



**STATE OF ALASKA DEPARTMENT OF NATURAL RESOURCES
DIVISION OF MINING, LAND AND WATER**

Statewide Abatement of Impaired Land Section

Preliminary Decision

ADL 234436

Rio Tinto Closure

Application for Restricted Use & DNR Consent to Environmental Covenants
AS 38.05.035 and AS 38.05.020

Executive Summary

This Preliminary Decision (PD) is the State’s preliminary best interest finding regarding a proposed disposal of interest in state land. The public is invited to comment on this PD. The deadline for commenting is 5:00 pm December 18, 2024. Please see the Public Notice section of this decision for requirements related to submitting comments for consideration. Only the applicant and those who comment on the PD have the right to request reconsideration of the Final Finding and Decision (FFD).

Requested Action

Rio Tinto Closure, on behalf of Minaska, Inc. and its successors, (“applicant”) submitted an Application for Restricted Use & DNR Consent to Environmental Covenants to the Alaska Department of Natural Resources (DNR), Division of Mining, Land and Water (DMLW), Statewide Abatement of Impaired Land Section (SAIL) on July 10, 2024. The applicant requested that DNR consent to the placement of an environmental covenant, which would include activity and use limitations (AULs), on 389.4 acres of DNR-managed tide and submerged lands. The environmental covenant, and associated AULs, are proposed to prevent the disturbance of tailings deposited on the tide and submerged lands between 1915 and 1930. The tailings, estimated at a volume of 2 million tons, cover an area of approximately 97 acres. The applicant requested that the environmental covenant include a 500-foot buffer to ensure the tailings are not disturbed, resulting in a total request of approximately 389.4 acres to be encumbered by the environmental covenant. The proposed environmental covenant is located on tide and submerged lands off the northwest side of Latouche Island, Prince William Sound, Alaska.

Proposed Action

Provide DNR consent to the environmental covenant, as both grantor and grantee, on the full 389.4 acres proposed for inclusion in the environmental covenant to prevent disturbance of the historic tailings deposit. DNR worked with the Alaska Department of Environmental Conservation (DEC) to draft site specific AULs to prevent disturbance of the tailings and to ensure protection of human health, safety, welfare, and the environment. The proposed AULs are included in the draft environmental covenant, which is attached to this preliminary decision. The environmental covenant, including the AULs, will create an encumbrance that runs with the land and is perpetual, unless amended or terminated pursuant to AS 46.04.325 or 46.04.330.

Scope of Decision

The scope of this decision is limited to the determination of whether it is in the State's best interest to consent to the environmental covenant as both grantor and grantee. The administrative review for this authorization is defined by AS 38.05.035(e)(1)–(2) and is limited to (1) reasonably foreseeable, significant effects of the uses to be authorized; (2) applicable statutes and regulations; (3) facts pertaining to the land or resources; and (4) issues that are material to the determination.

Authority

This decision is being adjudicated pursuant to AS 38.05.020, Authority and Duties of the Commissioner; AS 38.05.035(e) Powers and Duties of the Director; and AS 38.05.945 Notice. The authority to execute the FFD and the environmental covenant is not delegated to DMLW and will be signed by the DNR Commissioner.

Administrative Record

The administrative record for the proposed action consists of the Constitution of the State of Alaska, the Alaska Land Act as amended, applicable statutes and regulations referenced here-in, the 1988 Prince William Sound Area Plan, and other classification references described herein, and the casefile for the application serialized by DNR as ADL 234436.

Location Information

Geographic Location:

The site is on State-owned and DNR managed tide and submerged land in Latouche Passage, Prince William Sound. More specifically, the site is located off the northwest side of Latouche Island, adjacent to the former Beatson Mine Site, just north of Chicken Island and near the northeast boundary of Horseshoe Bay State Marine Park.

Property Description:

The proposed environmental covenant is located within Section 28 & 33, Township 001 South, Range 009 East, Seward Meridian. The proposed environmental covenant contains approximately 389.4 acres more or less, beginning at the mean high tide line and extending seaward.

Regional Corporation: Located within the Chugach region.

Village Corporation: Located near Chenega corporation lands.

