

DEC Request for Adjudicatory Hearing Form Pursuant to 18 AAC 15.200

A request for adjudicatory hearing must be submitted using this form and timely served upon the Commissioner by hand delivery, electronic mail or U.S. mail (see 18 AAC 15.200(a), (c) and (e), as well as on the division that issued the decision.

Attn: Jason Brune, Commissioner -Alaska Department of Environmental Conservation

P.O. Box 111800

Juneau, AK 99811-1800 or DEC.Commissioner@alaska.gov

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Requestor Contact Information

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		Email Address	twaldo@earthjustice.org / oglasscock@e

Please provide the name(s), mailing address(es), electronic mail address(es) and telephone number(s) for the individual(s) or organization(s) bringing forward this request for adjudicatory hearing (see 18 AAC 15.200(c) and 18 AAC 15.920(13))

*Required

Identification of Represented Parties

For each requester named above that is a member organization, please provide the names and addresses of members who are adversely affected by the decision who are being represented by the organization in this matter (see 18 AAC 15.200(c)(3))

See attachment.

Please identify the permit or other decision you are seeking to have reviewed. Please include information such as who made the decision, the title of the document within which the decision is contained or the permit number.

Earthjustice requests an adjudicatory hearing to review the Alaska Department of Environmental Conservation's (ADEC) May 7, 2020 decision upholding the Certificate of Reasonable Assurance (Certificate) to Donlin Gold, LLC (Donlin) for the Donlin Gold Project (Project), POA-1995-120, and updating the associated Response to Comments. The decision is signed by Randy Bates, Director of the Division of Water. The Certificate is signed by James Rypkema, Program Manager in Storm Water and Wetlands. ADEC originally issued a certificate for the Project on August 10, 2018, and reissued the Certificate on April 5, 2019. Following both issuances, Earthjustice requested informal review on behalf of affected Tribes, and both times, ADEC granted review and remanded back to staff for reconsideration. The May 7 decision updated only the Response to Comments and did not alter the Certificate as issued on April 5, 2019.

Issues to be Decided

Please provide the following information for each question of material fact or law (collectively referred to as "contested issues" you are asking to be reviewed as part of the adjudicatory hearing request. Attach additional pages as needed if you are seeking to raise more than three issues or if you need more space for your response relating to an issue.

As set forth below, ADEC has failed to demonstrate reasonable assurance that the Project will (1) comply with numeric water quality standards for mercury in Crooked Creek, (2) comply with numeric water quality standards for temperature in Crooked Creek; and (3) fully protect existing uses for fish in Crooked Creek.

Contested Issue and Location of the Issue

See attachment.

Explanation and reasons the contested issue is relevant to the decision

See attachment.

How are requesters directly and substantively affected?

See attachment.

Any suggested terms or conditions?

See attachment.

Why should your request be granted?

See attachment.

Contested Issue 1

- a) A concise statement of the contested issue proposed for hearing (see 18 AAC 15.200(c)(4)(C))
- b) The location(s) in the permit, or other decision where the specific terms or conditions appear, that you are contesting (e.g. page, paragraph or other identifying description)
- c) An explanation of how the decision was in error with respect to the contested issue
- d) The reason(s) you believe the contested issue you are raising is relevant to the Division's decision (why you believe resolving the contested issue in your favor will materially change the Division's decision)
- e) How each requester (including represented parties if the requester is a member organization representing them in this matter) is directly and substantively affected by the contested decision to justify review; more specifically, please include a discussion or
 - 1) the nature of the interest of the requester or represented party who is impacted by the contested decision(s):
 - 2) whether that interest is one that the department's applicable statutes and regulations intend to protect; and
 - 3) the extent to which the Division's decision relating to this contested issue directly and substantively impairs the interest described in (2) above
- f) Identify when and where you raised this issue in testimony or comments you provided to DEC. If your comments or testimony were submitted to DEC in writing, please provide a reference to the page and paragraph where they appear. (see 18 AAC 15.200(a) and 18 AAC15.245)**
- (g) Suggested alternative terms and conditions that in your judgement are required for the Division's decision to be in accord with the facts or law applicable to the issue you are raising.
- (h) A discussion of any other reasons you believe your request for an adjudicatory hearing should be granted. Please include a concise summary of the facts and laws that you believe support your request.
- (i) If you believe a provision of the final decision or permit you are challenging was not in the draft decision or permit that was subject to the public notice or comment process, please explain the basis of your claim. (see 18 AAC 15.200(a))

** this requirement does not apply to a person challenging an Air Quality Division Stationary Source Emission Control permit under AS 46.15.2200 either (1) on the basis of a private, substantive legally protective interest under state law that may be adversely affected by the permit action, or (2) as the owner or operator of the stationary air source.

