended Ruling on Request for Adjudicatory Hearing (July 31, 2020).



remaining requesters specifically failed to meet requirements of 18 AAC 15.200(a) and therefore, were not entitled to an administrative hearing.

- O. The September 3, 2020 meeting between ALJ Sullivan and Commissioner Brune was the sole consultation during this entire administrative process.
- P. Parties fully briefed the issues and submitted proposed findings of fact and conclusions of law.
- Q. On April 23, 2021, the ALJ issued a notice of his recommended decision, without consulting with Commissioner Brune, giving parties until May 5, 2021, to submit proposals for action.
- R. In addition to the Corps and the Division, numerous government agencies, both state and federal, have conducted substantial technical analyses, issued permits, and granted approvals for aspects of the Project. These permits are legal documents with which the source must comply. These include:
  - 1. A Waste Management Permit (WMP) issued by the Division on January 18, 2019 and revised on June 25, 2019.<sup>21</sup> The WMP requires Donlin “to control and treat onsite surface water, groundwater and seepage as necessary to prevent offsite water quality exceedances.”<sup>22</sup> Further, the WMP includes conditions that require a detailed monitoring plan, surface and groundwater monitoring near the site to ensure water quality standards or natural conditions are protected, notification to the Department if statistically significant increases in concentrations of constituents above water quality standards are detected by surface water or groundwater monitoring, and corrective action if violations of water quality standards are identified.<sup>23</sup> Donlin is required to comply with all permit conditions and plans adopted by reference.<sup>24</sup>

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<sup>21</sup> DEC Waste Management Permit 2017DB0001 (WMP), DEC 006923–50.

<sup>22</sup> WMP, DEC 006929.

<sup>23</sup> WMP, DEC 006936–40.

<sup>24</sup> WMP, DEC 006928. *See* AS 46.03.120 (establishing DEC authority to terminate or modify waste permits for failure to comply with permit conditions); AS 46.03.760 (establishing civil liability and penalties for noncompliance with terms or conditions of DEC permits).

2. An Air Quality Control Construction Permit, issued by the Department's Division of Air Quality on June 30, 2017.<sup>25</sup> Construction permits specify what construction is allowed, what emission limits must be met, and often how the source can be operated. Further, specifications contain conditions to ensure the source is built to match parameters in the application that the permit agency relied on in their analysis. To ensure that sources follow the permit requirements, permits also contain monitoring, record keeping, and reporting requirements. Noncompliance with each permit and condition is a violation of AS 46.14, 18 AAC 50, and the federal Clean Air Act. Violations are grounds for enforcement actions, permit termination or revocation, or denial of permit renewal application.
3. Two Alaska Pollutant Discharge Elimination System (APDES) permits: a Multi-sector General Permit (MSGP) addressing storm water runoff, and a Wastewater Treatment Permit (WWTP).<sup>26</sup> Prior to issuing these APDES permits, the Department was required to conduct the same antidegradation analysis for discharges that is required for CWA water quality certifications.<sup>27</sup> These permits mandate that all water discharges from the Project must comply with Alaska water quality standards.<sup>28</sup> Contact water and storm water cannot be discharged to Crooked Creek until it is treated or otherwise controlled to meet water quality standards, and discharges from the mine's wastewater treatment plant must comply with applicable water quality standards. Both permits require extensive monitoring of discharges, and the WWTP also requires monitoring of the receiving water and reporting to the Department.<sup>29</sup> Noncompliance with these permits amount to water quality violations, which are subject to state enforcement.

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<sup>25</sup> DEC Air Quality Control Construction Permit AQ0934CPT01 (AQCC Permit), DEC 007823–921.

<sup>26</sup> APDES Permit AKRO6AA92 (MGSP), DEC 007538–815, and APDES Permit AK0055867 (WWTP), DEC 007202–241.

<sup>27</sup> See 18 AAC 70.015, 18 AAC 70.016(a)(1)(A).

<sup>28</sup> See FEIS at 3.7-167, DEC 016385 (“effects from all project-related discharges to Crooked Creek would be treated to meet the most stringent AWQC prior to discharge”); DEC Response to Comments, DEC 000050–51.

<sup>29</sup> MGSP, DEC 007588; WWTP, DEC 007205, 007210–12.

4. An antidegradation analysis required by the state's antidegradation policy and implementation methods was conducted prior to the issuance of the Certificate.<sup>30</sup> The analysis determined, among other things, that existing use protections under 18 AAC 70.016(b)(5) were met and provided a finding that the 401 Certificate would be adequate to fully protect and maintain the existing uses of the water.<sup>31</sup>
5. An Aquatic Resources Monitoring Plan (ARMP).<sup>32</sup> Monitoring under the ARMP is incorporated as a condition in Donlin's fish habitat permits.<sup>33</sup> The objectives of the ARMP are to:
  - a. Monitor for major changes to aquatic communities;
  - b. Monitor for smaller-scale and incremental changes to aquatic communities; and
  - c. Guide results-based refinement to the monitoring program.

Donlin must comply with its obligations under the ARMP and violations or noncompliance is subject to permit termination, revocation, or penalties.<sup>34</sup>
6. The ARMP requires Donlin "to collect information throughout the Project life cycle to assess aquatic life and hydrologic conditions in the Crooked Creek watershed that have the potential to be affected by the project."<sup>35</sup>
7. The ARMP requires Donlin to conduct chemical, biological, and physical monitoring at thirteen sites. Physical monitoring includes

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<sup>30</sup> The EPA approved the state's antidegradation policy and implementation methods on July 26, 2018, as consistent with the Clean Water Act and applicable Code of Federal Regulations in 40 CFR 131.

<sup>31</sup> See Memorandum, Antidegradation Analysis – Donlin Project, POA-1995-120 (updated), DEC 000001-14.

<sup>32</sup> Aquatic Resources Monitoring Plan, Plan of Operations - Volume VII C, Donlin Gold Project (ARMP), DEC 006612–865.

<sup>33</sup> ADF&G Fish Habitat Permits, DEC 006896, 006904, 006910, 006915–16, 006921.

<sup>34</sup> ADF&G Fish Habitat Permits, DEC 006896, 006905, 006911, 0069116, 006921.

<sup>35</sup> ARMP, DEC 006617.

Crooked Creek streamflow monitoring and substrate freeze-down surveys. Aquatic, biological, and flow component monitoring includes:

- a. Fish presence/abundance, invertebrate and periphyton sampling, and fish metals analysis for specific elements, *including mercury/methyl mercury*;<sup>36</sup>
  - b. Flow monitoring and winter surface water sampling to characterize fish habitat and passage and freeze-down patterns, *including temperature measurement and evaluation of the viability of fish spawning sites*;<sup>37</sup>
  - c. Sediment sampling;
  - d. Collection of additional geology and hydrology data to refine understanding of dewatering and surface flow dynamics; and
  - e. During construction, operations, and through the first 5 years post-closure, aerial surveys for salmon and redds with timing to coincide with the end of the migration peak to count the maximum number of adult salmon in the system and to determine how far upstream into the drainages each species migrates.<sup>38</sup>
8. Donlin will analyze all information and data collected under the ARMP against baseline data and report annually to the Alaska Department of Fish and Game (ADF&G). Donlin and ADF&G will evaluate all sites and components of the ARMP annually to determine whether modifications to the plan or Project activities are necessary.<sup>39</sup>
9. ADF&G Fish Habitat Permits have been issued for the Project including:
- a. Fish Habitat Permit FH18-III-0191, which includes provisions for the development of the ARMP; and
  - b. Fish Habitat Permits FH18-III-0192 and FH18-III-0193, which have been issued for restoration of aquatic habitats in Ruby, Queen, and Snow Gulches.

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<sup>36</sup> Emphasis added.

<sup>37</sup> Emphasis added.

<sup>38</sup> ARMP, DEC 006621.

<sup>39</sup> ARMP, DEC 006646–48.

Restoration of these habitats is intended to offset potential habitat losses.

10. Donlin is required to engage in adaptive management under the ARMP. Adaptive management is a four-step iterative process that analyzes monitoring data to modify planned actions in response to observed changes from baseline conditions. The process includes:
  - a. Biomonitoring of aquatic resources to establish baseline conditions during construction, operations, closure, and post-closure to evaluate whether Project activities have caused changes in the aquatic ecosystem relative to the baseline conditions.
  - b. Analyzing monitoring results for changes in the aquatic ecosystem to assess whether they are being affected by Project activities and whether mitigation measures are successful and documenting the analysis in annual reports.
  - c. Using site aquatic biomonitoring analyses to modify or plan future monitoring or Project actions.
  - d. Taking appropriate action based on the results of steps one through three and making appropriate modifications to, or implementing Project activities, mitigation measures, and/or monitoring as necessary, by:
    - i. Implementing measures prior to Project development to offset predicted future impacts, or in response to measured impacts;
    - ii. Quantifying predicted impacts and predicted changes, and understanding fully their causes to generate designs to minimize or mitigating impacts; and
    - iii. Making changes even before Project development to offset predicted future impacts.<sup>40</sup>

## **II. Findings of fact related to reasonable assurance of compliance with water quality standards for stream temperatures in Crooked Creek.**

ONC claims that the Project will not comply with Alaska water quality standards

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<sup>40</sup> ARMP, DEC 006648–49.

for stream temperatures, based on the following statement in the FEIS:

Maximum recorded stream temperatures for Crooked Creek at Crevice Creek in June, July, and August are 45.8°F, 51.6°F, and 50.1°F, respectively. Under summer low flow conditions during mining operations, reductions in groundwater inputs to Crooked Creek could cause stream temperatures in reaches near the mine to be close to or above the State of Alaska's water quality temperature standard of 55.4°F for egg/fry incubation and spawning and 59.0°F for migration and rearing.<sup>41</sup>

- A. The EIS's reference to "reductions in groundwater inputs to Crooked Creek" refers to modeled reductions in groundwater flow into Crooked Creek caused by dewatering wells that are located in and around the Project open pit.<sup>42</sup> These dewatering wells draw groundwater toward the Project open pit and away from Crooked Creek, thereby creating a groundwater "cone of depression" around the Project open pit.<sup>43</sup> Groundwater modeling indicates that as a result, groundwater will no longer rise up (upwell) and discharge to Crooked Creek in the vicinity of the Project open pit.<sup>44</sup> If so, this will reduce the discharge of colder groundwater to Crooked Creek in this specific area.<sup>45</sup>
- B. The baseline temperatures identified in the FEIS statement quoted above are from a single location: the Crooked Creek/Crevice Creek gauging station (CCAC).<sup>46</sup> This gauging station is located in Crooked Creek,

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<sup>41</sup> FEIS at 3.13-101, DEC 017029 (internal citation removed).

