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Governor Sean Parnell
STATE OF ALASKA

July 30, 2009

Colonel Reinhard W. Koenig
Department of the Army
Alaska District
Regulatory Division (1145)
CEPOA-RD
Post Office Box 6898
Elmendorf AFB, AK 99506-0898

Re: U.S. Army Corps of Engineers' Permit for the Kensington Mine (Reference No. POA-1990-592-M6)

Dear Colonel Koenig:

I submit the enclosed to reinforce the strong level of support that my Administration continues to extend to the proposed development of the Kensington Mine. As you know, the State of Alaska has been an active party in the defense of the Corps' permit allowing disposal of mine tailings at Kensington. We have devoted considerable resources to that successful defense over the last few years. After receiving a favorable ruling from the United States Supreme Court last month, we believed that our collective efforts to allow responsible mine development had succeeded. I find it particularly troubling that the U.S. Environmental Protection Agency (EPA) now seeks to undercut the finality and certainty of a Supreme Court ruling by asking for many months more of environmental analysis and likely delays from challenges and appeals.

I am enclosing the State of Alaska's comments in response to the Corps' July 17, 2009 notice. We do not believe governing regulations require another period of public comment, and we hope this does not indicate that the Corps is inclined to require even more environmental analysis of the tailings disposal options at the Kensington Mine, as requested by EPA. In my view, something is seriously wrong with the federal permitting system if a state can successfully defend a permit in the highest court of this country only to find that a responsibly permitted project such as this cannot get off the ground and provide needed jobs to our citizens.

I hope and trust that you will give the enclosed comments your serious consideration. Thank you in advance for doing so.

Sincerely,

Sean Parnell

Sean Parnell
Governor

Enclosure

State of Alaska's Comments to Corps re: Kensington Permit Extension/Mod.]

Introduction

These comments are submitted on behalf of the State of Alaska. The comments consist of three parts. Part A addresses the two issues described in the United States Army Corps of Engineers' (Corps') July 17, 2009 Public Notice: whether to extend the construction deadline contained in the current Corps permit until July 31, 2014; and whether to make certain adjustments in the acreage to be disturbed and filled, as further described in Attachment 1 to the Public Notice. Part B is the State's response to a July 14, 2009 letter from the U.S. Environmental Protection Agency (EPA), Region X, to Colonel Koenig of the Corps, regarding the need for further evaluation of the Kensington Mine project. The State submits these latter comments in the event that the Corps intends to consider that recent letter from EPA, and the issues addressed in that letter, as part of its deliberations on the first point, whether to extend the construction deadline in the current Corps permit. The State also submits these comments to memorialize its position with regard to EPA's letter, and because of its uncertainty about whether the Corps' Public Notice is broad enough in its scope to embrace those issues. Part C addresses the social and economic issues associated with timely completion of construction so the facility can continue its positive impact on Southeast Alaska communities.

Part A: Issues Set Out in the Corps' Public Notice

The Corps' public notice mentions two requests for permit changes: an extension of a construction deadline until July 31, 2014, and some adjustments to the numbers of acres to be impacted by the project. The second change, the adjustment in acreage, is described and explained in an April 10, 2009 document attached to the Public Notice as Att. 1. That document does not mention the first change, the deadline extension, and no request for such an extension is otherwise included with the Public Notice. The State has obtained a copy of a letter from Coeur Alaska, Inc. (Coeur) to the Corps dated Jan. 30, 2009, where Coeur requested that the Corps extend Coeur's time-frame to complete construction work at the mine. Based on that letter, the State understands that the reason for the requested extension was to extend the construction deadline in the permit in order to account for the period of time that construction activities could not proceed due to the stay imposed on Coeur's construction activities by the Ninth Circuit Court of Appeals during the protracted litigation over its CWA § 404 permit.[1]

It appears that Coeur's request for an extension of its construction deadline is governed by, and should be considered under, 33 C.F.R. § 325.6(d). Under that regulation, the district engineer has the authority to grant an extension of a construction period, and is in fact directed to do so unless the district engineer "determines that an extension would be contrary to the public interest." The State is not aware of any respect in which granting the requested extension, which is rendered necessary due to litigation beyond the control of the permittee and in which litigation the permittee diligently participated, would be contrary to the public interest. Further, and as described in more detail in Part C of these comments, the State's position is that it is affirmatively in the public interest to grant the extension and allow the permittee to complete construction work now long delayed by the ultimately unsuccessful legal challenge to this permit. The State also submits that "there have been no significant changes in the attendant