NOTE: IF you did not raise your issue before the Division's issuance of the permit or contested decision, then 18 AAC 15.245 requires you to show "good cause" for the failure to raise the issue for it to be considered. You should include this information in your response to (h) above.

Contested Issue and location of the Issue

See attachment.

Explanation and reasons the contested issue is relevant to the decision

See attachment.

How are requesters directly and substantively affected?

See attachment.

Any suggested terms or conditions

See attachment.

Why should your request be granted?

See attachment.

Contested Issue 2

a) A concise statement of the contested issue proposed for hearing (see 18 AAC 15.200(c)(4)(C))
b) The location(s) in the permit, or other decision where the specific terms or conditions appear, that you are contesting (e.g. page, paragraph or other identifying description)

c) An explanation of how the decision was in error with respect to the contested issue

d) The reason(s) you believe the contested issue you are raising is relevant to the Division's decision (why you believe resolving the contested issue in your favor will materially change the Division's decision

e) How each requester (including represented parties if the requester is a member organization representing them in this matter) is directly and substantively affected by the contested decision to justify review; more specifically, please include a discussion or

1) the nature of the interest of the requester or represented party who is impacted by the contested decision(s):

2) whether that interest is one that the department's applicable statutes and regulations intend to protect; and

3) the extent to which the Division's decision relating to this contested issue directly and substantively impairs the interest described in (2) above

(f) Identify when and where you raised this issue in testimony or comments you provided to DEC, if your comments or testimony were submitted to DEC in writing, please provide a reference to the page and paragraph where they appear. (see 18 AAC 15.200(a) and 18 AAC15.245)**

(g) Suggested alternative terms and conditions that in your judgement are required for the Division's decision to be in accord with the facts or law applicable to the issue you are raising.

(h) A discussion of any other reasons you believe your request for an adjudicatory hearing should be granted. Please include a concise summary of the facts and laws that you believe support your request.

(i) If you believe a provision of the final decision or permit you are challenging was not in the draft decision or permit that was subject to the public notice or comment process, please explain the basis of your claim. (see 18 AAC 15.200(a))

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NOTE: IF you did not raise your issue before the Division's issuance of the permit or contested decision, then 18 AAC 15.245 requires you to show "good cause" for the failure to raise the issue for it to be considered. You should include this information in your response to (h) above.

Contested issue and location of the issue

See attachment.

Explanation and reasons the contested issue is relevant to the decision

See attachment.

How are requesters directly and substantively affected?

See attachment.

Any suggested terms or conditions?

See attachment.

Why should your request be granted?

See attachment.

Contested Issue 3

a) A concise statement of the contested issue proposed for hearing (see 18 AAC 15.200(c)(4)(C))

b) The location(s) in the permit, or other decision where the specific terms or conditions appear, that you are contesting (e.g. page, paragraph or other identifying description)

c) An explanation of how the decision was in error with respect to the contested issue

d) The reason(s) you believe the contested issue you are raising is relevant to the Division's decision (why you believe resolving the contested issue in your favor will materially change the Division's decision

e) How each requester (including represented parties if the requester is a member organization representing them in this matter) is directly and substantively affected by the contested decision to justify review; more specifically, please include a discussion or

1) the nature of the interest of the requester or represented party who is impacted by the contested decision(s):

2) whether that interest is one that the department's applicable statutes and regulations intend to protect; and

3) the extent to which the Division's decision relating to this contested issue directly and substantively impairs the interest described in (2) above

(f) Identify when and where you raised this issue in testimony or comments you provided to DEC. If your comments or testimony were submitted to DEC in writing, please provide a reference to the page and paragraph where they appear. (see 18 AAC 15.200(a) and 18 AAC 15.245)**

(g) Suggested alternative terms and conditions that in your judgement are required for the Division's decision to be in accord with the facts or law applicable to the issue you are raising.