<sup>42</sup> FEIS at 3.6-2, DEC 016153; FEIS at 3.6-30, DEC 016181-82; FEIS at 3.13-101, DEC 017029.

<sup>43</sup> FEIS at 3.6-30-31, DEC 016181-82; FEIS at 3.13-78, DEC 017006; FEIS at 3.13-101, DEC 017029.

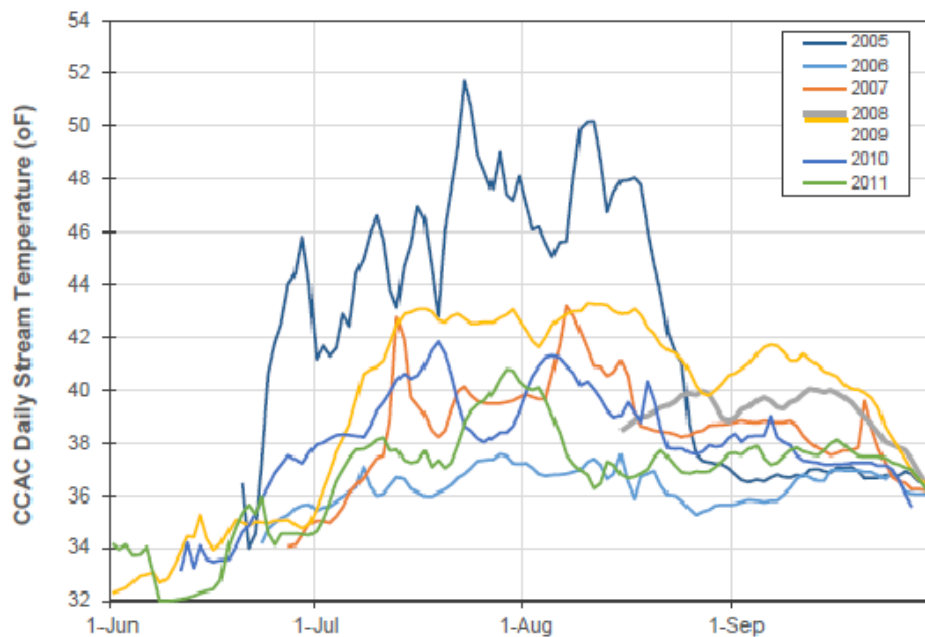
<sup>44</sup> FEIS at 3.6-27, DEC 016178; FEIS at 3.6-30-31, DEC 016181-82.

<sup>45</sup> FEIS at 3.13-101, DEC 017029.

<sup>46</sup> See BGC Engineering, Inc., Donlin Gold, Donlin Creek Gold Project, Hydrometric Stations: Data and Installation Summary (June 14, 2012) (BGC 2012a), Appendix A, Memorandum from Peter S. McCreath, Clearwater Consultants Ltd., to Richard Ridley, Placer Dome Technical Services Ltd., "Donlin Creek Project Hydrology Investigation 2005, Installation of Streamflow Gauging Stations" (July 25, 2005), Appendix A, "Table A7 - Monthly Summary 2005 - Discharge & Water Temperature Data," at 177 (describing highest recorded daily water temperatures (in Celsius) for the months of June, July, and August at CCAC monitoring location).

approximately 490 feet upstream from the confluence of Crevise Creek with Crooked Creek, immediately downstream from the southern end of Project development. At this location, Crooked Creek’s channel is approximately 49 feet wide.<sup>47</sup>

- C. The temperatures identified in the FEIS statement quoted above are the highest water temperatures that were recorded at CCAC over a 6 year period (2005 and 2007 to 2011).<sup>48</sup> The data for all 6 years are depicted on the following chart. The spikes on the blue line for 2005 are the *highest recorded* temperatures, and form the basis for ONC’s argument.



- D. All of the highest recorded water temperature readings during the 6 year period occurred in a single year—2005.<sup>49</sup>
- E. Each of the highest recorded temperature readings at CCAC in 2005 were higher than the readings in the other five observed years, and they are all higher than the average temperatures that were recorded at this site over 6 years of observation.

<sup>47</sup> FEIS at 3.5-20, DEC 015997.

<sup>48</sup> See BGC 2012a at Appendix F, “Water Levels and Temperature Summary Figures (2005-2011),” Figures F16, F18–F21, at 302, 304–07 (outlining summer water temperatures recorded at CCAC for 2005, and 2007 through 2011).

<sup>49</sup> See *supra* fn. 47.

- F. Each of these highest recorded monthly stream temperature readings from this single year (2005)—45.8°F, 51.6°F, and 50.1°F—were below the applicable Alaska water quality temperature standards of 55.4°F for egg/fry incubation and spawning and 59.0°F for migration and rearing.<sup>50</sup>
- G. In order for an exceedance of water quality standards for water temperature to occur, Project operations would have to increase the highest stream temperature observed at CCAC in 2005 by more than 3.8°F (for the egg/fry incubation and spawning standard) and more than 7.4°F (for the migration and rearing standard). Neither ONC nor the FEIS refers to any data or analysis that supports the conclusion that Project operations in general, or reduced groundwater flow in particular, would produce increases in water temperature of this magnitude.
- H. The FEIS does not state that temperature exceedances are probable or likely—it states only that exceedances are *possible*.<sup>51</sup> ONC has not identified any evidence establishing that any exceedance of temperature standards is either probable or likely.
- I. The effect on stream temperature from reduced groundwater flow into Crooked Creek may be calculated using existing data. This data shows that even in 2005, when water temperatures were particularly high, withdrawal of groundwater flows associated with open pit dewatering would not produce water temperatures in excess of the maximum levels set by Alaska’s water quality standards.
1. Calculation of the effect on water temperatures from reduced groundwater flow involves four variables established by data in the record: the water temperature of Crooked Creek; Crooked Creek’s streamflow; groundwater flow that upwells into Crooked Creek; and groundwater temperature.
  2. Water temperatures at CCAC are discussed in Findings B3 and B4 (above). This analysis uses the highest recorded (2005) temperatures observed at CCAC.
  3. To assess the claim that temperature exceedances may occur, it is appropriate to consider the water temperatures and streamflows in the

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<sup>50</sup> 18 AAC 70.020(b), Tbl. at (10)(A)(iii), (10)(c).

<sup>51</sup> Emphasis added.



months with the highest stream temperatures. In 2005, the highest stream temperatures were in July and August. During these two months, the streamflow at CCAC ranged between approximately 40 cubic feet per second (cfs) to a peak near 180 cfs.<sup>52</sup>

4. The groundwater component of the streamflow during these months was determined using the extensive groundwater modelling that Donlin completed as part of its 404 permit application and the FEIS process.<sup>53</sup> This modelling estimates the amount of groundwater flow lost from Crooked Creek as a result of open pit dewatering during summer months of Project operations at 2.0 cfs.<sup>54</sup> This lost flow is a small portion of the total streamflow in Crooked Creek as measured in July and August 2005, a loss of between 1.1% to 5% of the total streamflow.<sup>55</sup>
5. The final variable for this calculation is the temperature of the groundwater. This data is known from temperatures gathered from June 2007 to March 2014 by a network of forty sampling locations. The average groundwater temperature was 35.6°F.<sup>56</sup>
6. This data yields a calculation of what the 2005 water temperatures would have been in Crooked Creek at the confluence with Crevice Creek with a reduction in groundwater flow by 2.01 cfs, as predicted by the groundwater modelling. Removing 2.01 cfs of groundwater from Crooked Creek would raise the 2005 highest

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<sup>52</sup> See BGC 2012a at Appendix E, “Daily Discharge Data Summary Tables (1996-2011),” Table E-4, “Crooked Creek below Crevice Creek (CCAC) daily discharges,” at 281 (setting out streamflow (cfs) for July and August 2005).

<sup>53</sup> See BGC Engineering Inc., *Donlin Gold Project, Numerical Hydrogeologic Model*, (July 18, 2014) (BGC 2014c).

<sup>54</sup> Memorandum from Owl Ridge Natural Resources Consultants, Inc., “Potential effects to fish habitat from modeled changes in alluvium inflow and outflow” (Feb. 3, 2017), at 1.

<sup>55</sup> 2.01 cfs as a percentage of the July/August 2005 streamflow range stated above (40 cfs to 180 cfs).