[1] We are also aware that Coeur sent a July 16, 2009 request to the Corps to lift its August 2006 partial suspension of the sec. 404 permit. Since this Public Notice does not mention that recent letter, we do not submit specific comments on it, other than to note that the same reasons for extending the construction deadline, as outlined in these comments, apply with equal force to the need to lift the partial suspension. We also note that under 33 C.F.R. § 325.7(c), lifting the suspension is within the Corps' authority and no public notice is required for this action. We therefore urge the Corps to immediately reinstate the permit.

circumstances since the [permit] was issued," other than the litigation and its consequences. Accordingly, no public notice was even required under the governing regulation. *Id.*

Further, as a matter of equity, it would not be fair or reasonable to not allow extension of a construction deadline that could not be met due to a court-ordered stay in a legal challenge later determined to be without merit. The well-established doctrine of equitable tolling requires that result. *See, e.g., Clark v. Frank*, 5 F.3d 535, 1993 WL 337481 (9th Cir. 1993); Alaska Statute 09.10.170.[2] In other contexts, "[t]he purpose of allowing relation back – to extend a deadline – allies the doctrine closely to equitable tolling, which permits a party to delay filing the party's suit beyond the expiration of the limitations period if he could not reasonably be expected to have done so sooner." *Springman v. AIG Marketing, Inc.*, 523 F.3d 685, 688-89 (7th Cir. 2008).

To deny the extension in this case would effectively undermine the United States Supreme Court's June 22, 2009 decision reversing the Ninth Circuit Court of Appeals and up-holding this permit.[3] If even an unsuccessful legal challenge could kill a project, by delaying permitted construction beyond the initial deadline, that will encourage frivolous lawsuits, designed simply for delay. The Corps should not countenance that result, but should instead recognize that the interests of equity and fairness require that the construction deadline be extended now that the litigation is over and the court's injunction lifted.

The second change included in the Public Notice concerns an adjustment in acreage. The proposal is for a permit modification under 33 C.F.R. § 325.7 that allows the district engineer to modify the terms and conditions of the permit by mutual agreement with the permittee. Given that the Public Notice identifies permittee-requested minor changes in the locations of the wetlands impacts and an overall reduction in the wetlands acreage impacted, the State has no objections to the proposed change.

Further, the Alaska Department of Environmental Conservation's (DEC's) May 6, 2005 Clean Water Action Section 401 certification of the current Corps permit is sufficient to address the water quality aspects of the proposed modification. However, DEC intends to review the final modification of the Corps' permit for any changes from the original proposal that may cause DEC to revisit the existing state certification.

Part B: Response to EPA's Letter

If the Corps considers EPA's July 14, 2009 letter in connection with this Public Notice, or if EPA submits its own comments to the Corps similar in substance to its July 14 letter, then the State asks the Corps to also consider the following comments as representing the State's position on the following three issues raised in EPA's letter.

1. Re-evaluation of Tailings Disposal Alternatives

EPA suggests that there is a "significant change in the attendant circumstances" since the Corps permit was issued in 2005 (that being a withdrawn permit application for a paste tailings disposal option). To the contrary, the State submits that there are only two changes since the 2005 Corps permit and the issuance of the 2004 Final Supplemental Environmental Impact Statement (FSEIS) for the mine project, neither of which are significant nor warranting a re-evaluation of tailings disposal alternatives.

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[2] *See also Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) (agency should comply with Court's remand order in later administrative proceedings).

[3] *Coeur Alaska Inc. v. Southeast Alaska Conservation Council (Coeur Alaska v. SEACC)*, No. 07-984, slip op. (June 22, 2009).

