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July 29, 2009

The Honorable Lisa Jackson
Administrator
United States Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Avenue, N.W.
Room 3000
Washington, DC 20460

Dear Administrator Jackson,

Thank you for taking the time to meet with us on Thursday to discuss the future of the Kensington Mine. We know you are very busy and this letter is long, but we hope you will take the time to personally read it.

We recognize your personal commitment to protect the environment of our Nation and specifically that of our beautiful state of Alaska. We share that commitment. Because we care about both the environment and also the people of Alaska, we find it profoundly distressing to have the EPA suggest yet another tailings disposal option in the EPA letter of July 14, 2009 to Colonel Koenig of the Alaska Corps of Engineers, especially in the wake of a U.S. Supreme Court decision which specifically recognized the thorough review of alternatives undertaken in the permitting process leading to the Lower Slate Lake Corps 404 tailings permit.

As you are aware, the development of the Kensington mine will be a major new economic driver in Southeast Alaska, creating over 300 badly needed jobs, many to be filled by Alaska Natives (We refer you to the July 28th letter from the Central Council of Tlingit & Haida Indian Tribes of Alaska). EPA's apparent advocacy of a tailing disposal option that is demonstrably worse for the environment, could potentially kill the project, and that appears to be an attempt to circumvent the Supreme Court's decision on this issue is of grave concern to many of us.

We also refer you and your staff to the U.S. Army Corps of Engineers March 29, 2006, Revised Record of Decision affirmed by the Supreme Court and accompanying 404(b)(1) evaluation, for the detailed reasoning on why the Lower Slate Lake disposal option is environmentally preferred. Please also see the Final Supplemental Environmental Impact Statement (Dec 2004) for further details of the evaluation that occurred.

My staff is looking forward to reviewing the details of this issue with EPA staff when they meet, but the principle point that we would make is that, after mine closure and

reclamation, the Lower Slate Lake (LSL) preferred option, as upheld by the Supreme Court, will result in a lake with substantially better habitat for fish and other aquatic life than currently exists, and a long term wetland loss of only 0.4 acres. The Paste Tailings Facility (PTF) option, which is apparently now being promoted by the EPA staff, would result in a long term wetland loss of 102 acres and an eight-story high tailings pile.

It is noteworthy that the EPA and the Corps argued in the Supreme Court of the United States that the Kensington Section 404 permit was lawfully issued by the Corps (*in briefs signed by two different Solicitors General AND the Acting General Counsel of EPA*) and the Supreme Court accepted those arguments and validated the permit.

We know you do have the best interests of the environment at heart, and you seemed somewhat surprised when we told you that the other agencies believed the Lower Slate Lake option was the environmentally preferred option. Your staff further asserted that Fish and Wildlife (USFWS) opposed the Lower Slate Lake alternative and you understandably said you wanted to check with USFWS.

When our staff double-checked with officials at USFWS, they received an email saying, “. . . I don’t know why EPA made the statement that we are opposed to the Slate lake disposal option.” As noted below, we also checked the administrative record and USFWS did not in those filings ultimately oppose the LSL permitted plan.

The Lower Slate Lake option was proposed in a 2001 amendment to the approved 2001 Plan of Operations for the stated purpose of improving efficiency and reducing the extent of surface disturbance of the approved project. In response, the Forest Service directed the preparation of a new SEIS, which was completed in 2004. In comments on the 2004 Draft Supplemental Environmental Impact Statement, USFWS offered technical comment on a number of areas of the DEIS, but did not object to the selection of Lower Slate Lake as the environmentally preferred alternative as a project development option. The USFWS comments lay this out in full detail and your staff may want to revisit them.

Although we understand that the EPA disagreed with the preference of the Corps and other federal and state agencies, at no time during this multi-year permit and lengthy litigation process did EPA “escalate” the discussion according to its Memorandum of Agreement with the Corps, and EPA chose not to veto the permit under its authority pursuant to section 404(c) of the Clean Water Act.

As noted by the Supreme Court: “By declining to exercise its veto, the EPA in effect deferred to the judgment of the Corps on this point.” Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, No. 07-984, slip op. at 6 (S.Ct. June 22, 2009) (hereinafter Coeur Alaska v. SEACC). In fact, up until the issuance of the July 14, 2009 letter from Mike Gearheard of Region X to the Corps, EPA fully supported the Corps’ permit, up to and through the Supreme Court’s rejection of the challenge by outside groups, and its subsequent holding that “The Corps acted in accordance with the law in issuing the slurry discharge permit to Coeur Alaska.”