<sup>56</sup> This average was calculated using the available groundwater temperature data from BGC 2014c. See BGC 2014c at 15 (discussing how “available data show that groundwater temperature generally varies from 32 to 43°”); BGC 2014c at Drawings 15–18 (plotting observed groundwater temperature data).

daily temperature from 51.6°F to 52.3°F.<sup>57</sup>

7. The highest projected stream temperature based on predicted reduced groundwater at this location—52.3°F—is below the temperature limits set by Alaska’s water quality standards for egg/fry incubation and spawning (55.4°F) and salmon migration and rearing (59°F).<sup>58</sup> The projected water temperatures after removal of the groundwater component would be even lower if this calculation used the *average* water temperature at CCAC, rather than the *highest recorded* water temperatures that were observed at CCAC site in the warmest year, 2005.
- J. The FEIS concluded that in areas near the Project site, incidents of injury or mortality to fish eggs may be detectable, but populations would remain within normal variation.<sup>59</sup> The FEIS concluded that in Lower Crooked Creek, there would be “no noticeable incidents or mortality to individual fish or other aquatic biota” and “population level effects are not detectable.”<sup>60</sup>
- K. Donlin’s Integrated Waste Management Monitoring Plan, incorporated into Donlin’s WMP, requires Donlin to monitor surface water and groundwater near the Project site to assure compliance with water quality

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<sup>57</sup> This temperature (52.3° F) is derived by using the following equation:

$$T3 = \frac{Q1 * T1 + Q2 * T2}{Q1 + Q2}$$

In this equation, Q1 is the measured streamflow at CCAC minus Q2 (2.01 cfs). Q2 is the baseline groundwater flow into the stream at CCAC (2.01 cfs). T2 is the groundwater temperature (35.6°F). T3 is the measured water temperature at CCAC. These values yield T1: the calculated maximum temperature at CCAC without the groundwater flow into the stream (52.3°F). The calculated temperature of the stream at CCAC without the groundwater flow — (52.3° F) — is a correction to the temperature that Donlin stated in its December 29, 2020 brief at pages 42-43 (54.5° F).

<sup>58</sup> 18 AAC 70.020(b), Tbl. at (10)(A)(iii), (10)(c).

<sup>59</sup> FEIS at 3.13-155, DEC 017083.

<sup>60</sup> FEIS at 3.13-155, DEC 017083.

standards.<sup>61</sup> Water temperature is one of the measured parameters.<sup>62</sup> Where there is an exceedance or noncompliance with a permit requirement, Donlin is required to report to the Department and implement corrective action under Department oversight.<sup>63</sup>

- L. The ARMP requires Donlin to conduct physical stream and biological monitoring of Crooked Creek that includes monitoring of streamflow changes due to open pit dewatering; shallow groundwater monitoring (which includes an evaluation of the effects of pumping and open pit dewatering); winter habitat freeze-down monitoring, including temperature measurement and evaluation of the viability of fish spawning sites; and surface water quality monitoring, with temperature being one of the measured parameters.<sup>64</sup>

### **III. Findings of fact related to reasonable assurance of compliance with anti-degradation requirements related to reduced streamflow in a portion of Crooked Creek.**

ONC claims that the Project will not comply with the antidegradation requirements in 18 AAC 70.015, based upon the following statement in the EIS:

The evaluation of flow reduction on spawning habitat determined that 65 percent (11 of 17) of the redds in Crooked Creek between American Creek and Anaconda Creek and 78 percent (7 of 9) of redds between Anaconda Creek and Crevice Creek were located in gravels that would be outside the predicted wetted portions of the stream channel during winter low flow conditions during construction and operations.<sup>65</sup>

- A. Salmon redds are depressions in a streambed created by salmon for deposit of eggs during spawning.

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<sup>61</sup> WMP, DEC 006936; Integrated Waste Management Monitoring Plan, DEC 006534.

<sup>62</sup> Integrated Waste Management Monitoring Plan, DEC 006576.

<sup>63</sup> Integrated Waste Management Monitoring Plan, DEC 006541–42.

<sup>64</sup> ARMP, DEC 006637–43, DEC 006626–27.

<sup>65</sup> FEIS at 3.13-90, DEC 017018.

- B. The quoted statement from the FEIS identified the modeled loss of redds in two contiguous segments of Crooked Creek. These two stream segments are 1) the segment of Crooked Creek between American Creek and Anaconda Creek, and 2) the segment of Crooked Creek between Anaconda Creek and Crevice Creek. These two stream segments are directly west of the proposed open pit and related facilities.<sup>66</sup>
- C. A high percentage of the salmon spawning activity in Crooked Creek occurs in the lower portions of Crooked Creek, downstream from Crooked Creek's confluence with Crevice Creek, and downstream from the two segments identified above.
1. A 2009 ground (instream) survey of salmon redds identified 532 salmon redds in Crooked Creek.<sup>67</sup> More than 94% of the redds observed in this survey were downstream from Crevice Creek. Over 88% of the redds observed in this survey were located in the segment of Crooked Creek between Getmuna Creek and the Kuskokwim River.<sup>68</sup>
  2. Aerial surveys of salmon redds conducted every summer from 2009 through 2014 documented an annual average of 180 redds in the Crooked Creek watershed.<sup>69</sup> Ninety-eight of those redds were located in the mainstem of Crooked Creek below Crevice Creek, while an annual average of five redds were documented near the Project site. Average annual redd counts for Getmuna Creek and Bell Creek, including their tributaries, identified seventy-three and four redds, respectively.<sup>70</sup>
  3. Aerial surveys of salmon redds conducted every fall from 2009 through 2014 documented a five-year average of approximately 257

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<sup>66</sup> Donlin's Opposition to ONC's Appeal to the Commissioner at p. 12.

<sup>67</sup> FEIS at 3.13-89, DEC 017017.

<sup>68</sup> FEIS at 3.13-89, DEC 017017.

<sup>69</sup> See OtterTail Environmental, 2014 Aquatic Biomonitoring Report, Donlin Gold Project, 2004 through 2014 Data Compilation (OtterTail 2014c), Appendix F, "Crooked Creek Aerial Salmon Redd Counts (2009-2014)," at 161 (documenting summer totals); see also OtterTail 2014c at 103 (figure depicting reaches referenced in Appendix F).

<sup>70</sup> See OtterTail 2014c at 161 (setting out summer totals for reaches CR-R1 and CR-R2, CR-R3 and CR-R4, GM-R1 through GM-R5, and BL-R1 through BL-R3).

redds in the Crooked Creek watershed.<sup>71</sup> On average, sixty-seven redds were counted on Crooked Creek below Crevice Creek, twenty-one redds near the Project site, and sixty-two upstream from the Project site. Average annual redd counts for Getmuna Creek and Bell Creek and their tributaries were sixty-three and forty-four, respectively.<sup>72</sup>

- D. Surveys of adult salmon in area streams show that salmon are predominantly located in the stretches of Crooked Creek below Crevice Creek. Aerial surveys from 2004 to 2010 identified an annual average of 354 adult salmon in the main stem of Crooked Creek.<sup>73</sup> Of these 354 salmon, an average of 88% were in areas downstream from Crevice Creek.<sup>74</sup> 83% of the salmon in Crooked Creek were downstream of Getmuna Creek (i.e., they were located between the mouth of Getmuna Creek and Crooked Creek's confluence with the Kuskokwim River).<sup>75</sup> Only 12% of Crooked Creek salmon (an average of 40 out of 354 fish) were observed in the middle reach of Crooked Creek, upstream from Crevice Creek.<sup>76</sup> Even more salmon were observed in Crooked Creek tributaries far downstream from the area of Project activities. Average counts for Getmuna and Bell Creeks and their tributaries were 596 and 126 adult salmon, respectively.<sup>77</sup>
- E. Projected winter low streamflow conditions in segments of Crooked Creek that are upstream from Crevice Creek near the Project site will not significantly affect the salmon spawning habitat in lower stretches of Crooked Creek, downstream from Crevice Creek.<sup>78</sup> This is because of the large proportion of the streamflow in lower Crooked Creek that is derived

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<sup>71</sup> See OtterTail 2014c at 161 (summarizing fall totals).

<sup>72</sup> See OtterTail 2014c at 161 (setting out fall totals for reaches CR-R1 and CR-R2, CR-R3 and CR-R4, DO-R1 through DO-R3, DM-R1, and CR-R5, GM-R1 through GM-R5, and BL-R1 through BL-R3).

<sup>73</sup> FEIS at 3.13-89, DEC 017017.

<sup>74</sup> FEIS at 3.13-89, DEC 017017.

<sup>75</sup> FEIS at 3.13-89, DEC 017017.

<sup>76</sup> FEIS at 3.13-89, DEC 017017.

<sup>77</sup> FEIS at 3.13-22–23 and Table 3.13-6, DEC 016950–51 (setting out counts for reaches GM-R1 through GM-R5 and reaches BL-R1 through BL-R3).

<sup>78</sup> FEIS at 3.13-89, DEC 017017.

from the major tributaries, Bell Creek and Getmuna Creek, whose flow will not be affected by Project operations.<sup>79</sup>

- F. In support of the conclusion that possible reduced winter flow will not significantly affect salmon spawning habitat in lower Crooked Creek, the FEIS referred to a 2012 study that compared potential flow reductions during Project operations, based on a flow reduction model, with the known locations and depths of the salmon redds observed in the 2009 study.<sup>80</sup> This analysis showed that in lower Crooked Creek (from Crevice Creek to Getmuna Creek), 3 out of 144 salmon redds observed in the 2009 survey would have been above the predicted winter low flow water line.<sup>81</sup> None of the 348 salmon redds observed in Crooked Creek between Getmuna Creek and the Kuskokwim River would have been above the predicted winter low flow water line.
- G. The information presented in the FEIS supports the conclusion that a high percentage of Crooked Creek's salmon spawn in habitat areas that are located in the lower parts of the Crooked Creek watershed, and these habitat areas will not be significantly affected by potential low water conditions in the middle reach of Crooked Creek near the Project site. The FEIS concluded that "aquatic life in the lower parts of Crooked Creek would not be measurably impacted" by the project.<sup>82</sup>
- H. The two segments of Crooked Creek identified by ONC are not significant in terms of salmon spawning habitat in Crooked Creek. The 2009 instream spawning survey identified a total of 532 salmon redds in the entire length of Crooked Creek.<sup>83</sup> This survey identified twenty-six redds in the two stream segments that form the basis for ONC's argument.<sup>84</sup> According to the flow depletion model, eighteen of these twenty-six redds would be above the winter low water level.<sup>85</sup> These 18 redds constitute 3.4% of the total salmon redds observed in Crooked Creek in the 2009 survey.