(h) A discussion of any other reasons you believe your request for an adjudicatory hearing should be granted. Please include a concise summary of the facts and laws that you believe support your request.

(i) If you believe a provision of the final decision or permit you are challenging was not in the draft decision or permit that was subject to the public notice or comment process, please explain the basis of your claim. (see 18 AAC 15.200(a))

** this requirement does not apply to a person challenging an Air Quality Division Stationary Source Emission Control permit under AS 46.15.2200 either (1) on the basis of a private, substantive legally protective interest under state law that may be adversely affected by the permit action, or (2) as the owner or operator of the stationary air source.

NOTE: IF you did not raise your issue before the Division's issuance of the permit or contested decision, then 18 AAC 15.245 requires you to show "good cause" for the failure to raise the issue for it to be considered. You should include this information in your response to (h) above.

Request for Evidentiary Hearing

With reference to the number of issues listed in your response to "Issues to be Decided" above, please list the number of the issues for which you are requesting an evidentiary hearing that may involve the testimony of factual witnesses, expert witnesses or the offering of additional documents or other evidence not already in the existing agency record.

Requesters do not seek an evidentiary hearing. They request review of ADEC's findings on the existing record.

Description of Question of Fact to be Raised at an Evidentiary Hearing

With reference to the number of issues listed in your response to "Request for Evidentiary Hearing" above, please describe each of the factual issues you want considered in an evidentiary hearing. You may reference you answers in you response above if they describe all the questions of fact that you want considered at an evidentiary hearing

Not applicable.

Estimated Time for an Evidentiary Hearing

Please provide your estimate of the time you think will be needed to conduct the evidentiary hearing you are requesting.

Not applicable.

IF YOU HAVE QUESTIONS

If you have questions regarding what information needs to be included in this form or questions about the process for requesting an adjudicatory hearing, you may find help by:

1. Reviewing the department's regulations, many of which are referenced in this form. The Administrative Procedures regulations at 18 AAC 15 are available on the Internet at <http://dec.alaska.gov/commish/regulations/index.htm>. The definitions of key terms may be found at 18 AAC 15.920.
2. Reviewing the guidance documents posted by the department at <http://dec.alaska.gov/commish/ReviewGuidance.htm>; or
3. Contacting the department's adjudicatory hearing liaison, Gary Mendivil, in the Commissioner's Office at (907) 465-5061 or at Gary.Mendivil@alaska.gov

Please be aware that failing to comply with the requirements for filing and serving a request for adjudicatory hearing could result in all or a portion of your request being denied.

APPLICABLE DEADLINES

Requests for an adjudicatory hearing must be made not later than 30 days after the issuance of the department's decision or permit, or not later than 30 days after the issuance of a decision on a request for informal review under 18 AAC 15.185, whichever is later. (see 18 AAC 15.200(a))

ATTACHMENT

Identification of Represented Parties

ORUTSARARMIUT NATIVE COUNCIL
P.O. Box 927
Bethel, AK 99559

CHEVAK NATIVE VILLAGE
P. O. Box 140
Chevak, AK 99563

KASIGLUK TRADITIONAL COUNCIL
P.O. Box 19
Kasigluk, AK 99609

NATIVE VILLAGE OF EEK
P.O. Box 89
Eek, AK 99578

NATIVE VILLAGE OF KWINHAGAK
P.O. Box 149
Quinhagak, AK 99655

NATIVE VILLAGE OF MARSHALL
P.O. Box 110
Marshall, AK 99585

NATIVE VILLAGE OF NIGHTMUTE
P.O. Box 90021
Nightmute, AK 99690

NATIVE VILLAGE OF TUNUNAK
P.O. Box 77
Tununak, AK 99681

ORGANIZED VILLAGE OF KWETHLUK,
KWETHLUK IRA COUNCIL
P.O. Box 130
Kwethluk, AK 99621

VILLAGE OF KOTLIK
P.O. Box 20210
Kotlik, AK 99620

SALMONSTATE
201 Main Street, Suite #202
Juneau, AK 99801

ALASKA COMMUNITY ACTION ON
TOXICS
1225 E. International Airport Rd.,
Suite 220
Anchorage, AK 99518

Contested Issue 1

Contested Issue and Location of the Issue

The Certificate fails to demonstrate reasonable assurance that construction and operation of the Project will comply with Alaska's water quality standards for mercury as required by section 401 of the Clean Water Act and by regulations of the U.S. Environmental Protection Agency (EPA) and ADEC. 33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 121.2(a) (2019), 131.36(b)(1); 18 AAC 70.010(a). EPA regulations require Donlin to

receive certification from ADEC that there is “reasonable assurance” that the entire “activity” associated with the certification will not violate water quality standards. 40 C.F.R. § 121.2(a)(3) (2019). ADEC has not provided adequate support for these findings here.