Federally Recognized Tribe: Located near the Native Village of Chenega.

Approximate Coordinate Location: 60.0501 N, 147.9158 W

Title

The State of Alaska holds title to lands beneath tidally influenced and navigable waterways within its jurisdiction, including lands underlying Latouche Passage in the area of the proposed

environmental covenant, on the basis of the Equal Footing Doctrine, the Submerged Lands Act of 1953 and AS 38.04.062 (Identification of State Submerged Lands). A DNR Title Report, RPT-21812, issued on June 16, 2021, from DNR's Realty Services Section attests to the State's ownership of subject tide and submerged lands within section 33.

Adjacent Landowners

The entirety of the proposed environmental covenant rests on the State's tide and submerged lands. These tide and submerged lands are adjacent to over 12 small upland lots that are a part of the Latouche Island subdivision. Ownership information for those upland lots was not readily available. Deed information was not found in the Alaska Department of Natural Resources Recorder's Office. The upland lots are in an unorganized borough and not subject to any local platting authorities that may maintain readily available ownership information. The only adjacent upland owner that was identified, via a DMLW tideland lease application, was David Burlingame. Chugach Alaska corporation and Rio Tinto also own uplands near the area.

Third Party Interests

ADL 233787 – Tideland lease for a private dock that exists within the proposed environmental covenant boundary.

Planning and Classification

The proposed environmental covenant is consistent with the 1988 Prince William Sound Area Plan (PWSAP). The proposed environmental covenant is in management unit 13, subunits 13F and 13J of the PWSAP. The land use designations for 13F are habitat & harvest, and shoreline development, which convert to land classifications of wildlife habitat land and settlement land. The land use designation for 13J is general use, which converts to a joint classification of public recreation land, settlement land, and wildlife habitat land.

The PWSAP outlines the general management intent for unit 13 tidelands saying, "management will emphasize providing access to the uplands while protecting the important public resources such as fish and wildlife habitat and harvest areas and access to public campsites, anchorages, and important sport-fishing sites" (p. 3-97). For subunit 13F, which contains the majority of the area proposed under the environmental covenant, the PWSAP states that "tideland management should accommodate shoreline access, including possible access for mineral or other development, while avoiding significant destruction of the intertidal vegetation or habitat used by wintering waterfowl that concentrate along the shoreline" (p. 3-98).

The nature of this request in the context of the area plan is somewhat unique, as the plan is largely designed for weighing proposed uses of the land, whereas this proposal does not seek to do any development on the land, and instead will limit future uses of the land. Thus, considering whether the proposed limitations will impact the management priorities for the area will help inform whether the environmental covenant is allowable under the current management plan. The proposed AULs would not prevent access, recreation, or harvest if approved. The proposal is not expected to create any new impacts to wildlife or harvest areas since the tailings have been onsite for nearly 100 years, have found to be physically and geochemically stable, and no site

changes are proposed that would create an impact. Shoreline development may be limited in some instances, as any proposed development within the environmental covenant that involves excavation, drilling, dredging, or other intrusive activities will require approval from DEC. Overall, the proposed environmental covenant conforms with the provisions of the PWSAP because the environmental covenant still allows for shoreline development to the extent practical, and no other impacts on the designated parcel management priorities are foreseen.

Traditional Use Finding

Based on the comment received from Alaska Department of Fish and Game (ADF&G) during agency review, along with the information found in PWSAP, and SAIL's general knowledge of the area, SAIL recognizes that there may be traditional uses that occur within the area of the proposed environmental covenant. However, because the proposed environmental covenant will not restrict traditional uses or alter the landscape in any way, SAIL finds that the proposed environmental covenant is likely to have little or no effect on the density of the population in the immediate vicinity and that there is little potential for conflict with the known traditional uses of the land. If information is provided that clearly demonstrates the environmental covenant may have the potential to adversely impact traditional uses, we will address the potential impacts in the Final Finding and Decision.

Access

There is no road access to Latouche Island. Physical and legal access to the adjacent tide and submerged lands, where the environmental covenant is proposed, is via the waters of Prince William Sound, whether arriving by boat or floatplane.