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<sup>79</sup> FEIS at 3.13-89, DEC 017017.

<sup>80</sup> FEIS at 3.13-90, DEC 017018.

<sup>81</sup> FEIS at 3.13-90, DEC 017018.

<sup>82</sup> FEIS at 31, DEC 015306.

<sup>83</sup> FEIS at 3.13-89, DEC 017017.

<sup>84</sup> FEIS at 3.13-90, DEC 017018.

<sup>85</sup> FEIS at 3.13-90, DEC 017018.

- I. The modeled reduction in salmon redds in the entire main stem of Crooked Creek due to low winter streamflow is 21 redds out of 532 redds (18 redds in the American-Anaconda and Anaconda-Crevise segments identified by ONC, and 3 more redds in the Crevise-Getmuna segment). Thus, the modeled loss of salmon redds for the entire length of Crooked Creek is 3.9%.<sup>86</sup>
- J. While the Crooked Creek reach near the proposed mine site does sustain spawning, the use by salmon for such purpose is marginal, indicating natural conditions suitable for spawning are poor. Salmon in Crooked Creek spawn mainly in the lower reaches of the creek, in areas where mine effects on spawning would be “unmeasurable.” Rather than result in “drying up” of redds, streamflow changes are likely to cause salmon to spawn in more suitable habitat in Crooked Creek.
- K. The ARMP requires Donlin to conduct year around physical streamflow monitoring to determine potential effects on Crooked Creek; to conduct shallow groundwater monitoring to quantify potential project-related changes in streamflow under both summer and winter flow conditions; to conduct winter habitat freeze-down monitoring to, in part, determine the viability of spawning sites within Crooked Creek; and to conduct watershed-level physical habitat mapping and surveys to track potential changes in aquatic habitat.<sup>87</sup> The ARMP also requires extensive salmon and salmon spawning and macroinvertebrate and periphyton surveys throughout the Crooked Creek watershed to allow assessment of how flow changes could be affecting salmon use at the watershed level.<sup>88</sup> Under the ARMP, adaptive management is required if changes from baseline conditions are observed.<sup>89</sup>

**IV. Findings of fact related to reasonable assurance of compliance with water quality standards for mercury in Crooked Creek.**

ONC claims that the Project will not comply with the water quality standard for

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<sup>86</sup> FEIS at 3.13-90, DEC 017018.

<sup>87</sup> ARMP, DEC 006637–45.

<sup>88</sup> ARMP, DEC 006625, DEC 006634.

<sup>89</sup> ARMP, DEC 006648–49.

chronic exposure to mercury, based upon a statement in the FEIS that mining operations “would likely cause an increase in exceedances of the 12 ng/L chronic criterion.”<sup>90</sup>

**A. Water sampling for mercury**

1. As part of its water quality characterization program, in 2005-2015, Donlin conducted baseline water sampling. This sampling identified mercury concentrations in the waters closest to the Project (Crooked Creek and Donlin Creek).<sup>91</sup>
2. None of the 564 baseline samples exceeded the acute water quality standard for mercury (2400 ng/L).<sup>92</sup>
3. “About 80” of the 564 baseline samples for mercury collected in 2005- 2015 exceeded 12 ng/L, the chronic standard for mercury.<sup>93</sup> The FEIS stated that mining operations “would likely cause an increase in exceedances of the 12 ng/l chronic criterion.”<sup>94</sup> The FEIS did not quantify the number of additional exceedances due to mining activities, or the frequency, magnitude, or duration of any increased exceedances. The FEIS also stated that atmospheric deposition of mercury during Project operations “could” result in increases in mercury concentrations that “may be” sufficient to exceed Alaska water quality criteria “at some locations.”<sup>95</sup> The FEIS did not quantify the likelihood of exceedances, or the number of locations.
4. This water sampling data is not sufficient to demonstrate noncompliance with the chronic water quality standard for mercury during mine operations.
  - a. Chronic standards are intended to identify the level of a pollutant that is protective against harm to aquatic organisms

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<sup>90</sup> FEIS at 3.7-151, DEC 016369.

<sup>91</sup> FEIS at 3.7-150, DEC 016368.

<sup>92</sup> FEIS at 3.7-150, DEC 016368.

<sup>93</sup> FEIS at 3.7-151, DEC 016369.

<sup>94</sup> FEIS at 3.7-151, DEC 016369.

<sup>95</sup> FEIS at 3.7-152, DEC 016370.



that are exposed to the pollutant continuously for at least four days.<sup>96</sup>

- b. None of the water sampling taken from 2005-2015 included samples taken on four or more consecutive days at any one location.<sup>97</sup> As a result, these samples alone do not indicate the existence of conditions that would expose aquatic organisms to mercury levels in excess of the chronic standard (12 ng/L) for four or more days.
- c. What the 2005-2015 sampling results do is identify a high degree of variability in mercury levels at the sampling locations. For example, sampling in CCAC shows highly variable mercury levels that are both above and below the 12 ng/L chronic standard. CCAC was sampled 39 times during 2005-2015 with results ranging from 1.5 ng/L to 67.4 ng/L. Seven of the 39 results exceeded the 12 ng/L chronic standard. None of the exceedances were observed in consecutive quarters of monitoring.<sup>98</sup>
- d. The high degree of natural variability in mercury levels at the sampled locations may be explained by sporadic and localized events that increase mercury levels at particular locations for a finite period of time. These natural events could include high levels of snow melt or rainfall that wash mercury-laden soil into the stream, or high water events that disturb stream sediments containing mercury so that those sediments are suspended in the stream water for some period of time.
- e. This explanation is supported by information regarding baseline mercury in the area soil and streams. First, area soils contain high levels of mercury.<sup>99</sup> Second, water sampling results show a clear association between high mercury levels and high levels of other substances, such as total suspended

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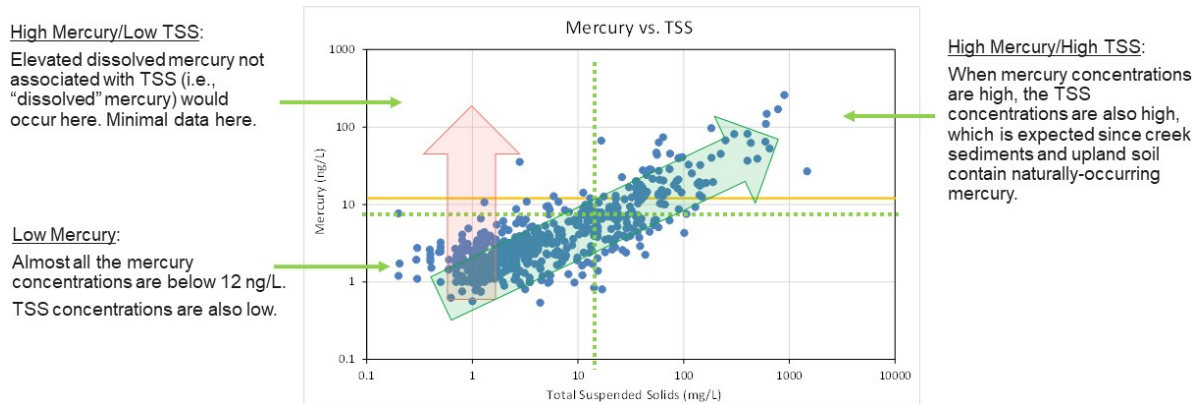
<sup>96</sup> 40 CFR § 131.36(b)(1), footnote d.

<sup>97</sup> The water sampling data for 2005-2015 is contained in Rieser 2017 (which is part of the EIS record), at SW Analytical Results for WRMP Appendix A - 23June2017.xlsx.

<sup>98</sup> See footnote 98.

<sup>99</sup> FEIS Table 3.2-1, DEC 015712.

solids (TSS), that are associated with events that produce erosion or heightened amounts of sediment in the water.<sup>100</sup> The following graph illustrates the point. The graph plots total mercury levels with concurrently-measured levels of TSS. The graph illustrates that elevated baseline mercury concentrations in surface water in Crooked Creek are well-correlated with the presence of TSS.



- f. For the foregoing reasons, the mercury sampling data is at best inconclusive about whether mercury levels in excess of 12 ng/L persist at any given location for periods long enough to produce chronic exposure for fish and other aquatic organisms.
- g. In addition, even if there are high mercury events at particular locations for finite periods, aquatic organisms are not necessarily present in these particular locations throughout such an event. Fish and other aquatic organisms move around. Thus, even if a high-mercury event occurs at a particular location for four days or more, any given fish or other aquatic organism may not be in that particular location for the entire period of the high-mercury event. If so, any mercury exposure for that particular aquatic organism may not be chronic exposure.

<sup>100</sup> Donlin's baseline surface water monitoring data are summarized in FEIS table 3.7-2-4, DEC 016232-40, and are provided in the following documents cited in the FEIS references: Enos (2013b), Weglinski (2016), SRK (2017b), and Rieser (2017).

- h. Although there are periodic events when natural mercury levels within this watershed are elevated, the watershed sustains fish and other aquatic organisms. The continued productivity of the watershed suggests that high mercury events are sporadic and transient, and do not persist in a manner that implicates the chronic exposure standard.

