



File Code: 1570

Date: March 23, 2005

Mr. Buck Lindekugal
Southeast Alaska Conservation Council
419 6th Street, Suite 200
Juneau, AK 99801

Dear Mr. Lindekugal:

Pursuant to 36 CFR 215.17, I have reviewed the administrative appeal record for the Kensington Gold Project Final Supplemental Environmental Impact Statement (FSEIS) and Record of Decision (ROD). The Tongass Forest Supervisor signed the ROD. I have also considered the Appeal Reviewing Officer's (ARO) recommendation (enclosed) regarding the disposition of your appeal (Appeal No. 05-10-00-0007). The ARO recommended that the decision be affirmed and your requested relief be denied.

DECISION

I concur with the ARO's recommendation and I affirm the Forest Supervisor's decision. Your requested relief is denied. As discussed in the ARO's recommendation, a journey level Forest Service botanist and the Forest Supervisor are directed to review the Sensitive Plant Biological Evaluation to ensure that it complies with agency policy, and document their findings in the record.

My decision incorporates, by reference, the entire administrative record, which includes the appeal and project planning records, and constitutes the final administrative determination of the Department of Agriculture (36 CFR 215.18). The ROD may be implemented 15 days following the date of this decision (36 CFR 215.10(b)).

Sincerely,

/s/ Dennis E. Bschor
DENNIS E. BSCHOR
Appeal Deciding Officer

Enclosure

cc:
Tongass Forest Supervisor
Juneau District Ranger
Tongass Appeal Coordinator





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Route To:

Subject: Kensington Gold Project Record of Decision and Final Environmental Impact Statement

To: Appeal Deciding Officer

This is my recommendation, as Appeal Reviewing Officer, on the action you should take, as Appeal Deciding Officer, on the pending appeal of the Kensington Gold Project. The appeal, #05-10-00-0007, was filed by the Southeast Alaska Conservation Council under the appeal regulations found at 36 CFR 215.

The decision being appealed is the decision by the Tongass Forest Supervisor to amend the 1997 Plan of Operations for the Kensington Gold Project, operated by Coeur Alaska, Inc. The mine is located on the Juneau Ranger District approximately 45 miles north-northwest of Juneau. The decision also approves a non-significant Forest Plan amendment to enlarge three Old Growth Habitat reserves.

Under the Selected Alternative, Alternative D, the 1997 Plan of Operations will be modified to include the following (see Exhibit A – Alternative D Map):

- A Tailings Storage Facility (TSF) would be located at Lower Slate Lake rather than a Dry Tailings Facility (DTF) near Comet Beach. The TSF will be sized to accommodate 4.5 million tons of tailings and would increase the size of Lower Slate Lake from 23 acres to 56 acres. East Fork Slate Creek will be dammed between Upper and Lower Slate Lakes and diverted by pipeline around the TSF.
- Surface processing of ore will be done at mill facilities located on patented lands in the Johnson Creek drainage. A floatation process will be used to separate gold from tailings and gold concentrate will be shipped off-site for further processing. Tailings will be transported as slurry through a 3.5-mile long pipeline from the mill to the TSF at Lower Slate Lake.
- The existing Kensington and Jualin Mine access roads will be upgraded to safely accommodate mine traffic. Two new bridges will be constructed on the Kensington access road and two existing bridges will be upgrades on the Jualin access road. A 3.5-mile pipeline access road and a 1-mile cutoff road will be constructed.
- The DTF, personnel camp, and mooring facilities located at Comet Beach will be eliminated.
- A tunnel will be built to connect the Kensington Mine with ore processing facilities on private land near the Jualin Mine in the Johnson Creek drainage.
- Permanent waste rock disposal facilities will be developed at a 31.5 acre site near the Kensington 850-foot portal and a 4.8 acre site near the Jualin Mine process area.



- Surface water diversions will be built above the Kensington Mine 850-foot portal and waste rock disposal area, the Jualin process area and mine portal, and the diversion pipeline around the TSF.
- A fresh water infiltration gallery will be constructed in Johnson Creek, subject to Alaska Department of Natural Resources (ADNR) approval, and a 300,000 gallon tank will be built at the Jualin process area for fresh water. A water recycle pipeline will be constructed alongside the tailings slurry pipeline to return water to the mill.
- Diesel fuel (3.2 million gallons, annually) will be delivered, transported, and stored using 6,500 gallon isotainers. Isotainers would be moved by truck to the power plant and fueling areas where they would be connected to pipe headers, such that they would function as storage tanks. There would be no diesel fuel tanks.
- The development of two new sand and gravel borrow areas, as well as the continued use of two existing borrow areas, disturbing a total of approximately 7.1 acres will provide construction materials.

Background

The Kensington Gold Project began in 1990 when the Kensington Venture (a joint venture between Coeur Alaska, Inc. [Coeur] and Echo Bay Exploration) submitted plans to the Forest Service to develop the Kensington mine. The Forest Service completed the Kensington Gold Project Final Environmental Impact Statement (1992 FEIS) and Record of Decision (ROD) in 1992. Alternative F, Water Treatment – Option 1 was selected as the basis for a plan of operations which was subsequently approved by the Forest Service in July 1992. Alternative F consisted of underground mining, ore processing using cyanide vat leaching, tailings impoundment in Sherman Creek, marine discharge of process wastewater, and various support facilities including liquefied petroleum gas for power generation.

In 1995, prior to obtaining all the necessary permits, the joint venture was dissolved and Coeur became the lone stakeholder in the property. Coeur submitted an Amended Plan of Operations to the Forest Service in September 1995, and the Forest Service began preparing a supplement to the 1992 FEIS.

In June 1996, Coeur revised the 1995 Amended Plan of Operations in response to issues raised during scoping and at meetings with state and federal agencies. The 1996 Amended Plan of Operations was analyzed in the Kensington Gold Project Final Supplemental Environmental Impact Statement (1997 SEIS) and a ROD selecting Alternative D (the no action alternative in the 2004 Final SEIS) was signed in August 1997. Major project changes approved as part of Alternative D in the 1997 decision included off-site shipment of concentrate rather than on-site cyanide leaching, elimination of the slurry disposal dam in Sherman Creek in favor of a dry tailings disposal facility, and the use of diesel fuel rather than liquefied petroleum gas for power generation. The Forest Service approved an Amended Plan of Operations, consistent with Alternative D of the 1997 SEIS, on May 28, 1998. Coeur obtained all permits necessary for construction from federal, state, and local authorities.

In 2001, Coeur submitted an amendment to the approved 1997 Plan of Operations for the stated purpose of improving efficiency and reducing the extent of surface disturbance. In addition to

the modifications described above, the 2001 Amended Plan of Operations calls for the construction of two marine terminals on state tidelands; one at Slate Creek Cove and one at Cascade Point, adjacent to lands owned by Goldbelt Incorporated (Goldbelt), an Alaska Native corporation. Goldbelt would own and operate the Cascade Point dock as well as the ferry service between the two facilities.

In order to evaluate the effects of the changes included in the 2001 Amended Plan of Operations, the Forest Service directed the preparation of an SEIS using a third-party contractor, Tetra Tech, Inc. The U.S. Environmental Protection Agency (USEPA), U.S. Army Corps of Engineers (USACE), and Alaska Department of Natural Resources (ADNR) participated as cooperating agencies in preparing the SEIS. The Forest Supervisor's decision was based on the analysis and evaluation in the 2004 Final SEIS, as well as information incorporated by reference from the 1997 SEIS and ROD and the 1992 EIS and ROD.