The first change is Coeur's development of the paste tailings option, in an attempt to deal with the incorrect ruling of the Ninth Circuit Court of Appeals. In considering the 2005 permit, the Corps did not evaluate a paste tailings facility (PTF) option, but the PTF is really a variant of the dry tailings facility (DTF) alternative which was fully analyzed in the NEPA process. The Corps is not required to evaluate every conceivable variant of every project plan. The Corps cannot reasonably determine that refinement or variations of an alternative, in response to an incorrect decision of an intermediate court that is later reversed by the Supreme Court, is sufficient reason to revisit the original alternatives analysis. To do so at this stage would open the door on this and *any* other project for *any* agency -- or third party litigant -- to assert or suggest, at *any* time and well after the fact, that there are other variants of alternatives that are significant and require supplemental consideration.

The second change is the wetland and other disturbance that has already taken place, with almost 20 acres of that disturbance directly related to the Lower Slate Lake Tailings Disposal Facility (SLTF). Any new comparison of alternatives would have to be relative to the current disturbance footprint, not the pre-construction footprint. On that basis alone, virtually any other alternative disposal site would involve additional disturbances and greater environmental impact than completion of the SLTF.

Additionally, both the DTF and the PTF were projected to impact more wetlands than the SLTF and would result in permanent destruction of those wetlands (Note: Contrary to some of the comments already submitted to the Corps, the Environmental Analysis (EA) of the PTF and other alternatives was never completed and no formal determination of the preferability of the PTF over the SLTF alternative was made.). The SLTF alternative impacts fewer acres and some of those only temporarily during the mine life, since these acres will be returned to productive re-use after the end of mine operations.

The 2004 FSEIS indicates a high degree of confidence that reclamation of the non-acid generating SLTF will support fish in a larger lake after mine closure. Further, financial assurances remain in place to cover the post-closure contingency placement of approximately 4 inches of clean material at the lake bottom to assure that productive habitat is re-established. Additional analysis of a PTF option isn't needed to determine that the permitted SLTF remains the alternative that is least environmentally damaging to waters of the United States.

Moreover, the SLTF dam has been fully vetted by the agencies, and its design has been approved by the State's Dam Safety Program, and is consistent with State Dam Safety standards, which include strict seismic standards. This review was never completed for the PTF, which included a proposed dam structure significantly larger than the SLTF dam.

Thus, rather than motivated by any significant or substantial change or new information, EPA's issuance of the letter requesting additional environmental review is apparently a consequence of EPA's newly escalating dissatisfaction with the Corps' 404 permitting decision -- made four years prior -- on a tailings disposal alternative that the Supreme Court has held that the Corps is authorized to approve, and a decision upon which the Court held the Corps properly exercised its authority. EPA's maneuvering at this late date can only be viewed as an attempt to circumvent the Supreme Court's decision validating the Corps' 404 permit and inexplicably subject the project to further delay.

As the Ninth Circuit has stated, an agency "need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision making intractable, always awaiting updated information only to find the new

information outdated by the time a decision is made." *Headwaters v. BLM*, 914 F.2d 1174, 1177 (9th Cir.1990). Nor does NEPA require "a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences. *Id.* (citing *Northern Plains Resource Council v. Lujan*, 874 F.2d 661, 666 (9th Cir. 1989).

Pursuant to 40 C.F.R. 230.10(a), the Corps considered an adequate array of alternatives for tailings disposal, among them, a dry stack alternative that had similar impacts -- including a similar wetlands footprint and visual impacts -- to the more recent PTF proposal, and the Corps selected the least environmentally damaging practicable alternative in the 2004 FSEIS. Such Section 404 analyses of practicable alternatives are deemed adequate under the Clean Water Act. *See Bering Strait Citizens for Responsible Resource Development*, 524 F.3d 938, 947 (9th Cir. 2008).

Further, courts have held that [u]nder NEPA, an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative. An agency need not, therefore, discuss alternatives similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management area.

Id. at 955, quoting *Northern Alaska Env'l Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (quotation marks and internal citations omitted). Given the similarities in the impacts of the DTF and PTF, there is no justification to EPA's assertion that the PTF presents significant or substantial new information (or change in circumstances) to justify additional alternative tailings disposal analysis under either the Clean Water Act or NEPA for the Kensington project. Indeed, EPA's verbal comments in meetings on the PTF option, as well as in its statement in a September 16, 2008 letter commenting on the PTF option, expressed a view that dry stack tailings disposal might be less environmentally damaging than paste tailings disposal.