**B. Projected average mercury concentrations during operations**

1. The FEIS evaluated potential increases in mercury concentrations from mine operations in waters within a 20-mile radius of the mine site, encompassing the Crooked Creek watershed. Within this area, mercury levels are projected to increase by about 0.2%, which the FEIS characterized as “negligible.”<sup>101</sup> Mercury concentrations in this extended area are projected to average 7.8 ng/L, significantly below the chronic standard of 12 ng/L.<sup>102</sup>
2. The FEIS also evaluated potential increases in mercury concentrations from mine operations in waters close to the mine site, specifically Donlin Creek and Crooked Creek.<sup>103</sup> The FEIS projected that during mine operations, average mercury concentrations in waters close to the mine site (Donlin Creek and Crooked Creek) would be 11 ng/L, which is below Alaska’s chronic standard for mercury, 12 ng/L.<sup>104</sup>
3. The FEIS’s projection of average mercury levels in waters close to the mine site during mine operations is based on the following methodology:
  - a. Sampling data established an average baseline mercury concentration in waters close to the mine

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<sup>101</sup> FEIS at 3.7-160, DEC 016378.

<sup>102</sup> FEIS at 3.7-159, DEC 016377.

<sup>103</sup> FEIS at 3.7-151–52, DEC 016369–70.

<sup>104</sup> Response to Comments at 26–27, 29, DEC 000049–50, 000052; FEIS at 3.7-151–52 and Table 3.7-42, DEC 016369–70.

site of 7.81 ng/L.<sup>105</sup>

- b. The FEIS used a combination of monitoring and modeling to estimate the current (baseline) rate for atmospheric deposition of mercury. The baseline atmospheric annual deposition in the two closest watersheds to the Project, Crooked Creek and Donlin Creek, was estimated to range from 7.8 to 8.4 ug/m<sup>2</sup>/yr.<sup>106</sup>
  - c. Based on modeling, the potential increase in atmospheric mercury deposition in the two watersheds closest to the Project due to mine operations was estimated to be 2.3 to 4.7 ug/m<sup>2</sup>/yr., with an average increase of about 3.5 ug/m<sup>2</sup>/yr. Thus, the projected average annual increase in atmospheric mercury deposition due to Project activities was estimated at approximately 40%.<sup>107</sup>
  - d. Based on the projected 40% increase in atmospheric mercury deposition from mine operations, the FEIS projected a corresponding 40% increase in the mercury concentration in the waters close to the mine site. Applying this 40% increase to the average baseline mercury concentration of 7.81 ng/L (subparagraph a, above) yielded the predicted average mercury level in the affected streams of 11 ng/L.<sup>108</sup> This level is below the Alaska water quality standards' chronic level of 12 ng/L.
4. In determining projected average mercury concentrations during mine operations, the FEIS and the Department employed conservative assumptions, with the objective of establishing the upper limit of expected average mercury

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<sup>105</sup> FEIS at 3.7-150, 3.7-152 and Table 3.7-42, DEC 016368, 016370.

<sup>106</sup> FEIS at 3.7-151, DEC 016369.

<sup>107</sup> FEIS at 3.7-151, DEC 016369.

<sup>108</sup> FEIS at 3.7-151–52 and Table 3.7-42, DEC 016369–70.

concentrations.<sup>109</sup> Conservative assumptions underlying the EIS's and the Department's projected average mercury concentrations during mine operations include the following:

- a. In evaluating the expected potential air emissions from project-related sources, the model used year twenty-six of the Project life. Year twenty-six is the year with the highest projected total mercury emissions. Mercury deposition levels are predicted to be lower in other years, especially early in the Project life.<sup>110</sup>
- b. The modeling considered two emission sources: (1) point-source (stack) emissions from Donlin's ore processing activities and (2) "fugitive" emissions of mercury, primarily from the Project tailings storage facility (TSF).<sup>111</sup> The TSF sources include fugitive emissions from the TSF beaches (dry areas) and the TSF surface (wet areas).<sup>112</sup> The assumed mercury concentration for the beaches was derived from characterization of solid tailings from pilot-scale processing tests, but the actual mercury concentrations in beach materials are expected to be lower.<sup>113</sup> For the TSF pond surface, the mercury concentration in

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<sup>109</sup> Response to Comments at 25, 27, 29, DEC 000048, 000050, 000052; FEIS at 3.7-150, 3.7-152, DEC 016368, 016370 (acknowledging that concentrations of mercury during Project operations were estimated in order to identify an "upper range" of potential changes).

<sup>110</sup> Response to Comments at 26, DEC 000049. The Response to Comments indicates that this modelling was year 25 of mine operations, but the correct reference is year 26. *See also* ENVIRON International Corporation, Modeling of Local Impacts of Mercury Air Emissions from Stacks and Fugitive Sources, Advanced Water Treatment Scenario: Donlin Gold Mine, Alaska (Sept. 10, 2015) (Environ 2015), at 33, 34 (modelling relied on peak emissions predicted in year 26 of the mine life).

<sup>111</sup> *See* Environ 2015 at 19 (considering Project stack mercury emissions); Environ 2015 at 19–33 (considering Project fugitive mercury emissions).

<sup>112</sup> *See* Environ 2015 at 20 (discussing how mercury emissions at the TSF were estimated for the tailings beach and tailings pond).

<sup>113</sup> *See* Environ 2015 at 23 ("We use the solids [mercury] concentration as a conservative estimate (i.e., over-estimate), of the beach [mercury] concentration; the latter will actually be lower than the solid tailings material [mercury] concentration.").

tailings slurry from pilot-scale tests was used. Actual mercury concentrations should be lower, because the solids portion of the slurry and associated mercury will settle below the pond surface and thus will be unavailable for air deposition.<sup>114</sup>

- c. Most of the atmospheric mercury potentially deposited into streams from Project activity will be particulate mercury. Due to the high density of these mercury particles, and the nature of the local streams, a substantial fraction of these mercury particles will sink to the bottom of the stream and be buried in sediment. These buried mercury particles will not increase the amount of mercury that is present in the stream water. The FEIS's estimate of average mercury concentrations ignored this factor and assumed that 100% of additional mercury deposited from atmospheric sources would become aqueous mercury.<sup>115</sup>
- d. Baseline mercury concentrations in the streams have two sources: atmospheric deposition (from sources such as forest fires and power plants in Asia) and non-atmospheric sources such as naturally-occurring mercury in soils and sediments.<sup>116</sup> As discussed above there are clear indications that the non-atmospheric contribution is significant, especially in areas where baseline mercury levels are elevated. The FEIS's analysis of projected average mercury levels assumed a 40% increase in atmospheric deposition as a result of

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<sup>114</sup> See Environ 2015 at 25 (“The estimated Donlin tailings pond [mercury] flux is likely conservative (i.e., an over-estimate) because lower [mercury] concentrations are expected at the pond surface due to solids’ settling.”); see also Response to Comments at 26–7, DEC 000049–50.

<sup>115</sup> FEIS at 3.7-151, 3.7-152 and Table 3.7-42, DEC 016369-70; Response to Comments at 24 DEC 000047.

<sup>116</sup> ARCADIS, Assessment of Mercury Fate in the Environment from Changes in Atmospheric Deposition, Donlin Gold Project (June 2014) (hereinafter ARCADIS 2014), at 5 (discussing how existing sources are mercury that “naturally occurs in the soil and sediment in the region” and “atmospheric mercury”).

Project activities. Based upon this projection, the FEIS's methodology assumed that mercury levels in the streams near the mine site would also increase by 40%.<sup>117</sup> This approach effectively applied the 40% increase to *both* components of the baseline mercury levels in streams--both the *atmospheric* component and the *non-atmospheric* component. In fact, only the baseline *atmospheric* component is projected to potentially experience a 40% increase during Project operations. As a result, this methodology overstates potential mercury levels in streams during mine operations, especially in areas where mercury levels are elevated due to mercury in the water column due to non-atmospheric sources such as soil erosion and stream sediment disturbances.

- e. The methodology did not account for re-volatilization or soil sequestration of mercury. Significant re-volatilization into the atmosphere of elemental mercury can be expected (33-50%), therefore reducing the potential increases.<sup>118</sup>

**C. Monitoring, reporting, and adaptive management for mercury**

- 1. Donlin's WMP incorporates by reference Donlin's Integrated Waste Management Monitoring Plan.<sup>119</sup> The Monitoring Plan includes surface water quality monitoring at two locations within Crooked Creek and single locations in Anaconda Creek and Snow Gulch in the Project area where water quality effects from mercury deposition are predicted to be the highest.<sup>120</sup> Donlin must immediately report to the Department any exceedances of water quality standards above background conditions and, if necessary, implement corrective action to

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<sup>117</sup> FEIS at 3.7-151, DEC 016369.

<sup>118</sup> Environ 2015 at 46.

<sup>119</sup> WMP, DEC 006936; Integrated Waste Management Monitoring Plan DEC 006523-611.

<sup>120</sup> Integrated Waste Management Monitoring Plan, DEC 006534.

avoid future exceedances.<sup>121</sup>

2. Donlin obtained two APDES permit authorizations for the project: a Multi-Sector General Permit authorization that addresses stormwater runoff, and the individual WWTP permit for discharges from the wastewater treatment plant. Under these permits, all water discharges from the Project must comply with Alaska water quality standards.<sup>122</sup>
  - a. Donlin cannot discharge contact water and stormwater to Crooked Creek until it is treated or otherwise controlled to meet water quality standards, including standards for mercury.<sup>123</sup>
  - b. In addition, the WWTP permit requires surface water quality monitoring immediately upstream and downstream of the Project area. This monitoring includes monitoring for mercury content.<sup>124</sup>
3. The ARMP requires surface water quality and sediment monitoring throughout the Crooked Creek watershed.<sup>125</sup> Additionally, mercury is one of the elements Donlin will monitor through sampling of juvenile fish whole body concentrations.<sup>126</sup> This monitoring will allow assessment as to whether mercury is causing adverse effects on aquatic life use of the watershed.<sup>127</sup> Monitoring results must be reported annually to ADF&G, and the ARMP requires Donlin to develop and implement corrective actions to address

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<sup>121</sup> Integrated Waste Management Monitoring Plan, DEC 006541–42.