My review of the appeal was conducted pursuant to 36 CFR 215.19. The appeal and project records have been carefully reviewed in my consideration of the objections raised by the appellant and the requested relief. The Juneau Ranger District prepared the enclosed indices of the documentation supporting the decision, which are keyed to specific issues raised by the appellants. My recommendation hereby incorporates by reference the entire administrative record for the project.

The appellants list many interrelated issues in their appeal of the Kensington Gold Project. Although I may not have listed each specific issue, I have considered all the issues raised in the appeal and believe that they are adequately addressed in the following discussions.

Issue 1. Whether the Forest Service violated Section 7(a) of the Endangered Species Act by approving the amended plan of operations before the completion of the ongoing formal consultation process.

Appellants assert that because the National Marine Fisheries Service has not yet issued its final Biological Opinion (BO) regarding the effects of construction of the dock at Cascade Point, the ferry crew service, and barge traffic at the Slate Creek Cove dock, the Forest Service has violated Section 7(a) of the ESA which requires that agencies "ensure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species...." [16 U.S.C. § 1536(a)(2)]. They claim that it is irrelevant that the project components likely to affect Steller sea lions and humpback whales do not occur on Forest Service lands because Section 7 applies to all actions in which the Forest Service has discretionary involvement or control.

Appellants also assert that the Forest Supervisor's decision constitutes an "irreversible and irretrievable commitment of resources" in violation of Section 7(d). They contend that the Forest Service approval of the components of the Plan of Operations occurring on National Forest System lands is prohibited by Section 7(d) because the Forest Service cannot ensure that components of the plan under the authority of the USACE (activities at the marine terminals) will not result in jeopardy. Additionally, the appellants' assert that Forest Supervisor's approval

of the Amended Plan of Operations has prejudiced the formal consultation process by foreclosing consideration of reasonable alternatives to the marine facility at Slate Creek Cove.

Finally, appellants assert that the Forest Service violated NEPA by approving the Amended Plan of Operations and issuing the FSEIS before NFMS issued its biological opinion, thereby depriving the public of key information.

Discussion

Section 7(a) of the ESA requires that “[e]ach Federal agency shall... insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species....” [16 U.S.C. § 1536(a)(2)]. In this case, the U.S. Environmental Protection Agency (USEPA), the U.S. Army Corps of Engineers (USACE), and Alaska Department of Natural Resources (ADNR) are cooperating agencies in the preparation of the FSEIS and have authority over various components of the project. The ROD clearly explains the different authorities the Forest Service, USEPA, USACE, ADNR, other Federal and State agencies, and the City and Borough of Juneau have in the approval of the amended Plan of Operations in the ROD. The Forest Supervisor states:

My decision addresses only those project components subject to my authority over National Forest System lands. Other Federal and State agencies and the City and Borough of Juneau have authority to issue specific permits on National Forest System lands and elsewhere. In particular, both the Environmental Protection Agency and the U.S. Army Corps of Engineers have yet to exercise their permitting authority over this project and have indicated their intent to issue separate Records of Decision based on this FSEIS. The State of Alaska will also rely on much of this analysis to approve activities on state lands and issue applicable permits. Implementation of my decision to select an alternative is subject to the completion of those necessary permit processes by the other federal, state, and local authorities.

[ROD at 1].

Tables 2-6 and 2-7 in the FSEIS identify the mitigation and monitoring requirements included in Alternative D for each of the permitting agencies [FSEIS at 2-49 through 2-67]. In the event that these mitigation and monitoring measures are not adopted by other permitting agencies, the Forest Supervisor will review the decision to determine whether any changes are needed [ROD at 4]. The ROD clearly explains that the Forest Service will not approve implementation of the Plan of Operations until all the necessary permits, licenses and certifications are obtained from federal, state, and local agencies [ROD at 10].

Upon review of the record, I disagree with appellants’ assertion that the Forest Supervisor’s decision constitutes an “irreversible and irretrievable commitment of resources” in violation of Section 7(d). As discussed in the FSEIS and ROD, the USACE must consult with the National Marine Fisheries Service (NMFS) under Section 7 of the ESA before issuing a permit under Section 404 of the Clean Water Act for the construction or operation of marine terminals in Berners Bay. The USACE (and the Forest Service) submitted a Biological Assessment/Biological Evaluation (BA/BE) [FSEIS, Appendix J] to the NMFS on November 17,

2004, and requested initiation of formal consultation. The Final Biological Opinion (attached as Exhibit B) received from NMFS on March 18, 2005, makes the following determinations:

After reviewing the current status of the endangered western population of Steller sea lions, the environmental baseline for the action area, the proposed action, and the cumulative effects of other actions, it is NMFS' biological opinion that the proposed action is unlikely to jeopardize the continued existence of the western population of Steller sea lions.

Given that the eastern population of Steller sea lions is increasing and appears to be robust, it is unlikely that it will experience reductions in reproduction, numbers or distribution in response to the proposed action. After reviewing the current status of the endangered western population of Steller sea lions, the environmental baseline for the action area, the proposed action, and the cumulative effects of other actions, it is NMFS' biological opinion that the proposed action is unlikely to jeopardize the continued existence of the eastern population of Steller sea lions.

After reviewing the current status of the central North Pacific population of humpback whales, the environmental baseline for the action area, the proposed action, and the cumulative effects of other actions, it is NMFS' biological opinion that individual whales within the action area may be adversely affected by the proposed action, but the action is unlikely to jeopardize the continued existence of the central North Pacific population of humpback whales.

[NMFS Final Biological Opinion at 2].

The USACE will not issue any permit for the marine terminals until final consultation is completed. The USACE retains full discretionary authority to deny or condition the terminal permits in response to a final biological opinion or the identification of reasonable and prudent alternatives. Therefore, the Forest Supervisor's decision on the Plan of Operations does not constitute an irretrievable or irreversible commitment of resources foreclosing any reasonable and prudent alternatives with regard to the marine terminals that might be found necessary to avoid jeopardy to an endangered or threatened species [ROD at 4-5].

With respect to appellants' assertion that the public was deprived of key information because the Forest Supervisor issued his decision before the final BO was received from NMFS, I find that the record discloses adequate information to support the Forest Supervisor's decision. The FSEIS discloses the effects to aquatic marine resources and identifies mitigation and monitoring requirements that will be required to minimize effects. As discussed above, the Forest Supervisor's decision addresses only those project components subject to his authority over National Forest System lands. In the event that the BO from NFMS results in recommended changes to the project, the Forest Supervisor will review his decision to determine whether any changes are needed in the components of the project on National Forest System Lands. The ROD describes the process for changes that may be made during implementation of the project. The ROD states in part:

Proposed changes to the authorized project actions will be subject to the requirements of National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), Section 810 of Alaska National Interest Lands Conservation Act (ANILCA), Coastal Zone Management Act (CZMA), 36 CFR 228 (Subpart A), and other laws concerning such changes.