Access Along Public Waters:

The site is located on Latouche Passage. Pursuant to AS 38.05.126(a), the public has a constitutional right to free access to, and use of, navigable or public waters of the State of Alaska. There is no need for the creation of an access easement because the parcel is remaining in state ownership, no property interests are granted via this disposal, and the environmental covenant in no way restricts access.

Mineral Orders

The proposed EC does not fall within the areas delineated in an Administrative Mineral Closing Order (MCO). However, the proposed EC does overlap with Leasehold Location Order (LLO) No. 55. LLO No. 55 was put into place due to potential use conflicts associated with the presence of historical tailings. The LLO changes how rights to locatable minerals in land covered by the LLO are obtained, only allowing those rights to be obtained under the leasehold location system, rather than allowing those rights to be obtained by locating a mining claim under AS 38.05.195.

Agency Review

An agency review was conducted on July 26, 2024. The deadline for agency comments was August 26, 2024.

The following state agencies were included in the review:

- ADF&G – Division of Wildlife Conservation
- ADF&G – Habitat Section
- DEC – Contaminated Sites Program
- DOT&PF – Statewide ROW Chief
- DNR – Office of History and Archaeology
- DNR – Division of Parks & Outdoor Recreation
- DNR – Division of Mining, Land and Water – Mining Section, Resource Assessment & Development Section (RADS), Southcentral Regional Land Office, Water Section

Agency Review Comment and Response:

DOT&PF Comment:

DOT&PF did not have any comment on the proposed action but wishes to receive all subsequent copies of public notices and decision documents related to ADL 234436 or any other file that DNR may open related to the potential creation of environmental covenants at Latouche Harbor.

DNR-DMLW-SAIL Response:

SAIL put a note in the files for the site in an effort to ensure DOT&PF receives any future notices for the site.

ADF&G Comment:

ADF&G Division of Subsistence provided spatial search and harvest information for the Chenega households from a 2014 study year. The study showed that marine resources are an important food source for residents of Chenega and that those marine resources are harvested throughout Latouche Passage.

DNR-DMLW-SAIL Response:

SAIL appreciates the information. Because of the potential uses in the area, SAIL will be distributing public notice of our preliminary decision to the Chenega community for awareness and input. Currently, SAIL does not have any information indicating any forms of harvest need to be restricted under the environmental covenant to prevent human health risks.

DEC Contaminated Site Program Comment:

The DEC Contaminated Sites Program is in support of DNR consenting to the environmental covenant.

DNR-DMLW-SAIL Response:

Thank you for the comment.

DMLW-RADS Comment:

RADS has no objection to the environmental covenant to implement the AULs.

DNR-DMLW-SAIL Response:

Thank you for the comment.

Background

The current presence of tailings on the State's tide and submerged lands in Latouche Passage stems back to pre-statehood mining operations on Latouche Island, referred to as the Beatson Mine site, which consisted of a group of three underground copper mines. The Beatson Mine Site operated from 1904-1930, and based on the evidence available, it is assumed that tailings from the mine were discharged into the waters of Latouche Passage between 1915 and 1930. This discharge of tailings resulted in a deposition of approximately 2 million tons of tailings on what is now the State's tide and submerged lands. This tailings deposit covers approximately 97 acres of tide and submerged lands, spanning of depth of approximately 44-241 feet at mean high tide.

In 2013, DEC learned that potential contamination was present at the former Beatson Mine site. DEC research into the mine history led to the identification of Minaska, Inc. as a responsible party of the former mine site. In 2016, Rio Tinto, on behalf of Minaska, Inc., and its successors, began site characterization work to define the scope of the environmental impacts at the site. During their characterization work Rio Tinto encountered a map showing a historical flume that extended over the adjacent tidelands and was thought to have been used to discharge tailings into the water. In 2022, Rio Tinto began investigation into this presumed tailings discharge area. These investigations were documented in the reports described below.