<sup>122</sup> See FEIS at 3.7-167, DEC 016385 (“effects from all project-related discharges to Crooked Creek would be treated to meet the most stringent AWQC prior to discharge”); Response to Comments at 27–28, DEC 000051–52.

<sup>123</sup> WWTP, DEC 007205–06; MSGP, DEC 007562–63.

<sup>124</sup> WWTP, DEC 007211–12.

<sup>125</sup> ARMP, DEC 006626–27.

<sup>126</sup> ARMP, DEC 006625–26.

<sup>127</sup> ARMP, DEC 006621.



documented effects, with oversight from ADF&G.<sup>128</sup>

4. Donlin's Air Quality Control Construction Permit, issued by the Department's Division of Air Quality also addresses mercury.<sup>129</sup>
  - a. To minimize potential point-source emissions of mercury, the permit requires installation and proper operation of stack emission controls designed for the capture and removal of mercury from the exhaust stacks of gold ore and gold concentrate processing sources (autoclaves, carbon regeneration kilns, electrowinning cells, mercury retort, and gold induction furnace).<sup>130</sup> These mercury control systems are required under the Clean Air Act and are designed to reduce mercury emissions to less than 25% of the emissions standard in the Act.
  - b. In addition, the permit requires implementation of Donlin's proposed Fugitive Dust Control Plan, which will limit potential releases of mercury from all fugitive emission sources at the Project site, including the Tailings Storage Facility.<sup>131</sup>

## ANALYSIS

### I. Burden of Proof and Standard of Review

At the outset, it is necessary to address threshold matters in the Department's administrative adjudication procedures, including the burden of proof and standard of review. In administrative hearings, the standard of proof is preponderance of the evidence and the burden of proof is on the party who requested an adjudicatory

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<sup>128</sup> ARMP, DEC 006647-49.

<sup>129</sup> AQCC Permit, DEC 007823-921.

<sup>130</sup> FEIS at 2-23-26, DEC 015376-79.

<sup>131</sup> AQCC Permit, Section 14, DEC 007911-19.

hearing.<sup>132</sup> “To prove a fact by a preponderance of evidence, a party with the burden of proof must show that the fact more likely than not is true.”<sup>133</sup> Further, not only does the requesting party hold the burden of proving its case by a preponderance of the evidence, it also has the burden of going forward with the evidence.<sup>134</sup> Here, ONC is the requesting party and had the burden of proof, which it failed to carry.

With respect to the standard of review, the ALJ is correct that the Department’s regulations set no specific standards of review for this type of appeal. In the absence of a specific statute or regulation the ALJ chose to exercise his independent judgment. However, he also acknowledged that the Commissioner could defer to the Division “if the circumstances warranted.”<sup>135</sup> I choose to do so.

Generally, when a legal question turns on an agency’s interpretation of its own regulations, courts apply a deferential standard of review when the agency’s interpretation implicates agency expertise or raises fundamental policy considerations over matters within the agency’s discretion.<sup>136</sup> Further, when a court applies its

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<sup>132</sup> 2 AAC 64.290(e).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Proposed Decision at 19.

<sup>136</sup> *In the Matter of City of Valdez’s Objection to Assessment of Crowley Marine Services’ Property & In the Matter of City of Valdez’s Objection to Assessment*, OAH Nos. 06-0250-TAX, 06-0251-TAX (April 25, 2011) 2011 WL 11073223 (Alaska Dept. Rev.) (citing *Palmer v. Municipality of Anchorage*, 65 P.3d 832, 837 n. 7 (Alaska 2003) (explaining that courts “review an agency’s interpretation of its own regulations using [their] independent judgment, so long as that interpretation does not implicate the agency’s area of expertise or questions of fundamental policy committed to the agency’s discretion.”

independent judgment to a question of interpretation, it may defer to an agency's long-standing interpretation. <sup>137</sup>

"A commissioner or final decisionmaker is never bound to defer to staff, however."<sup>138</sup> "[A]ccording deference by rote to subordinates may be contrary to the purpose of allowing an executive branch appeal."<sup>139</sup> Often when a particular interpretation question does not require the subject-matter expertise of staff making intermediate decisions, deference is not needed. Yet, even if not required, "a measure of practical 'due deference' is often extended as a matter of good administrative practice."<sup>140</sup>

Though not strictly applicable to reviews wholly internal to the executive branch, judicial standards of review may be instructive. Since they are used when courts review final executive branch actions, an executive branch reviewer making such a final decision may wish to look through a similar lens when reviewing an intermediate executive branch decision by a subordinate.

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<sup>137</sup> *Id.*

<sup>138</sup> *In the Matter of City of Valdez's Objection To Assessment of Crowley Marine Services' Property In the Matter of City of Valdez's Objection To Assessment of Prince William Sound Oil Spill Response Corp.'s Property*, 2011 WL 11073223, at \*5.

<sup>139</sup> *Id.* Citing to *In re Alaska Medical Development—Fairbanks, LLC, Kobuk Ventures, LLC, and Fairbanks Memorial Hospital*, OAH Nos. 06-0744-0746-DHS at 6.

<sup>140</sup> *See, e.g., Quality Sales Foodservice v. Dep't of Corrections*, OAH No. 06-0400-PRO., Decision and Order at 11-12 (Dep't of Administration 2006); *In re Waste Management of Alaska, Inc.*, Case No. 01-08, Decision at 9-13 (Dep't of Administration 2002).

*In the Matter of City of Valdez* is instructive in this instance. There, where the proceeding similarly lacked specific standards of review prescribed by law or regulation in making a determination, the ALJ discussed the standard of review the commissioner was to apply:

[I]f the final decisionmaker is reviewing an intermediate decision that depends on expertise of the subordinate, the final decisionmaker may wish to defer to that expertise, both because that may be the best way to ensure that proper expertise is brought to bear upon the matter and in anticipation that a reviewing court might look through the final decision to the use of expertise by the subordinate. Borrowing from the judicial standards of review, therefore, the commissioner could, and possibly should, defer to the division's interpretation of the relevant regulation if the special [] expertise of the division were implicated by the interpretation question. <sup>141</sup>

Here, the expertise of the Division is indeed needed to interpret and implement its guiding statutes and regulations. Water quality and antidegradation expertise is certainly required to determine whether there is reasonable assurance that state water quality standards will not be violated. Moreover, as the principal executive officer of the Department, I have the authority to organize the Department into Divisions, to adopt regulations, and to appoint subordinates. As such, I am entitled to, and possibly should, give due consideration to the Division's interpretation of Department regulations.

## **II. Applicable Law**

Under the applicable rule, in the § 401 certification process, the state agency is required to include a “statement that there is reasonable assurance that the activity will be

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<sup>141</sup> *Id.*

conducted in a manner which will not violate applicable water quality standards,”<sup>142</sup> and a “statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity.”<sup>143</sup>

Yet, absolute certainty is not required in making a reasonable assurance determination. Indeed, the state is not required “to provide absolute certainty that permittees will never violate state standards, assuming this sort of guarantee is even possible.”<sup>144</sup> Instead, the state agency with the discretion to issue a Certificate “is only required to provide a ‘reasonable assurance’ that the activity will be conducted in a manner that will not violate applicable water quality standards.”<sup>145</sup> The § 401 certification must address future events and the likelihood that those events will result in violations of water quality standards.

While federal rules do not explicitly define reasonable assurance, the State of Washington has described it as “something [that] is reasonably certain to occur.”<sup>146</sup> Specifically, in *Port of Seattle*, a case the parties and ALJ rely upon heavily, Washington’s Pollution Control Hearing Board provided that “reasonably certain to occur” means “[s]omething more than a probability; mere speculation is not sufficient.”

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<sup>142</sup> 40 CFR 121.2(a)(3) (2019).

<sup>143</sup> 40 CFR 121.2(a)(4) (2019).

<sup>144</sup> *Miners Advocacy Council, Inc. v. State, Dept. of Environmental Conservation*, 778 P.2d 1126, 1138 (Alaska 1989).

<sup>145</sup> *In Re: Certification of the 1989 and 1990 NPDES Placer Mining Permits For Alaska*, 1991 WL 574966, at \*13 (citing *Miners Advocacy Council* at 11383).

<sup>146</sup> *Port of Seattle v. Pollution Control Hearings Bd.*, 90 P.3d 659, 676 (Wash. 2004).

In elaborating, the board provided that “[c]learly, the ‘reasonable assurance’ standard does not require absolute certainty. The inherent predictive nature of a § 401 certification cannot be avoided.”<sup>147</sup>

### III. Analysis

#### A. The Division is not required to analyze compliance based on worst case scenarios.

In *Miners Advocacy Council*, where the Alaska Supreme Court upheld the Department’s certification of draft NPDES permits issued to placer gold mines, the Court focused on the original hearing officer’s conclusions rejecting the challenger’s assertions. There, where the permit challengers argued more stringent effluent limits and site-specific verifications were necessary to assure compliance with water quality standards, the Court agreed with the hearing officer’s conclusion that “assumptions underlying such an approach are not reasonable” and that arguments for assuming “a worst case scenario in every case and ignor[ing] reasonable assumptions” are flawed “when applied to the real world and actual mining sites.”<sup>148</sup>

Further, the Court held that in making a reasonable assurance certification, the Department is not *guaranteeing* that there will never be an exceedance.<sup>149</sup> Quoting the hearing officer further, who declined to interpret reasonable assurance “to mean that DEC has assured that there will never be an incident where a discharge from a placer

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<sup>147</sup> *Id.*

<sup>148</sup> *Miners Advocacy Council*, 778 P.2d at 1136.