In determining whether and what kind of NEPA action is required, the Forest Supervisor will consider the criteria set forth in the Code of Federal Regulations (40 CFR § 1502.9(c)), and FSH 1909.15, sec. 18, for determining whether to supplement an existing EIS. In particular, the Forest Supervisor will determine whether the proposed change is a substantial change to the Selected Alternative as planned and already approved, and whether the change is relevant to environmental concerns. Connected or interrelated proposed changes regarding particular areas of specific activities will be considered together in making this determination. The cumulative impacts of these changes will also be considered.

[ROD at 16].

In my opinion, the Forest Supervisor did not violate the ESA or NEPA by issuing his decision prior to issuance of a final BO from the NMFS. The record fully discloses the effects of the project on marine species, formal consultation with the NMFS is ongoing, and implementation of the decision is subject to the completion of the consultation process. The USACE has the authority to deny or condition the activities at the marine terminals in response to the NFMS biological opinion. The Council on Environmental Quality (CEQ) regulations allow that, in implementing the decision “[m]itigation... and other conditions established in the environmental impact statement or *during its review* and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency” [40 CFR § 1505.3, emphasis added]. If any additional mitigations or modifications are incorporated into permits from other agencies, the Forest Supervisor will review the decision to determine whether any changes are needed.

Issue 2. Whether the Forest Service failed to consider a reasonable range of alternatives in the FSEIS.

Appellants assert that the Forest Service failed to analyze a true no action alternative because the 2004 Final SEIS’s no action alternative, Alternative A, (Alternative D in the 1997 SEIS) actually involves action – proceeding with the building and operation of the mine in accordance with the already approved 1997 Plan of Operations. They contend that because the mine has not yet been developed at the site, the FSEIS could, and should have, included an alternative that prohibits development of the project. Appellants further assert that the Forest Service use of the 1997 ROD selected alternative as the no action alternative (Alternative A in the 2004 Final SEIS) is unreasonable because project area and effects considered in both the 1992 FEIS and the 1997 SEIS are fundamentally different from the project area evaluated in the current SEIS. They contend that the no action alternative fails to provide the benchmark conditions for the Johnson and Slate Creek drainages. The lack of a complete discussion of baseline conditions relevant to the proposed action violates NEPA because it prevents the decision-maker and the public from adequately comparing the effects of the action alternatives on the affected environment. Finally, the appellants assert that use of the permitted 1997 selected alternative as the no action

alternative is unreasonable because Coeur has made it clear that it does not intend to pursue that alternative (1997 Plan of Operations).

Discussion

The purpose of the proposed action is described in the FSEIS and is appropriately focused on responding to Coeur's request to amend the 1997 approved Plan of Operations. Because this final SEIS is a supplement to a NEPA analysis that resulted in a permitted project (the 1997 Plan of Operations), the No Action Alternative in this case represents no changes to the approved project. As acknowledged in CEQ's 40 Most-Asked Questions, there are two distinct interpretations of "no action." In the first interpretation, "no action" means no change from current management or from what is currently permitted. The second interpretation involves decisions on proposals for new projects where "no action" means that the proposed action would not take place. In the case of the Kensington Gold Project, the purpose and need of the proposed action is to respond to Coeur's request to amend the 1997 Plan of Operations. The No Action Alternative reflects a previous action, which in this case, is the selected alternative identified in the ROD issued for the 1997 SEIS. Alternative A in the 2004 Final SEIS corresponds to the 1997 SEIS Alternative D. The No Action Alternative functions as the baseline against which the effects of other alternatives are compared. As stated in the ROD, the Forest Supervisor's "...decision is based on the analysis and evaluations in the 2004 Final Supplemental Environmental Impact Statement (FSEIS) as well as information incorporated by reference from the 1997 FSEIS and ROD and the 1992 FEIS and ROD" [ROD at 1].

The appellants' raised this issue in their comments on the DSEIS, and the Forest Supervisor directly responded to them regarding this issue. The response to comments summarizes his March 25, 2004 letter:

... the No Action alternative for a supplemental EIS reflects the status quo. The Plan of Operations for the Kensington Gold Project, as approved in the ROD issued for the 1997 Final SEIS, represents the status quo. The 1997 Final SEIS did not include extensive analysis of the Slate and Johnson creek drainages because the alternatives under consideration were in the Sherman Creek, Sweeny Creek, and terrace area drainages. However, the 1992 FEIS, which included a "no build" no action alternative, presented significant discussion of resources within the Slate Creek drainage because the Berners Bay Access alternative (Alternative C) would have resulted in impacts on resources in the vicinity of Slate Creek Cove. The current SEIS builds on the data presented in the 1992 FEIS, which were adequate to present a baseline characterization at that time. Coeur Alaska has since developed additional data, including surveys of fish, wildlife, water quality, and wetlands, to supplement the information available for the 1992 FEIS, all of which were used in the development of this SEIS. The fact that the proposed action under consideration is different from that studied in 1997 and that none of the facilities proposed in 1997 have been constructed do not change the fact that this is a SEIS and that the No Action Alternative reflects the permitted action

[FSEIS, Appendix L at 269].

In summary, Coeur could operate under the Plan of Operations approved in 1997 (i.e., Alternative A, no action, in the 2004 Final SEIS) however, Alternative A does not meet the purpose and need of the proposed action which is to respond to Coeur's request to amend the 1997 Plan of Operations. Therefore, the use of the 1997 selected alternative as the no action alternative in the current SEIS is appropriate.

In my opinion, the Forest Supervisor has adequately addressed this issue and his response is supported by the record. The Forest Service has been consistent in its presentation of No Action Alternatives throughout the three iterations of the Kensington Gold Project.

Issue 3. Whether the scope of the FSEIS is too narrow.

Appellants assert that the Forest Service has violated NEPA by allowing the piecemealing of impact analyses for cumulative actions within overlapping study areas, thereby failing to provide decisionmakers and the public with a complete picture of the effect of these developments' adverse impacts to the resources of Berners Bay. Specifically, appellants contend that the proposed highway between Juneau and Skagway along the east shore of Lynn Canal and the proposed Kensington project should have been analyzed in one comprehensive EIS.

Discussion

The scope of an environmental impact statement is discussed in 40 CFR § 1508.25(a), which describes the range of actions, alternatives, and impacts that should be considered in an EIS. These regulations state in part:

To determine the scope of an environmental impact statement, agencies shall consider 3 types of actions...They include (a) actions (other than unconnected single actions) which may be... (2) cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

[40 CFR § 1508.25(a)].

Appellants contend that the proposed Juneau Access Road and the Kensington Gold Mine project should have been considered together in one EIS; however, the proposed road is not directly connected to the Kensington Gold project – neither is necessarily dependent on the other. The access road is considered an individual action rather than a connected action in terms of NEPA. The cumulative effects of the proposed action and all reasonably foreseeable actions are described in Section 4.21 of the FSEIS and were considered in the decisionmaking process. Specifically related to the Juneau Access Road, the Forest Service obtained technical reports from the Alaska Department of Transportation and Public Facilities for the Juneau Access Improvements Supplemental Draft EIS. Data from the reports were incorporated to the extent practical for the analysis of the potential cumulative effects associated with the Kensington Gold Project.

NEPA does not require a quantitative assessment of impacts when considering direct,

indirect, or cumulative effects. NEPA's intent is to use the best information reasonably obtainable to disclose impacts resulting from past, present, and reasonably foreseeable future actions. Outside of the cumulative impacts consideration, NEPA does not require that all reasonably foreseeable actions be considered within the framework of a single EIS unless there are connected actions. In my opinion, the FSEIS used the best information available and adequately discloses the cumulative effects of the Juneau Access Road.