The Beatson Mine Tailings Desktop Assessment, dated February 16, 2022, found a sinuous elongate mound located on the seafloor adjacent to the assumed tailings flume, and interpreted the mound as the primary tailings depositional feature. The volume of the mound was estimated at 1.2-1.5 million tons of sediment. The assessment also concluded that the currents in Latouche Passage are likely capable of transporting and eroding fine sediments, which could result in minimal natural sediment deposition over the tailings.

The Submarine Tailings Characterization Report, dated January 12, 2023, presented results from 2022 field efforts to characterize the extent and nature of the tailings deposition. The field effort included sediment sampling from 30 locations, a detailed bathymetric survey, and a visual inspection of the seafloor using a remotely operated submersible. Field observations did not find any visual evidence that a cap of natural sediment had been deposited on top of the tailings. The sampling effort showed exceedances of DEC approved sediment cleanup objectives for arsenic (9 exceedances), copper (22 exceedances), cadmium (1 exceedance), and zinc (10 exceedances).

The Submarine Tailings Geophysical Investigation Report, dated January 20, 2023, also presented information from the 2022 field efforts. The report indicated that the tailings appear to be dominated by compacted sand with no evidence of a natural cap and that the tailings are

unlikely to resuspend in the water column. The total extent of the tailings was estimated to be 96.4 acres with a volume of 1.76-2.15 million tons.

Rio Tinto then developed a Net Environmental Benefit Assessment (NEBA), dated January 2023. The NEBA provided an overview of the tailings investigations and considered the potential remedial actions of capping the tailings, removal via dredging, and a no action alternative. The NEBA concluded that the environmental impact associated with remediating the tailings deposit via capping or dredging would result in a negative net benefit. The report asserted that the remedial actions considered would not substantially reduce the ecological risk from existing contamination and cause additional contamination impacts. The NEBA claimed that capping would be largely ineffective and have a negative net benefit because of the logistical hurdles of deep-water capping, the likelihood of the current scouring the capping materials, and the increased turbidity generated during active capping (which it was estimated would take two or more full construction seasons to complete). Dredging the tailings to remove contamination was also found to be logistically challenging because of the water depth. The NEBA estimated that dredging would take seven or more full construction seasons to complete, and that during active dredging water quality would decrease because of resuspension of contaminated material lost in the dredging process. It was also asserted that dredging would not be effective at removing 100% of the contamination and that residual contamination would likely remain. Alternatively, the NEBA claimed that the no-action alternative would have a smaller net negative impact to the environment and that the risk to humans is low.

In response to the NEBA, DEC requested site-specific information about the possible risk to the ecological community. Rio Tinto produced the Former Beatson Mine Submarine Tailings Receptors Assessment, dated April 2024, to address this request. This assessment concluded that potential impacts from the tailings on ecological receptors and human users are expected to be minimal.

Discussion

Based on Rio Tinto's findings in the NEBA and Receptors Assessment, DEC issued a letter on May 29, 2024, stating that "The tailings have been demonstrated to be physically and geochemically stable and they pose a low risk to humans and the environment in their current state. An institutional control, in accordance with 18 AAC 75.375(a)(2), could be used to prevent disturbance and ensure the protection of human, health, safety, or welfare, or the environment." DEC regulates the implementation of institutional controls as AULS via the Uniform Environmental Covenants Act (UECA), AS 46.04.300-AS 46.04.390. UECA states that an environmental covenant affecting a land or mineral interest of DNR must be signed by the Commissioner of DNR. Thus, Rio Tinto submitted an application seeking DNR's consent to and signature on an environmental covenant for the site, as both grantor and grantee.

The environmental covenant is proposed as a regulatory remedy for addressing contamination via the placement of AULs to prevent disturbance of the tailings. DNR's consent to the environmental covenant, as both grantor and grantee, would allow Rio Tinto to proceed with seeking contaminated site closure via DEC's regulatory closure process. As both the grantor and