<sup>149</sup> *Id.*

mining site in the state” exceeds effluent limits, the Court validated the premise that certificates of reasonable assurance must be more reasonably interpreted.<sup>150</sup> Thus, the court upheld the hearing officer’s decision that the reasonable assurance test is met if the Department can “certify that a limitation reasonably assures compliance with state water quality standards”<sup>151</sup>

Instead, here the ALJ’s proposed decision does adopt the challenger’s worst-case scenarios. For mercury, the proposed decision disregards the Division’s determination that the multiple conservative inputs into the mercury modeling performed by the FEIS do not accurately reflect the considerations required for § 401 certification. In its temperature analysis, the proposed decision would have the Division use the highest recorded temperature over a six-year study as the baseline for analysis. For existing uses, the proposed decision focuses on individual fish rather than the Division’s focus on the fish population as a whole in the watershed.

**B. The “potential” wording in the FEIS does not satisfy ONC’s burden of proving violation of an applicable standard is likely.**

The proposed decision mischaracterizes report findings. For example, the FEIS states that the Project “*could* cause stream temperatures in reaches near the mine to be *close to or above Alaska’s water quality temperature standard* of 55.4° F for egg/fry incubation and spawning and 59.0° F for migration and rearing.”<sup>152</sup> Yet, while the FEIS

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1137.

<sup>152</sup> FEIS at 3.13-112, DEC 17040 (emphasis added).

makes no definitive finding on this issue, the proposed decision does. More perplexing is that when reiterating the FEIS conclusion, the proposed decision characterizes the Project as “likely” to violate water quality standards for temperature, where the language used in the FEIS is “could.”<sup>153</sup> Webster’s Dictionary defines likely as “having a high probability of occurring or being true; very probable”<sup>154</sup> whereas the word “could” indicates an unspecified or uncertain level of uncertainty.

Further, the proposed decision states that violations are “predicted” in the FEIS.<sup>155</sup> Yet, to the extent that any data supports the conclusion that water temperatures during mine operations would be “close to” the levels set by water quality standards, these conclusions are not based on evidence in the record, and ONC did not produce any evidence to support such predictions. As such, the data is insufficient to allow for predictions.

The proposed decision misleadingly pulls singular quotes out of the FEIS and adopts them as determinative. This is a policy decision that the proposed decision makes, which is contrary to the policy decision implemented by the Division. Yet, it is the Department, and the Division under its guidance, that has the authority to dictate and discretion to implement policy decisions. Here, the Department maintains the discretion to decide what data to rely on in making its determinations. It is not required to utilize

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<sup>153</sup> Proposed Decision at p. 46.

<sup>154</sup> Merriam-Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/likely> (last visited May 21, 2021).

<sup>155</sup> *Id.* at 52, 53.



data only from the FEIS. The Division may review the FEIS, and the data and studies supporting the FEIS, but the Division is not restricted to reliance solely on the statements made, and conclusions reached, in the FEIS. The Division may consider those statements and conclusions, but is not required to rely exclusively on them. Indeed, under regulatory guidance and statutory authority, the Division with its subject-matter experts may appropriately make its determinations from thorough analyses of multiple sources of data.

Finally, I disagree with, and reject, the proposed decision's characterization of the FEIS findings. To the extent that any data supports the conclusion that water temperatures during mine operations would be "close to" the levels set by water quality standards, the data is insufficient to support the proposed decision's conclusion that the Division lacked reasonable assurance of compliance. Instead, the proposed decision elevates data from the FEIS, which was prepared for purposes other than certifying Donlin Gold's Certificate by federal entities, above analyses and conclusions made by the state agency charged with upholding and enforcing the state's water quality standards. Moreover, the proposed decision treats the FEIS as binding on the Division in making its § 401 certification.

**C. The Division's policy choice with a watershed approach is appropriate.**

Contrary to the proposed decision, the Division's use of the FEIS's watershed analysis is appropriate. The Division appropriately made a specific policy choice to use the watershed approach to evaluate this project. Among other reasons, the FEIS analysis was conducted on a watershed basis, and while the FEIS and the Certificate may have

slightly different purposes, both aim to analyze potential effects of the Project. The Division's application of the watershed analysis was appropriate and within its discretion.

However, with no support in regulation or the Division's precedent in other matters, the proposed decision utilizes an "area of impact" approach, which requires looking only at the specific geographic area next to or directly downstream of the project. Taking that approach would be an exceptionally conservative policy decision which would impose an extremely limited evaluation of impacts. Moreover, that approach fails to consider the overall Project, the continuing nature of those effects outside the "area of impact," and the overall biological health of the waterbody. Thus, the Division appropriately used its discretion to make a reasoned policy decision by looking at the Project through the lens of the watershed approach.

**D. Reasonable assurance of compliance of with mercury standards.**

ONC first asserts that the Division has not demonstrated reasonable assurance that construction and operation of the Project will comply with Alaska's water quality standards for mercury. This assertion is based largely on statements pulled from the FEIS. Specifically, ONC's pulls figures from past water studies and concludes, without additional evidence to rebut the Division's finding of reasonable assurance, that it is "all but certain there will be violations of the water quality standard for mercury."<sup>156</sup> Furthermore, ONC argues that the Division has failed to establish reasonable assurance by not offering any new data or studies to contradict the FEIS.

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<sup>156</sup> ONC Brief at 11.

Environmental Impact Statements evaluate *potential* impacts and are often overly inclusive, but the Division is not limited to information provided in an EIS in making its decision: it has access to a host of data its experts may utilize in making informed decisions within its statutory discretion. Moreover, the Division is not required to put forth additional evidence to prove that it has reasonable assurance. Indeed, the Division is not required to prove anything at this stage. Instead, it is ONC who has the burden to prove by a preponderance of evidence that the Division does not have reasonable assurance that the Project will not violate water quality standards. ONC has failed to produce more than assertions, opinions, or conclusions to rebut the Division's findings and has thus failed to meet its burden to prove by a preponderance of the evidence that reasonable assurance does not exist.

**E. Reasonable assurance of compliance with temperature standards.**

ONC's second claim is that the Division has not demonstrated reasonable assurance that construction and operation of the Project will comply with Alaska's water quality standards for temperature. Similar to its claims pertaining to mercury above, ONC's claims rely on assertions that characterize certain predictions in the FEIS as conclusive. Further, ONC argues that "the Division has offered no new data or studies to contradict the EIS's conclusions about temperature based on years of study."<sup>157</sup> Again, for the reasons provided above, ONC has failed to meet its burden to prove by a preponderance of the evidence that reasonable assurance does not exist.

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<sup>157</sup> ONC Brief at 17-18.

## **F. Reasonable assurance of compliance with existing uses standards.**

ONC's third claim is that the Division has not demonstrated reasonable assurance that construction and operation of the Project will fully protect existing uses. With § 401 certification, states are required to certify that the permittee will comply with state standards by including a statement in its certificate that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards."<sup>158</sup> Alaska's applicable water quality standards, "are set by the antidegradation policy in 18 AAC 70.015, the water quality criteria in 18 AAC 70.020(b), and the limits in 18 AAC 70.030, applied in accordance with [18 AAC 70.005 - 18 AAC 70.050]."<sup>159</sup>

In implementing Alaska's antidegradation policy, the Department is required to conduct an antidegradation analysis and make findings for discharges "subject to authorization by the department under [] 18 AAC 83 (Alaska Pollutant Discharge Elimination System (APDES) Program); and [] 33 U.S.C. 1341 (Clean Water Act, sec. 401) water quality certifications." When conducting this antidegradation analysis,

...if the quality of water exceeds levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on that water...that quality must be maintained and protected unless the department, in its discretion...allows the reduction of water quality...for another purpose as authorized in the department permit, certification, or approval; the department will authorize a reduction in water quality only after...the department finds that... (A) allowing lower water quality is necessary to accommodate important economic or social development in the area where the water is located;

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<sup>158</sup> 40 C.F.R. § 121.2(a)(3) (2019).

<sup>159</sup> 18 AAC 70.010(b).

(B) except as allowed under this subsection, reducing water quality will not violate the applicable criteria of 18 AAC 70.020 or 18 AAC 70.025 or the whole effluent toxicity limit in 18 AAC 70.030; (C) the resulting water quality will be adequate to fully protect existing uses of the water; and (D) all wastes and other substances discharged will be treated and controlled to achieve (i) for new and existing point sources, the highest statutory and regulatory requirements; and (ii) for nonpoint sources, all cost-effective and reasonable best management practices...<sup>160</sup>

Clearly, this required antidegradation analysis is not limited solely to whether existing uses will be fully protected. Instead, the Division is required to, among others, balance important economic or social development with the full protection of existing uses. Yet, the existing uses element is the only element of the analysis ONC focuses on in its challenge.

Here, after a thorough antidegradation analysis was conducted, it *was* determined that existing uses of the water would be fully protected.<sup>161</sup> ONC, however, relies on assertions that the FEIS, which was not conducted under the state's antidegradation regulatory scheme, concludes otherwise. But, under the state's antidegradation analysis and implementation policy, no authority exists to support a contention that an EIS prepared by the Army Corps of Engineers pursuant to federal law encompasses all of the evidence that the state may consider or that the state is limited only to reviewing FEIS data in making its determinations.

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<sup>160</sup> 18 AAC 70.015.

<sup>161</sup> See Memorandum, Antidegradation Analysis – Donlin Project, POA-1995-120 (updated), DEC 000001-14.

The detailed analysis of data specified in the state’s antidegradation implementation method requires § 401 certification applicants to submit “sufficient information”, including “parameters of concern in the discharge and the respective concentrations, persistence, and potential impacts to the receiving water”, “data on parameters that may alter the effects of the discharge to the receiving water”, and “any additional information as requested by the department.”<sup>162</sup> As the state agency charged with setting antidegradation policies and conducting antidegradation analyses prior to issuing a Certificate, it makes little sense that the Division would be limited to data dictated by the federal government under federal regulatory schemes. As such, the Division, under the direction of the Department, may choose to evaluate *all* relevant evidence in making its determination.