Issue 4. Whether the Forest Service violated the Clean Water Act, NFMA, agency regulations, and NEPA by authorizing an amended Plan of Operations, which allows the dumping of tailings into Lower Slate Lake.

Appellants assert that the Forest Service has violated requirements of the Clean Water Act, NFMA, agency regulations and NEPA because it approved modifications to the Amended Plan of Operations that will significantly impact water quality and aquatic resources in Lower Slate Lake and violate the State's water quality standards.

They contend that the dumping of mine tailings into Lower Slate Lake will violate State water quality standards and that the FSEIS fails to support the conclusion that water quality in Lower Slate Lake following post-closure reclamation will meet State water quality standards.

Discussion

The ROD and FSEIS list the permits, licenses, and certification required to be obtained by the Forest Service, and other Federal, State, and local agencies before the mine operator may proceed with development [ROD at 11, FSEIS at 1-8 through 1-14]. Final approval of the amended Plan of Operations is required by the Forest Service. As indicated in the ROD, the operator must receive a USACE CWA § 404 permit, USEPA CWA § 402 permit, an ADEC CWA § 401 certification and an ADNR Title 41 authorization and Certificate of Approval to Construct a Dam.

The Clean Water Act authorizes USEPA and the USACE to issue Section 402 and 404 permits (respectfully). Per Section 401 of the Clean Water Act, neither of these permits can be issued unless the State of Alaska issues a certification of reasonable assurance that State water quality standards will be met.

The USEPA May 17, 2004 Regas memo [Appeal Record Document 24] clarifies that mine tailings will be regulated as fill under Section 404 and that the USACE will issue this permit. The USEPA is responsible for issuing a permit under Section 402 (NPDES) for effluent discharge from the impoundment.

This memo further clarifies that:

“...because the entire lake is proposed to be within the permitted disposal site specified under section 404(a), the section 404(b)(1) Guidelines require the Corps to consider, during the permitting process, whether the discharge of fill material would cause or contribute to a violation of water quality criteria or impairment to designated uses in the adjacent water of

Slate Creek (the waters outside of the impoundment). The State, in making decisions with regard to water quality certification, determines whether the project would cause or contribute to a violation of water quality standard, at a minimum, in waters upstream or downstream (outside of the disposal site, considering, among other factors, whether future discharges from the impoundment to downstream waters will meet discharge limits that assure compliance with applicable downstream water quality standards.”

[Appeal Record Document 24 at 4].

In August 2004, the State of Alaska drafted a 401 Certification for both the 402 and 404 permits to be issued to the operator [Appeal Record Documents 39 and 40]. In these two drafts, the State indicates that a Certificate of Reasonable Assurance will be issued to Coeur Alaska, Incorporated for the proposed activities. Both Certificates contain stipulations that must be followed by the operator.

Concerning appellants’ assertion that the FSEIS fails to support the conclusion that water quality in Lower Slate Lake following post-closure reclamation will meet State water quality standards, I find that the record contains a thorough discussion of anticipated post-closure reclamation effects. Alternative D was developed to address comments received and concerns about the TSF effluent meeting NPDES permit limitations intended to protect downstream water quality in East Fork Slate Creek below the TSF [ROD at 9]. Under Alternative D, the reverse osmosis water treatment and tailings capping offer reasonable assurances that water quality downstream of the TSF will be protected. Reclamation of the TSF, post closure, will recreate habitat lost during operations and restore a viable fish population comparable to pre-operational conditions. EPA has indicated that they believe the potential impacts of tailings toxicity has been resolved by the inclusion of these mitigation measures as requirements of the permit. The State of Alaska has issued a draft 401 Certificate of Reasonable Assurance that the proposed development (which include the post-closure reclamation) will meet State water quality standards.

Based on my review of the record, I find that the FSEIS and project record adequately address water quality concerns and that the mitigation required by Alternative D will insure that State of Alaska water quality standards will be met. The State of Alaska is legally responsible for determining consistency with the State’s water quality standards, and they have determined that there will be no violation of their water quality standards.

Issue 5. Whether the Forest Service failed to consider alternatives that fully protect and maintain the continued productivity of anadromous fish habitat or whether it has adequately evaluated the effects on local economies if habitat productivity is reduced.

Issue 5a. Salmon and its prey

Appellants assert that the Forest Service has failed to ensure protection of fish habitat to the maximum extent feasible or guaranteed that the Amended Plan of Operations will not cause reductions in habitat productivity as required by Section 505a of ANILCA and TLMP.

Discussion

With respect to whether the decision complies with ANILCA, Section 505(a) of ANILCA reads as follows:

The Secretary of Agriculture shall, in consultation with the Secretaries of Commerce and the Interior, and with the State of Alaska, pursuant to his existing authority to manage surface resources, promulgate such reasonable regulations as he determines necessary after consideration of existing laws and regulations to maintain the habitats, to the maximum extent feasible, of anadromous fish and other foodfish, and to maintain the present and continued productivity of such habitat when such habitats are affected by mining activities on national forest lands in Alaska. The Secretary of Agriculture, in consultation with the State, shall assess the effects on the populations of such fish in determinations made pursuant to this subsection.

This provision is a requirement to promulgate regulations if they are deemed necessary. No regulations have ever been promulgated under this provision. There is no requirement for project-level decisions such as the Kensington Gold Project ROD to contain a finding related to Section 505(a). Consequently, I do not believe there is any support for the assertion that the FEIS and ROD do not comply with this section of ANILCA.

The Forest Plan, consistent with the resource management objectives of Section 505(a) of ANILCA, contains the following direction:

A. Maintain the present and continued productivity of anadromous fish and other foodfish habitat to the maximum extent feasible. (Consult ANILCA, Section 505(a).)

[1997 TLMP at 3-153].

The FSEIS contains a thorough discussion of the potential impacts the dock facility at Slate Creek Cove might have on important juvenile salmon habitat, their ability to move past the facility, and whether or not the facility will increase predation on juvenile salmon [FSEIS at 4-56 through 4-59]. These issues are also discussed in detail in the Essential Fish Habitat (EFH) Assessment [FSEIS, Appendix B]. The FSEIS cites studies from the west coast that indicate that pilings and floating dock facilities might delay movement of small salmon as they are sometimes reluctant to cross darker (shady) areas in the water. None of these studies found that these potential delays resulted in mortality or reduction in stock productivity. The FSEIS also discussed the potential for dock facilities resulting in increased predation of young salmon by larger fish. The same features that result in good habitat for salmon fry are often the same features that make them vulnerable to predation. Increases in predation rates have not been documented on fish moving around piers and docks.

The potential of impacts to adult eulachon are discussed on pages 4-54 through 4-58 of the FSEIS as well as in the EFH Assessment. Forage fish can be temporarily displaced by boat traffic, but because the eulachon tend to school near the bottom in deep water and the selected alternative includes mitigation measures that will result in reduced boat traffic during the

eulachon spawn, the FSEIS concludes that adult eulachon would not be likely to be affected by the dock structures or passing boat traffic [FSEIS at 4-58].