grantee, DNR would be agreeing to comply with the use restrictions and submit a report to DEC every 5 years to document the status of that compliance. Consenting to the environmental covenant would benefit DNR by placing AULs on the site that would help ensure that activities are not authorized that would cause a disturbance of the tailings and potentially worsen the contaminated site conditions and further spread contamination. This is especially important given DNR's potential contamination liability at the site. Because the tailings were dumped onto the submerged lands prior to statehood, and DNR acquired title via the equal footing doctrine and submerged lands act, SAIL asserts that DNR is not liable as an owner or operator of the contaminated site. Both the Comprehensive Environmental Response, Compensation and Liability Act, and DEC liability statutes, contain liability exemptions for when state government acquires contaminated property through involuntary actions by virtue of its function as a sovereign¹. However, that liability exemption is void if DNR causes or contributes to the release or threatened release. Thus, absent a complete clean-up and removal of the contamination, it is in the best interest of the State to consent to the environmental covenant, which will help ensure that DNR does not cause or contribute to the contamination issues at the site.

SAIL has no information to suggest Rio Tinto's analysis in the NEBA, that removal of the tailings through dredging would be extremely logistically and functionally challenging, is not accurate. Given the information that is known, SAIL concurs that the site conditions, including depth of water, speed of the current, topography of the seafloor, and technological limitations of dredging in such environments, would likely result in tailings being resuspended in the water column during dredging operations and result in tailings being dispersed to adjacent areas. SAIL finds it is in the best interest of the State to consent to the environmental covenant, as both grantor and grantee, due to the removal feasibility limitations; DEC's statement regarding the physical and geochemical stability of the tailings and that they pose a low risk to humans and the environment in their current state; the lack of any expected impacts to habitat, harvest opportunities, traditional uses; and the continual allowance of shoreline development to the extent practical.

Survey

The proposed environmental covenant lies entirely on state land, has been reasonably delineated, and will be entered into the Recorder's Office with an adequate legal description to ensure it appears in the appropriate land records. As such, no survey will be required.

Fees

DNR does not yet have regulations or policies setting equitable fees for permanent disposals of land uses via environmental covenants. Thus, DMLW has determined that no fees will be required.

¹ AS 46.03.822(k) & 42 U.S.C. § 9601(20)(D)
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Public Notice

Pursuant to AS 38.05.945, this PD will be noticed for a 30-day public comment period, starting on November 18, 2024. In addition, the post office(located near the proposed leasehold will be requested to post the notice pursuant to AS 38.05.945(b)(3)(C). The notice will also be posted on the State of Alaska Online Public Notice website pursuant to AS 38.05.945(b)(3)(B) located at: <https://aws.state.ak.us/OnlinePublicNotices/Default.aspx>. In accordance with AS 38.05.946, a municipality or a corporation entitled to receive notice under AS 38.05.945(c) may hold a hearing within 30 days after the receipt of the notice.

Comments

The public is invited to comment on this PD. All comments received during the public comment period will be considered in the FFD. If public comments result in significant changes to the PD, additional public notice may be given. A copy of the FFD, along with instructions on filing a request for reconsideration, will be sent to all persons who comment on the PD. To be eligible to file a request for reconsideration, a person affected by the FFD must provide written comments during the public comment period of the PD, per AS 38.05.035(i).

Written comments about this project must be received in this office no later than 5:00 PM on December 18, 2024, to be considered.

To submit comments please choose one of the following methods:

Mail: Department of Natural Resources
DMLW-SAIL
ATTN: Aaron Timian
550 W 7th Ave., Ste 640
Anchorage, AK 99501

Email: aaron.timian@alaska.gov

Signature page follows:

Adjudicator Recommendation

Based on the information provided by the applicant and other agencies, as well as review of planning documents, statutes, and regulations, I recommend consenting to the placement of an environmental covenant on the DNR lands described here-in, as both grantor and grantee. I recommend proceeding to public notice for the purpose of providing the members of the public and those entities identified in AS 38.05.945 an opportunity to review and submit comments.

Aaron Timian

11/18/2024

Aaron Timian, Natural Resource Specialist

Date

Preliminary Decision

It is the determination of the Division of Mining, Land and Water that it may be in the State’s best interest to consent to the placement of an Environmental Covenant, as described above. This preliminary decision shall now proceed to public notice.

Patty Burns

11/15/2024

Patty Burns, SAIL Section Chief

Date

Attachment(s):

Attachment 1 - Draft Environmental Covenant