ONC argues that the Division has offered no new data or studies to contradict the FEIS. Again, however, the burden is on ONC to prove by a preponderance of the evidence that the Division does not have reasonable assurance and, again, ONC has failed to meet this burden.

**G. Reliance on permits is appropriate.**

Finally, the ALJ’s determination that reasonable assurance did not exist was based on a strict reading and interpretation of what and how many conditions must attach to a Certificate for an issuing state agency to be reasonably assured. This interpretation purports to require a nexus between the Certificate, other permits already issued to

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<sup>162</sup> 18 AAC 70.016(5).

Donlin Gold, and the Division’s ability to remedy those issues if and when exceedances occur. Specifically, it provides that a “strong nexus between detailed conditions contained and referenced in the certificate itself and the remedies that could be invoked if standards are exceeded, is exactly what existed in *Port of Seattle*.”<sup>163</sup>

Further, the proposed decision suggests that it is improper for the Division to rely on the terms of other permits in concluding the Certificate provides reasonable assurance of compliance with water quality standards. This arises with Donlin’s ARMP, enforceable by ADF&G, and a number of air and water permits that are overseen by ADEC. *Port of Seattle* recognized that when the certifying agency assesses “reasonable assurance,” it is acceptable for the certifying agency to rely on provisions in other permits that govern the activity (in that case, provisions in an NPDES water discharge permit).<sup>164</sup>

The Proposed Decision attempts to distinguish *Port of Seattle* by noting that other permits in the Project are “dissimilar.”<sup>165</sup> Permits address different media, such as air, wastes, water, and circumstances, and the fact that they may be “dissimilar” does not undermine a conclusion by the Division that it, the Department, or another state agency will enforce the permits in question. In fact, as a policy matter it is preferable to have ADF&G, the agency charged by the legislature with the protection of fish and game, remain primarily responsible for enforcing fish protection measures. As such, the ARMP

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<sup>163</sup> Proposed Decision at 32.

<sup>164</sup> 90 P.3d 659.

<sup>165</sup> Proposed Decision at 33.

and permits issued by ADEC are relevant to the Division's overall assessment of the Project's compliance with water quality standards, and the Division is not necessarily precluded from relying on permit oversight and enforcement from ADF&G, other divisions in ADEC, and other agencies.

And, while *Port of Seattle* is instructive, it is not controlling. While it was appropriate in that matter for the certificate at issue to reference specifics of monitoring and contingency plans, including how to avoid exceedances, I disagree that these, along with "specifics of what will occur if exceedances take place, including the potential for the ultimate enforcement remedy of certificate revocation"<sup>166</sup> are absolutely necessary with every Certificate in order for reasonable assurance to exist.

The Clean Water Act of 1977 anticipates that changes may occur in the water quality after a project has been certified, and it provides the Department with a mechanism to take action. The Act provides for continuous monitoring of a Certificate contemplating revisions subsequent to the issuance of the § 401 certification and notice by the issuing state if there is no longer reasonable assurance of compliance with the substantive provisions of the Clean Water Act because of changes in "(A) the construction or operation of the facility, (B) the characteristics of the water into which such discharge is made, (C) the water quality criteria applicable to such waters or, (D) applicable effluent limitations or other requirements."<sup>167</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> 33 U.S.C.A. § 1341(a)(3).



Furthermore, 33 U.S.C. § 1341(d) provides that “[a]ny [Section 401] certification ... shall become a condition on any Federal license or permit subject to the provisions of this section.” As such, violations of conditions placed on the Certificate would subject the § 401 certificate holder to both state and federal enforcement mechanisms and would themselves be violations of state and federal law.

While the Certificate issued to Donlin Gold does have conditions attached, violations of which would be subject to state and federal enforcement, states have the option of including conditions necessary to achieve reasonable assurance. But, conditions are not mandated by the Act. Indeed, a state has four options when receiving applications for § 401 certification: “it may grant a certificate without imposing any additional conditions; grant it with additional conditions; deny it; or waive its right to participate in the process.”<sup>168</sup> The Act merely requires that if a state grants a Certificate, with or without conditions<sup>169</sup>, the Certificate must contain “[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.”<sup>170</sup>

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<sup>168</sup> *Sierra Club v. State Water Control Board*, 898 F.3d 383, 388 (C.A.4 (Va.), 2018); *See Delaware Riverkeeper Network*, 833 F.3d at 376 (noting states’ options to deny certificate or to waive right to participate); *see also S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 380 (2006) (“Section 401 ... was meant to continue the authority of the State to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.” (alterations and internal quotation marks omitted)).

<sup>169</sup> *Sierra Club* at 388.

<sup>170</sup> 40 C.F.R. § 121.2(a)(3) (emphasis added); *see PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712, (1994).

In *Sierra Club v. State Water Control Board*, several environmental groups challenged the state of Virginia’s issuance of a § 401 certification where the state had determined it had reasonable assurance that construction of a natural gas pipeline would not violate state water quality standards.<sup>171</sup> There, the court found that it was reasonable for the state to conclude it had reasonable assurance because the state agency, “like the EPA would be able to use the tools at its disposal to adjust to any unexpected contingencies that may lead to a short-term exceedance.”<sup>172</sup> Moreover, the court provided “§ 1341(d) plainly contemplates a state requiring water monitoring as a basis for its reasonable assurance certification” in determining that reliance on such monitoring would not be an arbitrary or capricious determination of reasonable assurance.<sup>173</sup>

Like in *Sierra Club*, a significant basis for the Division’s reasonable-assurance certification was the existence of monitoring requirements that would allow the Division to make prompt adjustments if samples reveal exceedances of water quality standards. Following this approach, the monitoring plan was crafted to protect against any degradation of water quality from the Project, without regard to what particular activities, combination of activities, or naturally-occurring conditions are the cause of such exceedances. This power of the Department, through the Division, to

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<sup>171</sup> 898 F.3d 383 (C.A.4 (Va.), 2018).

<sup>172</sup> *Id.* at 404-405.

<sup>173</sup> *Id.* (citing to 33 U.S.C. § 1341(d) (“Any certification provided under this section shall set forth any ... monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable ... limitations ... and with any other appropriate requirement of State law set forth in such certification.”) (*See also Port of Seattle*, 90 P.3d at 678.)).

continuously monitor projects and to notify the permitting agencies of changes in water quality so that an investigation can be held should provide adequate protection to the public health, safety and welfare of the people of the State of Alaska.

## CONCLUSION

Because I find the Division's decision is supported by a reasonable basis in law and substantial evidence in the record,<sup>174</sup> I reject the positions advanced by the other parties. In contesting the Department's issuance of a Certificate, ONC bears the burden of proving by a preponderance of evidence that the Division does not have reasonable assurance that state water quality standards for mercury, temperature, and existing uses will be protected. In determining whether ONC has met this burden and whether reasonable assurance exists, I find it appropriate to defer to the Division's expertise in its analysis of the relevant data and information from the record.

In this matter, ONC cherry-picked portions of the record describing *potential* impacts in a highly technical report and characterized them as conclusive. The Division consistently and thoroughly rebutted each of ONC's assertions with analysis of relevant

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<sup>174</sup> On pages 21-23 in the ALJ's proposed decision under "Documentation appropriately considered," the issue of ONC's challenge to documents it construes as "extra-record documents" is addressed. After analysis, the proposed decision finds ONC cannot claim it will suffer prejudice from, and finds good cause exists, for consideration of these documents. This issue was raised for the first time in ONC's reply brief, yet in the parties' proposals for action no party made arguments for or against consideration of these documents. Importantly, ONC's proposal for action provides that the proposed decision "is the result of thorough review of the extensive agency record and parties' briefs" and that it "is well supported and sound in its reasoning" and as such asks for adoption of the ALJ's proposed decision. As to this issue, ONC has lost its right to object to consideration of these documents. In the interest of creating a clean and comprehensive record, I adopt the ALJ's conclusion that these documents may be considered.

information and data using its subject-matter expertise. Consequently, ONC has failed to meet its burden and there is no need to return the matter to the Division for further review and analysis.

For the foregoing reasons, ONC's request to rescind the Certificate issued to Donlin Gold is DENIED; the Division's issuance of the Certificate to Donlin Gold is UPHELD.

This is a final agency decision. It may be appealed to the superior court within 30 days from the date of this order.<sup>175</sup>

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<sup>175</sup> AS 44.62.560.

## Non-Adoption Options

A. The undersigned in accordance with AS 44.64.060(e)(2), declines to adopt this Decision, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about \_\_\_\_\_;

make additional findings about \_\_\_\_\_;

conduct the following specific proceedings: \_\_\_\_\_.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

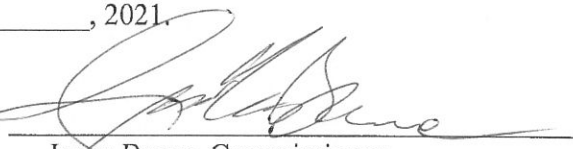
By: \_\_\_\_\_  
Jason Brune, Commissioner  
Department of Environmental Conservation

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B. The undersigned, in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set forth below, and adopts the proposed decision as revised:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 27<sup>th</sup> day of May, 2021.

By:   
Jason Brune, Commissioner  
Department of Environmental Conservation

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C. The undersigned, in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 27<sup>th</sup> day of May, 2021.

By: 

Jason Brune, Commissioner  
Department of Environmental Conservation

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D. The undersigned, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 27<sup>th</sup> day of May, 2021.

By: 

Jason Brune, Commissioner  
Department of Environmental Conservation