The potential impact to herring spawning habitat from the development of the Cascade Point dock facility is discussed on pages 4-56 through 4-58 of the FSEIS, the EFH Assessment [FSEIS, Appendix B], and in detail within the BA/BE [FSEIS, Appendix J]. As discussed, there is some potential for impacts on herring spawning habitat, particularly at Cascade Point. Several mitigation measures have been developed for the Slate Creek Cove and Cascade Point dock facilities. These measures include construction timing, construction methods, design, and reduced use of the facilities during critical spawning periods. These measures will help protect migrating juvenile salmon, migrating and spawning adult herring and eulachon, and will reduce the negative impact on habitat. These measures are described in detail in the BA/BE and in the EFH Assessment, as well as in Table 2.6 of the FSEIS. They are included in the operator's transportation plan, required by the CBJ's Allowable Use Permits for the Slate Creek Cove and Cascade Point marine terminals, and are expected to be included in ADNR's Tidelands Leases for the marine terminals.

The ROD states that the implementation of Alternative D, with the identified mitigation measures, will have minimal impacts on the fisheries resources within Berners Bay. The Forest Service's evaluation of the EFH Assessment concludes that the project will have no adverse effects on fresh water EFH, but it could have some short-term and some long-term effects on the marine EFH. However, these effects would not be substantial.

In the December 1, 2004 letter from ADNR to the Tongass National Forest [FSEIS, Appendix K], the State of Alaska supports the selection of Alternative D. The State agreed with the finding in the BA/BE, that with the proposed mitigation measures, the impacts to the herring stock will be at an acceptable level. The State further agrees that the level of impact will not threaten the Lynn Canal Herring stock. The State also indicated that the project will have negligible impacts on marine mammals.

Based on my review of the record, it is my opinion that consistent with TLMP, the FSEIS did consider alternatives that fully protect the continued productivity of the anadromous fish habitat within Berners Bay. The FSEIS includes a thorough discussion of potential impacts to juvenile salmon movements, near shore habitat impacts, and impacts to herring spawning habitat as a result of the development of the two dock facilities at Slate Creek Cove and Cascade Point. The EFH Assessment concludes that effects of the proposed freshwater and marine actions would not be substantial [FSEIS, Appendix B at B-14].

Issue 5b. Whether the Forest service violated NEPA, ANILCA, NFMA, and agency regulations by failing to consider reasonable alternatives to the Cascade Point marine terminal.

Appellants assert that the Forest Service failed to consider alternatives locating a marine terminal in Auke Bay or Yankee Cove and that failure to consider these reasonable alternatives violates NEPA's requirements to explore and evaluate all reasonable alternatives. They contend that failure to integrate the NEPA review with the USACE determination under Section 404(a)(1) of

the Clean Water Act and NMFS review under the ESA also violates NEPA. Appellants also assert that the failure to consider these alternatives prevented the Forest Service from meeting its substantive duty under ANILCA and TLMP to protect fish habitat and maintain habitat productivity “to the maximum extent feasible.”

Discussion

NEPA requires that agencies:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for all alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

[40 CFR § 1505.14(a)].

Section 2.4 of the FSEIS discusses project alternatives and components considered but not studied in detail. Section 2.4.7 discusses alternative locations for the Cascade Point marine terminal, specifically the Yankee Cove option. The FSEIS states:

The USACE’s alternatives analyses included Yankee Cove as a potential alternative location for the dock facilities. The USACE evaluated the Yankee Cove option because the site had been used for docking and pilings were present; however, these pilings have been removed. The Yankee Cove site is private property. Goldbelt is willing to construct a dock on its property, which is reflected in the Section 404 permit application. Whether the owners of the lands surrounding Yankee Cove would be willing to construct a dock is unknown. Even if construction of a facility at Yankee Cove were possible, it would only partially address the significant issues. The crew shuttle would need to cross Berners Bay to serve the Slate Creek Cove facility and operate in areas regularly used for recreation. The design limitations in terms of a year-round, all-weather facility in Yankee Cove are also unknown.

[FSEIS at 2-47].

Alternative C included the dock location at Echo Cove rather than Cascade Point. The Echo Cove marine terminal did not alleviate all the significant issues identified by the public, but it represented a viable alternative in terms of location and land ownership. Location of the dock at Auke Bay was not suggested by Coeur nor raised in public comments and in my opinion, would not be a reasonable alternative considering that Auke Bay is approximately 30 miles from the mine.

With respect to the appellants’ contentions regarding failure to integrate the NEPA review with the USACE determination under Section 404(a)(1) of the Clean Water Act and NMFS review under the ESA and the failure to consider alternatives to protect fish habitat and maintain habitat productivity, please refer to my response to Issues 1 and 5a, respectively.

In my opinion, reasonable alternatives to the Cascade Point marine terminal were considered and therefore, there is no violation of NEPA.

Issue 5c. Whether the Forest Service violated NEPA by failing to take a hard look at the reverse osmosis water treatment.

Appellants assert that the FSEIS provides little discussion or analysis of the reverse osmosis water treatment system in violation of NEPA.

Discussion

Alternative D, the Selected Alternative, was specifically designed to address comments received and concerns about the TSF effluent meeting NPDES permit limitations. The alternative includes reverse osmosis water treatment. In a February 3, 2005 letter, USEPA states:

Our objection regarding the ability of the project to meet NPDES effluent limits has been resolved through the surface water diversions, TSF water recycling, and TSF water treatment components included in Alternative D. We believe that the reverse osmosis technology as discussed in the document is a sufficient technology for meeting these limits.

[Appeal Record Document 25 at 2].

An in-depth assessment of various membrane treatments of tailings storage facility effluent, including reverse osmosis, is provided in a memo from Ed Cryer, (MWH) to Rick Richins (RTR) [Appeal Record Document 35]. This memo describes the types of membrane processes, the history of membrane development, the effectiveness of reverse osmosis treatment for metal and particulate matter, and operational issues associated with reverse osmosis. The memo concludes, "...the use of membrane treatment on the TSF discharge would be anticipated to produce a very high quality effluent and operate efficiently and reliably" [Appeal Record Document 35 at 11].

Efficiency of the reverse osmosis option is also discussed in another memo from Cryer to Richins. The memo states:

The reverse osmosis (RO) option would also be extremely effective at removing aluminum. Based on preliminary conversation with manufacturers of RO equipment and membranes (Ionics 2004) soluble organic and dissolved species of aluminum should be rejected by low pressure (300-600 psi) in the 95 percent plus range. The RO flux rates (recovery of treated water) using the Lower Slate Lake water quality will be in the 75-85 percent range (temperature dependent). The RO units would also be capable of removing essentially all of the TSS and turbidity in the effluent...

[Appeal Record Document 34 at 7].

In my opinion, the record contains a thorough discussion of the reverse osmosis water treatment system proposed for Alternative D. The USEPA supports the use of the system and states that its use resolves their concerns about the TSF effluent meeting NPDES permit limitations.

Issue 5d. Whether the Forest Service failed to adequately evaluate the impacts on Haines commercial fishers from the proposed action's effects on salmon and its prey.

Appellants assert that the Forest Service failed to analyze not only the scope of the ecological link between the Lynn Canal adult salmon resource and the Berners Bay ecosystem, but also the direct, indirect and cumulative economic impacts to commercial fishers from Haines that could result from changes in the Berners Bay ecosystem. They also contend that the Forest Service violated NEPA by failing to adequately disclose the impacts to the Haines community from the project's effects on salmon and its prey.