Further, EPA's assertion of significant changes and new information appears to be implicit recognition by EPA that it has waived any credible authority to "veto" the permit pursuant to Section 404(c).[4] The Court noted: "After considering the Corps findings, the EPA did not veto the Corps permit, even though, in its view, placing tailings in the lake was not the 'environmentally preferable' means of disposing of them."[5] The Court further noted that "[b]y declining to exercise its veto, the EPA in effect deferred to the judgment of the Corps on this point."[6] Were EPA to exercise that veto power now, such action would undermine any

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[4] Under the Clean Water Act, 33 U.S.C. § 1344(c), EPA's Administrator may "prohibit the specification of any defined area as a disposal site" in certain situations. Notably, at the time that the Corps issued the 404 permit, EPA apparently did not believe that veto was necessary for the proposed tailings disposal, and issued a separate Section 402 permit for water discharges from Lower Slate Lake into the East Fork of Slate Creek, allowing the Corps to issue the 404 permit for the discharges of tailings to Lower Slate Lake as fill material. This permitting approach, jointly approved by EPA and the Corps, was in accordance with both regulation and guidance (the "Regas Memo"). The Court noted EPA's significant permitting involvement. *Coeur Alaska v. SEACC*, No. 07-984, slip op. at 6.

[5] *Coeur Alaska v. SEACC*, No. 07-984, slip op. at 6.

[6] *Id.*

confidence that regulated entities hold in the finality of a Corps' 404 permitting decision, an untenable situation for not only the regulated entities, but for the regulating agencies.[7]

2. Milling Rate

With respect to EPA's contention that the 404 permit should be re-evaluated because Coeur constructed the mill to a lower capacity than was evaluated in the permitting process, the State strongly disagrees. It strains the limits of credibility to allege that a lower milling rate, and hence a lower tailings production rate, would necessitate a re-evaluation of the 404 permit. The mill's current or future capacity should not invalidate, or cause the re-evaluation of the 404 permit.

First, there is no requirement in any of the permits to operate the mill at 2000 tons per day, and there are certainly no prohibitions in any of the permits to operate the mill at a lower rate. It is not the place of the regulatory agencies to dictate the mine's milling rate.

Second, the environmental analysis done during the 2004 FSEIS analysis and the 404 permitting process, assumed a total of 4.5 million tons of tailings would need to be stored during the life of the mine. All the environmental assumptions, operations planning, and reclamation and closure planning was based on this tonnage of tailings. The mill's capacity was never a factor in any of the analyses.

A lower tailings production rate could extend the operating life of the mine, but would certainly not change the total volume of tailings produced and therefore would not result in a larger footprint. Presumably, a lower production rate could result in a smaller footprint if the mine life remained the same. In any case, there could not be an increased environmental impact from a lower production rate. The fact that the mill may have been constructed with an initial capacity less than that used in the environmental analysis cannot be grounds for invalidating the current permit and starting from scratch.

3. Acid Rock Drainage

It is important to note that the Acid Rock Drainage (ARD) issue at Lower Slate Lake is not related to mining, ore, tailings, or development rock, and that the 2004 FSEIS on the Kensington project cites multiple studies showing the tailings to be net-neutralizing. Rather, the small flow from the Lower Slate Lake ARD site (0-50 gallons/minute, as measured prior to covering the area with polyethylene) results from the disturbance of a pyritic rock unit encountered by Coeur during the process of constructing a coffer dam, in preparation for construction of the permanent SLTF impoundment dam.

The ARD issue is already being addressed by Coeur under an August 26, 2008 Notice of Violation issued by DEC that required Coeur to immediately minimize or eliminate discharge of impacted runoff; develop an engineered Corrective Action Plan; and increase water quality and biota monitoring. Interim steps to reduce water quality impacts have been taken and Coeur has recently installed and activated a water treatment plant at the ARD site. DEC is carefully monitoring Coeur's progress. Additionally, Coeur has initiated a program, including a

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[7] In fact, EPA has recognized the need to carefully exercise its veto authority in the process the EPA and Corps established for elevating a review of a particular proposed 404 permit. In an August 11, 1992 Memorandum of Agreement with the Corps regarding elevation of 404 permitting decisions, at 6-7, the EPA essentially agreed that it would elevate only "those cases that involve aquatic resources of national importance," a circumstance not found to exist in the context of the Kensington project's tailings disposal to Lower Slate Lake.

geophysical survey, to better delineate and characterize the rock unit responsible for the ARD. This program will enable Coeur to better address the existing ARD issue and to avoid any future ARD problems.