The discussion of this issue is located in the Response to Comments at pages 24-29.

Explanation and reasons the contested issue is relevant to the decision

As explained in the Tribes’ requests for informal review, the Final Environmental Impact Statement (FEIS) finds that, in combination with naturally elevated mercury levels in surrounding waters, operation of the Donlin Mine “would result in additional inputs of mercury to surface water from both atmospheric and aqueous sources, which would likely cause an increase in exceedances of the 12 ng/L chronic criterion.” U.S. Army Corps of Engineers (Army Corps), Donlin Gold Project, Final Environmental Impact Statement at 3.7-151 (Apr. 2018) (FEIS) (In this request, all citations to the FEIS are to the electronic version. Note that the pagination in the electronic version does not always match the pagination in the hard copy version.); see 40 C.F.R. § 131.36(b)(1) (establishing 12 ng/L chronic criterion in row “8 Mercury” and column B2). This finding was made assuming application of all mitigation measures, including design features, standard permit conditions, and best management practices. FEIS at 3.7-191. In other words, despite the application of mitigation measures, the FEIS found that operation of the mine would likely violate mercury standards.

In the Revised Antidegradation Analysis, dated April 4, 2019, and Response to Comments, updated May 6, 2020, ADEC addresses mercury but fails to provide any reasonable assurance that the prediction in the FEIS is wrong. The revised Response to Comments does not rebut the FEIS’s conclusion that there will be violations of the standard. It points out that (1) there is a high background level of mercury in the area already, (2) predicting the changes in mercury concentration is challenging, and (3) the estimated impacts are considered conservative. ADEC, Response to Comments for Donlin Gold Mine at 24-26 (updated May 6, 2020) (Response to Comments). None of these justifications provide reasonable assurance there will not be violations of the chronic mercury standard.

The existing concentrations of total mercury in surface water already exceeded the chronic criterion in 80 out of 564 samples (or 14 percent) collected by Donlin Gold’s water quality characterization program. FEIS at 3.7-29. Three samples had concentrations higher than 10 times the criterion. *Id.* These samples reflect wide variability in baseline levels in the vicinity of the mine, and the FEIS predicts that there will be a forty percent increase in mercury deposition rates and surface water mercury

levels caused by mine operation. *Id.* at 3.7-151, 160. Further, the 95th percentile upper confidence limit will also rise by 40%—from 23.5 ng/L to 33 ng/L—indicating a significant increase not only in the number of exceedances, but in the magnitude of the exceedance. Because there are already exceedances of the chronic criterion standard, any increases in mercury levels in the watershed will mean more and higher exceedances of the standard, regardless of whether the predictions are conservative or not. FEIS at 3.7-29. Elevated background levels do not excuse ADEC from being required to certify the standards will be met, and ADEC has not explained how adding more mercury to an already elevated environment will not cause additional violations.

ADEC also improperly focuses on long-term average concentrations rather than the potential for violations. ADEC correctly notes that there is a potential to cause an increase in the average concentration of total mercury in the surface water to 11.4 ng/L, which is barely below the EPA-approved aquatic life chronic criterion of 12 ng/L. Response to Comments at 27. The focus on average concentrations misses the mark. The number ADEC is relying on to assert there will be no violations is based on an average of 564 samples taken over eleven years, from 2005 to 2015. *Id.* at 26 n.34, 27. The chronic criterion, though, is an average measurement over four days. 40 C.F.R. § 131.36(b)(1), footnote d. It represents the level of mercury that aquatic life can be exposed to over that time period without experiencing long-term effects. *Id.*; see U.S. EPA, Water Quality Standards Handbook, ch. 3, at 15 (2017). In Crooked Creek, where there is such a wide variation in natural background levels and where mercury levels frequently exceed the standard already, it would be extremely surprising if mine operations depositing even more mercury into the watershed did *not* cause or contribute to frequent violations of the four-day chronic standard. ADEC's exclusive focus on a decadal average ignores the potential for violations above the average, missing the point of the certification.