Discussion

Based on my discussion of Issue 5a above, it is my opinion that the appellants' assertions regarding a link between impacts of the development of the mine on the Lynn Canal adult salmon resource and economic impacts on commercial fishers from Haines are not justified. The FSEIS discusses and documents why the project is not expected to have impacts on the habitat that would result in reduced salmon production. Therefore, I conclude that the FSEIS and project record demonstrate that the project would not have economic impacts on Haines-based commercial fisheries.

Issue 6. Whether the cumulative effects analysis in the FSEIS violates NEPA.

Appellants assert that the cumulative effects analysis contained in the FSEIS fails to take an adequate hard look at the cumulative effects of the Kensington Gold Project, when taking into account the effects of past, present, and reasonably foreseeable future actions.

Issue 6a. Whether the discussion of the cumulative effects of the Juneau Access Improvements Project violates NEPA.

Appellants assert that the cumulative effects analysis of the proposed highway between Juneau and Skagway violates NEPA because the FSEIS lacks a detailed discussion of the combined effects of the mine project and the highway on 1.) the loss of wetlands and wetland dependent species; 2.) wildlife; 3.) increased access and visitors on current recreation opportunities; and 4.) the objectives of increasing connectivity and maintaining forest corridors. They also assert that the cumulative effects analysis of the Juneau Access Improvement Project fails to consider any of the road-ferry combination alternatives proposed by ADOT in the Juneau Access SDEIS.

Discussion

The FSEIS at Section 4.21.1 describes the other reasonably foreseeable projects that were considered in the cumulative effects analysis including the proposed action for the Juneau Access Road [FSEIS at 4-140]. In my opinion, the FSEIS does a thorough job of disclosing the cumulative effects on all resources including wetlands, wildlife, recreation, and vegetation (connectivity and corridors) [FSEIS at 4-142 through 4-152]. Additionally, as indicated in the response to comments, technical reports for wildlife, wetlands, water quality, anadromous fish, and essential fish habitat developed for the Juneau Access Improvements Supplemental Draft

EIS were obtained from the Alaska Department of Transportation and Public Facilities. The discussions of cumulative effects for these resources have been revised by incorporating data from the technical reports as applicable [FSEIS, Appendix L at 274].

The proposed action for the Juneau Access Improvement Project SDEIS involves “a “hard link” along east Lynn Canal between the end of the existing Glacier Highway to the Katzehin River. From the Katzehin River, one alternative would continue with a road to Skagway while the other would involve a ferry terminal. Under these alternatives, the road would be constructed around Berners Bay” [FSEIS at 4-140]. When determining the scope of environmental impact statements, the NEPA regulations require that agencies consider:

(2) Cumulative actions, which when viewed with *other proposed actions* have cumulatively significant impacts...

[40 CFR § 1508.24(a)(2), emphasis added].

In this case, I find that FSEIS adequately considers the cumulative effects of the proposed Juneau Access Improvement Project as required by NEPA.

Issue 6b. Whether the cumulative effects analysis concerning the Cascade Point access road is inadequate.

Appellants assert that relying on the impacts disclosed in the outdated Cascade Point Access Road (CPAR) FEIS for purposes of conducting the cumulative impact analysis for Kensington Mine violates NEPA because this stale analysis inadequately evaluates the cumulative effects to wildlife from construction of the road.

Discussion

The Cascade Point Access Road project is described on p. 4-140. Cumulative impacts of the proposed project in combination with Cascade Point development on wildlife and wildlife habitat are discussed in section 4.21.10 where it states:

Reasonable and foreseeable impacts on wildlife and their habitat would likely occur as a result of partial or full development of Goldbelt’s Master Plan at Echo Cove and the associated construction of the Cascade Point Access Road. The extent of total acres of wildlife habitat potentially disturbed is unclear; however, based on available modeling information, further reductions in assumed carrying capacity for brown bear, black bear, American marten, and mountain goats would occur, ranging from less than 6 percent for mountain goats to 55 percent for marten, if full development ensued (Forest Service, 1998a).

[FSEIS at 4-145 and 4-146].

The effects of the Cascade Point Access Road on wildlife were disclosed in the 1998 Cascade Point Access Road Final Environmental Impact Statement and ROD. Appellants contend that the analysis presented in the CPAR FEIS is stale and therefore, cannot be relied upon for the

cumulative effects analysis for the Kensington Gold Project. I disagree. Although the Cascade Point Access Road has not yet been constructed, the information provided in that document, as well as the most current information available concerning wildlife in the area were appropriately considered in the Kensington Gold Project FSEIS. In my opinion, FSEIS adequately discloses the cumulative effects of the Cascade Point Access Road.

Issue 6c. Whether the Forest Service’s refusal to consider cumulative effects of reopening the Jualin Mine violates NEPA.

Appellants assert that changes in the design for the Kensington mine increase the possibility that development of the Jualin Mine is reasonably foreseeable which therefore, should have been considered in the cumulative effects analysis.

Discussion

The Forest Service considers an action reasonably foreseeable if there has been some type of formal proposal for the action. In the absence of a formal proposal, actions are deemed speculative and therefore not mandated for consideration under NEPA. As discussed in the response to comments, the FSEIS discusses an expansion (extension) of mining operations but does not discuss the Jualin property in particular because there is no exploration activity being conducted at the site, nor are there any proposals to initiate such activities. There is no description of the extent of reserves that might or might not be associated with the Jualin property; therefore, its inclusion in the cumulative effects discussions would be speculative [FSEIS, Appendix L, 105].

In my opinion, the cumulative effects analysis adequately addresses the proposed action as it was presented to the Forest Service by Coeur Alaska. Any exploration activities proposed at the Jualin property in the future would require additional NEPA analyses, which would consider all potential cumulative effects.

Issue 7. Whether the Forest Service failed to disclose the effects of the proposed action on State-selected lands within the project area or indicate if it received the State’s concurrence of use of the lands.

Appellants assert that the FSEIS fails to disclose or evaluate the effect of the proposed action on State-selected lands within the project area in violation of NEPA. They also contend that the Forest Service violated section 906(k) of ANILCA because neither the FSEIS nor any document found in the planning record indicate that the Forest Service obtained the State’s concurrence with the approved use of the right-of-way (ROW) across State-selected land.

Discussion

Appellant is correct that the Forest Service requested the Bureau of Land Management to reserve a 66-foot easement for existing FDR #8411; however, they cite as authority an incorrect section of ANILCA which refers to rights-of-way granted to third parties. Section 906(l) is the appropriate authority in this case and it states in part:

(2) Where, prior to a conveyance to the State, a right-of-way...has been reserved for... the United States or a...right-of-way...has been issued for the lands, the conveyance shall contain provisions making it subject to the right-of-way...reserved or appropriated and to the ... right-of-way... granted, and also subject to the right of the United States... grantee to the complete enjoyment of all rights, privileges, and benefits previously granted.... Upon issuance of tentative approval, the State shall succeed and become entitled to any and all interests of the United States as ...grantor, in any such...rights-of-way...except those reserved to the United States in the tentative approval.

(3) The administration of rights-of-way or easements reserved to the United States in the tentative approval shall be in the United States, including the right to grant an interest in such right-of-way or easement in whole or in part.

[ANILCA at Section 906(k)].

Based on this language, I conclude that the Forest Service retains the administrative authority over the 66-foot easement and is not required to get the State's concurrence.