These types of ARD issues in Southeast Alaska can develop with any construction site (including roads) and is unrelated to tailings disposal alternatives. This construction-related event is being addressed and is not a significant new circumstance that would justify re-opening the earlier thorough analyses of tailings disposal alternatives.

Part C: Economic and Social Impacts of Mine

It is critical to the economy of Southeast Alaska that the Corps' 404 permit not be delayed by unnecessary re-evaluation. The region's economy is already troubled, and the 3-plus year delay caused by the unfounded legal challenges to this project have only made the situation worse. Any delay in the resumption of activity at Kensington will only add to the economic hardships already felt by the residents of Southeast Alaska.

Alaska's economy is dependent on natural resource development. This is especially true in Southeast Alaska, where most of the land base is in U.S. Forest Service ownership, and opportunities for diversified natural resource development are fewer than in other parts of the state. As with the rest of rural Alaska, the Southeast economy is not doing well, and projects like Kensington are critical to the wellbeing of our local populations.

The Kensington Mine will be a significant contributor to the economy of Southeast Alaska. The mine will employ over 200 during operations, with an estimated $15 million annually in direct payroll earnings. In addition, the mine is expected to result in an additional 499 indirect or induced jobs, which would boost the total payroll earnings to approximately $36 million. The total tax income to the State and local governments is estimated at $10 million annually, with an additional $1.4 million annually in property taxes[8].

The State has committed substantial resources to worker training for Kensington and other future mining projects in Southeast Alaska. Through the Alaska Department of Labor and Workforce Development, Coeur Alaska now has arranged for its first apprenticeship program at Kensington, registered with the U.S. Department of Labor, to train diesel mechanics. The Department of Labor's staff recently received a commitment from Coeur to provide employment for Alaskans, particularly to continue developing a workforce through registered apprenticeship. Also, the Department is working with Coeur's Kensington Mine staff to develop other new apprentice opportunities in the electrician, heavy duty mechanic and millwright occupations. The Department has led or coordinated partner efforts with the University of Alaska, Delta Mine Training Center, other eligible training providers, the Tlingit and Haida Central Council, and the Berners Bay Consortium to provide mining industry specific training.

Coeur has already invested over $300 million in the Kensington project, and had completed most of the construction as originally permitted. Coeur is deeply vested in the chosen project/alternative, and to require environmental review of a new alternative at this point sets a horrible precedent and renders any agency permitting decision unreliable.

In addition to the direct economic impacts to the mine and local economies, there would also likely be other qualitative negative economic impacts in pursuing the PTF option as suggested by EPA. Both the PTF and the DTF alternatives result in large man-made landforms (60 feet to 90 feet tall) which would

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[8] Kensington Gold Project 2004 FSEIS, December 2004, at 4-109 to 4-118.

be visible from all the cruise ships, ferries, and other vessels traveling in Lynn Canal, just north of Juneau. The SLTF would not be visible from sea level from any vantage point. The visual impact resulting from either the PTF and DTF alternatives could result in negative impacts to Southeast Alaska's tourism industry.

This mine's importance to the region's economy was apparent when the mine was forced to dismiss most of its workforce after the legal challenge stopped construction at the site. At least forty workers lost their jobs, resulting in a serious blow to local communities such as Juneau, Haines, Hoonah, and Angoon. It is imperative that the hardship caused by this loss of employment not be prolonged by unnecessarily delaying the restart of this project through additional unwarranted environmental reviews. A delay of eight months as suggested by the EPA -- we believe it would likely be far longer -- would be devastating, and at a minimum would cause the loss of another construction season. More likely, this delay will be far longer as the permit will be open to appeals and litigation, further straining the economic viability of the project.

Conclusion

The State strongly urges the Corps to grant the requested extension to the permit's construction deadline, so that the decision of the highest court in this country is given effect. Any decision to the contrary would effectively reward an unsuccessful legal challenge to this permit, despite its vindication by the nation's highest court. This would truly make Coeur's successful defense of its Corps permit a Pyrrhic victory, where the losses of the battle outweigh the victory on the field.