The Response to Comments extensively discusses the monitoring plan, mitigation measures, and other permit requirements as reasons for its decision. See Response to Comments at 27-29. This provides no support for a conclusion to the contrary of the FEIS. Indeed, the FEIS assumed that ADEC would issue a point-source discharge permit that required compliance with water quality standards. FEIS at 3.7-144, -148. Despite this fact, the FEIS found that mercury violations were likely, because exceedances result not only from those point-source discharges, but from a combination of aqueous and atmospheric sources. *Id.* at 3.7-151. Similarly, the FEIS assumed that Donlin would get all needed air permits and comply with applicable air quality standards. *Id.* at 3.8-3, 10, 75. While there are standards for mercury emissions, the FEIS notes that “[t]here are no standards or guidelines for Hg deposition,” which would protect water bodies from indirect emissions. *Id.* at 3.8-54. And as with water

discharges, the FEIS assumed the application of design features, permit conditions, and best management practices—including state-of-the-art mercury abatement systems and dust control measures—would mitigate impacts. *Id.* at 3.8-75. Despite the requirements of air permits and application of significant mitigation measures, the FEIS found it was likely the Project would cause violations of the water quality standards for mercury, as described above.

None of these mitigation measures provide reasonable assurance that there will not be violations of the mercury standard, because the FEIS assumed all those measures were in effect when it predicted the violations. FEIS at 3.7-151, 191. The Response to Comments and the Revised Antidegradation Analysis fail to identify and analyze any actual mitigation measures that were not considered that would provide reasonable assurance violations will not occur. ADEC has simply not grappled with this issue, despite it being raised repeatedly by the Tribes in comments and informal review requests.

For these reasons, ADEC has failed to provide reasonable assurance that operation of the Donlin Mine will not violate the Alaska water quality standards for mercury.

How are requesters directly and substantively affected?

The represented Tribes are federally recognized sovereign tribal governments, responsible for the health, safety, and well-being of their citizens, located in the Kuskokwim and Yukon River watersheds. The proposed Project is located on Crooked Creek, which flows directly into the Kuskokwim River. The Tribes' ancestors historically lived, traveled, fished, and traded along the Kuskokwim River, and the Tribes' present members continue to do so. FEIS 3.21-5 to -12. The members of the Tribes rely on the Kuskokwim River and surrounding lands of the Yukon-Kuskokwim region for nutritional, economic, social, spiritual, and cultural purposes. *Id.* The Tribes value their long traditions of fishing and harvesting from the region's lands and waters. *Id.* Of particular importance are the salmon and rainbow smelt that annually return to the Kuskokwim River to spawn. The many communities along the Kuskokwim River harvest and use these and other subsistence species in various ways, and their combined harvests total well over a million pounds of edible resources every year. FEIS 3.19 to 3.91.

The Certificate will adversely affect the health, welfare, and cultural practices, including subsistence practices, of Tribal and non-Tribal residents of the Kuskokwim and Yukon River watersheds. Clean water and intact aquatic habitats are essential to the way of life for Tribes and communities all along the rivers.

The Tribes' ability to engage in traditional fishing and other subsistence practices would be directly and adversely affected by the Project. Specifically, the operation of the mine would likely lead to violations of Alaska state water quality standards for mercury and temperature within Crooked Creek, which is a tributary of the Kuskokwim River and a corridor traveled by fish to reach productive areas such as Bell Creek and Getmuna Creek. FEIS at 3.13-109. The FEIS acknowledges that "salmon may be nearly or completely extirpated from Crooked Creek by hydrological changes from mine development, operation, and closure." FEIS at 3.21-140 (quoting App. N at 15). Habitat in other stream segments in the Crooked Creek drainage would be altered or destroyed. *Id.* at 3.21-158.

The violation of Alaska's water quality standards and degradation of aquatic habitat would, among other things, affect the salmon and other species relied upon by the Tribes and other residents. This would constitute a direct and adverse impact to their strong interest in maintaining clean water and intact aquatic habitat to protect their closely held traditions and subsistence practices.