Issue 8. Whether the Forest Supervisor's approval of a non-significant amendment expanding old-growth reserves (OGRs) within the project area is inconsistent with TLMP and violates NEPA.

Appellants assert that when modifying OGRs, the interagency review team failed to consider the cumulative effects of the proposed Juneau Access Road and therefore, the Forest Service failed to provide reasonable assurance that the modified OGRs would help preserve the integrity of the forest's old-growth ecosystem within the affected landscape.

Discussion

The old growth habitat reserve criteria in TLMP state that, when identifying or modifying OGR's, the interagency team should "[m]inimize to the extent feasible, the amount of...roads within mapped reserves" [TLMP, Appendix K-1]; it does not require excluding roads from OGRs. Regarding small old growth reserves, the Plan states: "[a]ttempt to avoid existing roads" [TLMP, Appendix K-2].

TLMP direction has identified the corridor along the east side of Lynn Canal as a Transportation and Utility System Land Use Designation (LUD) "to provide for, and facilitate the development of ...future major public transportation and utility systems" [TLMP at 3-155]. If, at some time in the future, construction of a new road triggers the application of the Transportation and Utility System LUD to the corridor, then the Forest Service will review the OGRs along the corridor to determine if the reserve design criteria are met and adjust reserve locations to meet reserve size, spacing and composition criteria. Since the Juneau Access Road project contains alternatives that do not construct a road, any review and adjustment of OGR locations would be premature.

Furthermore, the guidelines for new road construction in an OGH LUD states that new roads may be constructed in an OGH LUD and that if reserve design criteria are no longer met, the Forest will adjust reserve locations to meet reserve criteria.

In modifying the original small old growth reserves, the interagency team expanded the reserves and added acres of productive old growth to each beyond the minimum acreage allowed in TLMP [FSEIS, Appendix F, Table F-1]. I conclude that the interagency team analysis was adequate and the modifications of the three small OGR's in the planning area were appropriately based on information available at the time.

Issue 9. Whether the Forest Supervisor's analysis of the impacts of Alternative D, in comparison to Alternative A, is misleading.

Appellants assert that the Forest Service violated NEPA because the FSEIS provides incomplete and misleading information in its comparison of the effects between Alternatives A and D. Appellants further assert that the record contradicts the Forest Supervisor's finding that both alternatives qualify as the environmentally preferable alternatives, as this conclusion is contrary to the opinions of NMFS and USEPA, who have direct expertise regarding effects on marine mammals and water quality. Appellants contend that the Forest Supervisor's finding is arbitrary, in violation of 40 CFR § 1505.2(b), which requires the Forest Supervisor to specify which alternative or alternatives are environmentally preferable.

Discussion

The NEPA regulations require that agencies:

Identify all the alternatives considered...in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions.

[40 CFR § 1505.2(b)].

The FSEIS provides a detailed comparison of the effects of each alternative in Table 2-9 [FSEIS at 2-69 through 2-83]. Appendix K of the FSEIS identifies the Forest Service environmentally preferred alternatives (Alternatives A and D) and provides specific rationale for each resource area. Appendix K also indicates that the Forest Service reviewed the input received from NMFS, USEPA, and ADNR in reaching its determination. The written conclusions and rationale from USEPA and ADNR regarding their environmentally preferred alternative is provided in Appendix K. While the Forest Service and ADNR are generally in agreement about the relative effects of Alternatives A and D on the environment, the USEPA differs in its assessment of impacts and has determined that Alternative A is its environmentally preferable alternative. As pointed out in the ROD, input provided by USEPA was provided without the benefit of a completed practicability evaluation by the USACE or a completed Biological Opinion from NMFS [ROD at 5]. As a cooperating agency, the USEPA will issue a separate ROD for the project. NEPA does not require that cooperating agencies identify the same alternative as the environmentally preferred alternative.

The Forest Supervisor based his rationale for selecting Alternative D on the information disclosed in the FSEIS and project record. His rationale states, in part:

I have carefully reviewed relevant information documented in the SEIS, discussions between cooperating agencies, and mitigation measures applicable to the project. Chapter 2 of the SEIS contains a detailed summary of the effects of each alternative both in tabular and narrative form. Based on that review, I believe that the actions described in Alternative D will be permitted by the other regulatory agencies.

[ROD at 5].

In my opinion, the FSEIS and ROD clearly display the differences between Alternatives A and D and the Forest Supervisor's decision is not misleading. The Forest Supervisor's identification of both alternatives as environmentally preferred is in keeping with the NEPA regulations at 40 CFR § 1505.2(b).

Issue 10. Whether the Forest Supervisor's conclusion that all reasonable measures have been taken to minimize harm to wetlands is arbitrary.

Appellants assert that the Forest Supervisor's decision is arbitrary because the Selected Alternative includes construction of a landing craft ramp in Slate Creek Cove that would affect an additional 3.6 acres of rocky intertidal and estuarine wetlands. They refer to a letter in which Coeur had agreed to eliminate the ramp in response to NMFS conservation recommendations. Appellants contend that even though the Forest Service knew Coeur had agreed to eliminate the ramp, the Forest Supervisor still chose Alternative D, which includes the ramp. They contend that selection of Alternative D does not meet the requirements of Executive Order 11990 "to avoid, to the extent possible, the long and short-term adverse impacts associated with the destruction or modification of wetlands."

Discussion

The intent of Executive Order 11990 is to reduce and minimize the destruction, loss, or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities. Additionally, the EO intends that proposed actions will include all practicable measures to minimize harm to wetlands, which may result from such use.

The ramp at Slate Creek Cove is only one portion of the overall proposal that will affect wetlands. Table 4-24 [FSEIS at 4-82] provides the acres of wetlands that would be affected by each alternative. The Selected Alternative (Alternative D) affects the second least amount of wetlands of all the alternatives. Therefore, in the overall picture of the proposal, the Forest Supervisor did select an alternative that minimizes the effects to wetlands.

The barge loading ramp at Slate Creek Cove was not included as part of Alternative C [FSEIS at 4-85]; therefore, the differences in the potential effects on wetlands to the barge loading ramp have been considered and disclosed. The appellant is correct in pointing out that Coeur agreed to

eliminate the ramp in response to NFMS conservation recommendations [Appeal Exhibit 20]. However, regardless of whether the ramp is eliminated, I do not agree that the Forest Supervisor's decision to select Alternative D is arbitrary. The effects of the ramp were analyzed and disclosed in the FSEIS and the Forest Supervisor has included reasonable mitigation measures to reduce these effects. These mitigation measures include maintaining sediment ponds as open water at closure, and retain any shallow water remaining in borrow areas as open water wetlands; and removing fill material from roads built in waters of the U.S. and reclaim to natural conditions (FSEIS at Table 2-54, Table 2-6).

The permitting authority for the ramp at Slate Creek rests with the USACE. The operator has applied for a 404 permit that includes (among other actions) the Slate Creek Terminal ramp. The USACE will incorporate any additional mitigation to reduce the effects to wetlands from the ramp, including elimination of the ramp, into the final permit they issue.

In my opinion, the Forest Supervisor selected an alternative that minimizes impacts to wetlands in keeping with the intent of the Executive Order.

Issue 11. Whether the Forest Service violated NEPA by refusing to supplement the DSEIS.

Appellants assert that the Forest Service should have supplemented the DSEIS because Coeur proposed substantial changes to the proposed project after the extended comment period. They contend that the changes raise additional and serious environmental concerns and that new circumstances and information regarding the environmental impacts of the project have surfaced that were not evaluated in the FSEIS.

Discussion

When determining whether to prepare a supplement to either a draft or final EIS, the agency should consider if...

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

[40 CFR § 1502.9(c)(1)].

The ROD describes the process for change during implementation and states:

In determining whether and what kind of NEPA action is required, the Forest Supervisor will consider the criteria set forth in the Code of Federal Regulations (40 CFR § 1502.9(c)), and FSH 1909.15, sec. 18, for determining whether to supplement an existing EIS. In particular, the Forest Supervisor will determine whether the proposed change is a substantial change to the Selected Alternative as planned and already approved, and whether the change is relevant to environmental concerns. Connected or interrelated proposed changes regarding particular

areas of specific activities will be considered together in making this determination. The cumulative impacts of these changes will also be considered.

[ROD at 16].

In presenting their argument for supplementing the Draft SEIS, the appellants point to updated feasibility work conducted by Coeur revealing the existence of approximately 2.4 million tons more probable gold reserves. They contend that the feasibility report implies that Coeur is planning to increase ore production over and above their proposed action. At this time, Coeur has not presented a revision to their proposed action as analyzed in the FSEIS. Any expansion of the activities proposed for the project in the future would require additional analysis consistent with NEPA, its implementing regulations, and agency direction discussed above.

Based on the information provided in the FSEIS and record, it is my opinion that a supplement to the Draft SEIS was not required.

Issue 12. Whether the failure to survey and evaluate sensitive plant species in the project area violates NEPA.

Appellants assert that the Biological Assessment/Biological Evaluation (BA/BE) does not contain any information concerning the existence of sensitive plant species in the project area or any analysis of the effect of the proposed action on such plants. They contend that the failure to conduct comprehensive plant surveys, disclose potential impacts of the proposed activities on all sensitive plant species, or document the agency's determination in the ROD, as required by TLMP, violates NEPA.

Discussion

As appellants note, TLMP standards and guides state that a biological evaluation will be prepared "...as part of the NEPA process for each project authorized, funded, or conducted on National Forest System lands to evaluate and disclose the potential impacts of proposed activities on sensitive species" [TLMP at 4-89, item G]. This Forest Plan language reflects direction in the Forest Service Manual [FSM 2672.4] to "Review all Forest Service planned, funded, executed, or permitted programs and activities for possible effects on endangered, threatened, proposed, or sensitive species. The biological evaluation is the means of conducting the review and of documenting the findings." The same section [FSM 2672.4] continues: "Document the findings of the biological evaluation in the decision notice." This same direction is echoed in TLMP (4-90, item 6): "Document the determinations from the biological evaluation in the NEPA decision." Per FSM direction, a BE "must be conducted or reviewed by journey or higher level biologists or botanist" [FSM 2672.42].

The appeal record contains several documents addressing sensitive plants. A Biological Evaluation for Plants was prepared in 1997 by a journey level Forest Service ecologist, based on 1990 field surveys documented in the Vegetation Technical Report for the Kensington Venture Gold Project [Appeal Record Document 55]. Additional field surveys were conducted in October 2002 (specifically for *Isoetes truncata*) and July 2003 (for other sensitive plant species),

and information on these surveys is found in the Kensington Gold Project 2002/2003 Sensitive Plant Surveys [Appeal Record Document 57].

Although Appendix J of the FSEIS contains only the BE for wildlife species, a Biological Evaluation for Plants, titled Kensington Gold Project [Appeal Record Document 56], was drafted in December 2003 and is in the planning record. This draft BE concludes that “Because no sensitive plants were found in the project areas of potential impact, the determination is made that there will be no impact on such species” [Appeal Record Document 56 at 14]. The document is unsigned and does not indicate that it was prepared or reviewed by a journey level Forest Service botanist.

The FSEIS at 3-66 references the Kensington Gold Project 2002/2003 Sensitive Plant Surveys [Appeal Record Document 57] and states that no sensitive plants were found during the surveys. The FSEIS at 4-80 again references the Kensington Gold Project 2002/2003 Sensitive Plant Surveys [Appeal Record Document 57] as well as a survey by Icy Straits Environmental [incorporated in Appeal Record Document 57], and the 2003 draft BE [Appeal Record Document 56]. Page 14 of the ROD references the wildlife BE and reiterates the determination that project activities are not likely to affect threatened and endangered species.

I conclude that a biological evaluation was conducted and that a BE document was drafted for sensitive plants that included an effects determination, and that document is in the planning record. As it appears that the BE is an unsigned draft document, I recommend that prior to implementation, a journey level Forest Service botanist and the Forest Supervisor be directed to review the BE to ensure that it complies with agency policy, and document their findings in the record.

Issue 13. Whether the Forest Service violated NEPA by not considering the economic impacts from an early mine closure.

Appellants assert that the failure to adequately consider impacts to the regional economy from an early mine closure scenario in the FSEIS, whether temporary or permanent, violates NEPA.

Discussion

The FSEIS discloses the socioeconomic affects of all the alternatives in Section 4.15 [FSEIS at 4-104 through 4-118]. As noted by the appellants, the Forest Supervisor addressed the issue of early mine closure in the response to comments where he states:

Mining operations, like most businesses are subject to the vagaries of business cycles, commodity prices, and other economic and financial factors. While extraction industries tend to be more volatile than other industry sectors, it would be too speculative and beyond the scope of the SEIS to evaluate the impacts of premature closure for the facility. The main objective of the economic impact analysis is to determine whether the regional economy can absorb the economic impacts of implementing the alternatives, including impacts on labor and housing markets, and public services. The magnitude of the impacts forecasted by the modeling efforts indicates that the alternatives would not result in effects that could not be

reasonably absorbed by the regional economy either in the project buildup or expansion or closure phase. This would also likely be true in an early closure scenario.

[FSEIS, Appendix L at 276].

NEPA does not require an analysis of events that may or may not occur. I agree that analysis of early mine closure would be purely speculative and beyond the scope of the FSEIS.

Issue 14. Whether the failure to disclose estimated reclamation costs and financial assurance calculations violated NEPA.

Appellants assert the Forest Service violated NEPA because the FSEIS fails to disclose reclamation costs and bond calculations, which appellants consider to be critical information needed by the decision-maker and public to effectively evaluate the project.

Discussion

The financial assurance is not critical information related to the potential effects of the Kensington project on the environment, and reclamation costs and bond calculations were not needed for the Forest Supervisor to make an informed decision relating to these effects. NEPA does not require disclosure of reclamation costs or bond calculations as part of the public participation process. Principles for the reclamation cost estimate and bond adjustment are discussed in the Preliminary Reclamation Plan [FSEIS, Appendix D at D-17 through D-21). As discussed in the response to comments, Coeur Alaska will be required to post financial assurance for reclamation and long-term stability of the tailings disposal facility.

Conclusion and Recommendation

I believe the Final SEIS and ROD meet the applicable statutory and regulatory requirements once the sensitive plant BE is reviewed by a journey level Forest Service botanist and the Forest Supervisor; all necessary findings are made and are well founded. Therefore, I recommend that you affirm the Forest Supervisor's decision.

/s/ Steven A. Brink
STEVEN A. BRINK
Appeal Reviewing Officer

Enclosures

cc: Margaret E VanGilder