SalmonState is an Alaska-based organization that supports work to protect salmon and their habitat. SalmonState works with communities across the state to keep Alaska a place where wild salmon, and the people who depend on them, thrive. The violation of Alaska's water quality standards and degradation of aquatic habitat would affect salmon and their habitat. This would constitute a direct and adverse impact to SalmonState's strong interest in maintaining clean water and intact aquatic habitat to protect salmon for Alaskans for generations to come.

Alaska Community Action on Toxics (ACAT) is an Alaska-based environmental health and justice organization, with supporters in the Kuskokwim region. ACAT helps communities implement effective strategies to ensure everyone has clean air, clean water, and toxic-free food. The violation of Alaska's water quality standards and degradation of aquatic habitat would affect salmon and other species relied on by communities ACAT works with. This would constitute a direct and adverse impact to ACAT's strong interest in empowering communities to limit their exposure to toxic substances and to protect and restore the ecosystems that sustain them and their way of life.

Any suggested terms or conditions?

The Tribes do not request any changed terms or conditions. They request that the Commissioner vacate the Certificate, deny Donlin's request for certification based on the information disclosed in the FEIS, and notify the U.S. Army Corps of Engineers.

Why should your request be granted?

There is no reasonable assurance that operation of the Donlin Mine will not violate water quality standards for mercury. The projected violations of mercury standards in Crooked Creek threaten the fish, other aquatic life, and human health of Tribal citizens and other residents of the Kuskokwim region.

Contested Issue 2

Contested Issue and Location of the Issue

The Certificate fails to demonstrate reasonable assurance that construction and operation of the Project will comply with Alaska's water quality standards for temperature as required by section 401 of the Clean Water Act and by regulations of the EPA and ADEC. 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.2(a) (2019); 18 AAC 70.010(a), 70.020(b), Tbl. at (10)(A)(iii), (10)(C). EPA regulations require Donlin to receive certification from ADEC that there is "reasonable assurance" that the entire "activity" associated with the certification will not violate water quality standards. 40 C.F.R. § 121.2(a)(3) (2019). ADEC has not provided adequate support for these findings here.

The discussion of this issue is located in the Response to Comments at pages 34-36.

Explanation and reasons the contested issue is relevant to the decision

Alaska's water quality criteria include temperature standards, with stricter temperature standards for fish migration, spawning, rearing, and egg & fry incubation areas. 18 AAC 70.020(b), Tbl. at (10)(A)(iii), (10)(C). The FEIS explains that groundwater that would normally flow to Crooked Creek will be diverted as part of the pit dewatering process. During the summer, this reduction in groundwater input "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." FEIS at 3.13-112. The FEIS goes on to explain that these violations may affect "the duration and timing of egg incubation and availability of prey species." *Id.* It further notes that these violations would occur in waters regulated as essential fish habitat "supporting key life stages of salmon that play a role in the Kuskokwim subsistence community." *Id.*

First, ADEC completely ignores the numerical standard it is required to meet for temperature and does not explain how it comes to the conclusion that there is reasonable assurance the standard will not be violated. Response to Comments at 34-36; Revised Antidegradation Analysis at 11. Instead, it asserts that because impacts to salmon will be minimal, it can issue the Certificate. There is no basis in the law or

regulation for ignoring the numerical standard, and ADEC cannot issue a certificate without having reasonable assurance the standard will not be violated.

In addition to ignoring the standard, ADEC tries to downplay the potential impacts by pointing to the point source or general storm water discharge permits issued under the Alaska Pollutant Discharge Elimination System (APDES) as requiring compliance with water quality standards. Response to Comments at 35; Revised Antidegradation Analysis at 11. The individual APDES permit only covers particular point source discharges and the general APDES permit authorization only covers storm water discharges. As discussed above, the temperature violations described in the FEIS do not result from any point source or storm water discharges covered by the APDES permits. Rather, temperature violations will result from dewatering processes, and ADEC is required to certify it has reasonable assurance these violations will not occur because they are part of the activity being certified.

Similarly, ADEC points to the Compensatory Mitigation Plan and unspecified adaptive mitigation measures to provide reasonable assurance there will not be violations of water quality standards for temperature. But the Compensatory Mitigation Plan only provides for mitigation in Upper Crooked Creek and Quartz, Snow, and Ruby Gulches, which are all upstream of the mine site, and does nothing to prevent or mitigate temperature violations below the mine, in the middle reaches of Crooked Creek, as predicted by the EIS. *See generally*, FEIS at App. M. ADEC provides no explanation for how the unspecified mitigation measures would prevent temperature violations or whether they would be feasible or effective.

For these reasons, ADEC has failed to show it has reasonable assurance the Project will not violate state water quality standards for temperature.

How are requesters directly and substantively affected?

See response to this prompt under Contested Issue 1.

Any suggested terms or conditions?

See response to this prompt under Contested Issue 1.

Why should your request be granted?

There is no reasonable assurance that operation of the Donlin Mine will not violate water quality standards for temperature. The increase in stream temperatures will adversely affect salmon and the Tribal citizens and other residents of the Kuskokwim region who rely on them.

Contested Issue 3

Contested Issue and Location of the Issue

The Certificate fails to demonstrate reasonable assurance that construction and operation of the Project will fully protect existing uses despite streamflow changes as required by section 401 of the Clean Water Act and by regulations of the EPA and ADEC. 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.2(a) (2019); 18 AAC 70.015(a)(2)(C), 70.016(a)(1)(B). EPA regulations require Donlin to receive certification from ADEC that there is “reasonable assurance” that the entire “activity” associated with the certification will not violate water quality standards. 40 C.F.R. § 121.2(a)(3) (2019). ADEC has not provided adequate support for these findings here.

The discussion of this issue is located in the Response to Comments at pages 33-34.

Explanation and reasons the contested issue is relevant to the decision

The Certificate does not demonstrate reasonable assurance that mine construction and operation will fully protect existing uses of Crooked Creek for growth and propagation of fish. The FEIS concludes that the Project will involve groundwater dewatering and other processes that reduce the flow of water in Crooked Creek, dewatering salmon spawning redds in low flow conditions: “Overall, impacts of streamflow changes and salmon spawning habitat as described above would involve noticeable changes in the character or quantity of aquatic habitat. The duration of these impacts may be expected to last during and beyond the life of the project.” FEIS at 3.13-90. The FEIS notes that 65% to 78% of the salmon redds in Crooked Creek between American 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.” *Id.* That segment of Crooked Creek is a distance of four miles as the crow flies and much longer taking into account the winding of the creek. *See id.* at 3.13-9, Fig. 3.13-1. With the loss of most of the habitat in such a significant segment of the stream, it is not reasonable to make a finding that the mine will fully protect existing uses for fish.

The FEIS makes this conclusion, even considering all the proposed mitigation measures. FEIS at 3.13-159. ADEC identifies these very same measures in its attempt to justify coming to the opposite conclusion, but does not explain its analysis of that contradiction. Response to Comments at 35-36; Revised Antidegradation Analysis at 6. The agency attempts to rely on an adaptive management program and potential hypothetical mitigation measures provided without analysis to ensure adequate streamflows. Response to Comments at 33; Antidegradation Analysis at 7. The FEIS took these measures into account in making its effects determinations. FEIS at 3.13-159.

Finally, ADEC attempts to rely on the Compensatory Mitigation Plan. Response to Comments at 35. Again, the Compensatory Mitigation Plan addresses actions to be taken in gulches upstream from the mine site and does not address the issue of streamflow. *See generally*, FEIS at App. M. ADEC cannot rely on that plan to certify existing uses will be protected in Crooked Creek.

For these reasons, ADEC has failed to show it has reasonable assurance the Project fully protects existing uses of Crooked Creek for fish propagation and habitat.

How are requesters directly and substantively affected?

See response to this prompt under Contested Issue 1.

Any suggested terms or conditions?

See response to this prompt under Contested Issue 1.

Why should your request be granted?

There is no reasonable assurance existing uses will be fully protected from the habitat losses resulting from streamflow reduction. The loss of salmon habitat will harm Tribal citizens and other Kuskokwim region residents who rely on salmon for subsistence.

CERTIFICATE OF SERVICE

I certify that on June 5, 2020, a copy of the foregoing REQUEST FOR
ADJUDICATORY HEARING was served by electronic mail on the following:

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