Thus, the administrative and legal process has been completely exhausted with regard to the permit issued to Coeur Alaska. The Supreme Court has spoken, and the Permit has been found to be valid. The Ninth Circuit has removed its injunction, under an unopposed motion, that prohibited construction under the permit. At this point, the only thing standing between the long awaited 300 new jobs to benefit the people of Southeast Alaska is for the Corps to lift its partial suspension of the Permit that was necessitated by the injunction, and modify the construction time period under the permit to compensate for the injunction delay that has prevented work from being completed at the Lower Slate Lake site.

Unfortunately, EPA appears to be attempting to construct “new” information that will justify the reopening of an administrative process that has already been exhausted. The Acting Deputy Administrator of EPA Region X, Mike Gearheard, in his letter dated July 14, 2009, is now claiming that three changes have occurred since the issuance of the permit that require the Corps to effectively reopen the permitting process for the Kensington Mine. As discussed in our meeting, we believe that all three of the issues raised are neither “new” information, nor, in any case, significant or substantial.

In particular, the letter’s first point, the assertion that the settlement discussions over the “paste tailings facility” (“PTF”) constitutes “new” information is, on its face, legally without merit. A “PTF” was a potential option that was discussed and evaluated during 2008 based on the unavailability of the permitted LSL facility due to the pending litigation over the 404 permit issued by the Corps. When litigation is ongoing, and particularly when an injunction is in place that impedes all progress, parties commonly negotiate over less than preferable proposals in an attempt to end the continued delay and uncertainty of litigation. This exploration of a PTF in the context of trying to reach a compromise while the LSL alternative remained unavailable was not itself a “substantial change” in circumstances, nor was the possibility of a PTF-like facility significant new information, due to its fundamental similarity to the EPA preferred, but already-rejected, dry stack option.

The PTF differs from dry stack primarily with respect to the moisture level in the tailings to be stored. In fact, the EPA noted in its own comments during the evaluation of the PTF that the principal difference between the options is that PTF would result in the destruction of a greater area of wetlands as compared to dry stack, and “[t]hus, it appears that Alternative C [dry stack] might be less environmentally damaging than Alternative B [PTF].” EPA Comments on Kensington Gold Project Draft Environmental Assessment, September 16, 2008. Clearly, given the “no wetlands loss” policy of the Administration (MOA between the Department of the Army and the Environmental Protection Agency for the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9,210 (1990)) this cannot be a proposal EPA would further advocate.

Contrary to the statement made in EPA’s July 14th letter, prior to Coeur Alaska’s withdrawal from further consideration of the PTF, EPA had not expressed a view that the PTF was the preferable option for tailings disposal, nor that it would be “permissible.”

During the environmental assessment process for PTF, EPA consistently expressed a continued preference for the dry stack option, and, in fact, expressed confusion regarding functional difference between PTF and dry stack. It is clear from a review of EPA's technical comments that they perceived PTF to be a less preferable variation of the dry stack option that had already been rejected by the Corps.

It was only following the Supreme Court decision affirming the Corps permit that rejected the dry stack option that EPA has chosen to advocate PTF as "new" and "environmentally preferable."

Thus, while we believe your desire is the protection of the environment, we are concerned that some on your staff may believe the best way to do that is to use bureaucratic maneuvers to "outlast" Coeur Alaska's ability to litigate over the Kensington Mine, and we must question EPA's sudden change of heart with regard to desirability of the PTF process.

The second issue raised in EPA's letter was mill rate throughput. The EPA's July 14th letter said "In addition, the mining rate based on the as-built capacity of the mill is less than the proposed mining rate in the 2004 final Supplemental Environmental Impact Statement (FSEIS). The FSEIS specified a 2000 ton/day operation, whereas the actual mill capacity is 1250 tons/day. The reduced mining rate translates into a decrease in the amount of tailings produced; more than one million fewer tons overall. This change to the project presents opportunities to further avoid and minimize aquatic impacts, which could affect the appropriate permit conditions. This new information also could reduce the environmental impacts of disposal sites that were considered as alternatives to disposal in Slate Lake, which could change the analysis of which disposal alternative is the least environmentally damaging. For those reasons, this information also warrants reevaluation of the permit and its conditions."

The Kensington mine plan centers on 4.5 million tons of mineable reserves. That has not changed. The permit is for total amount of tailings disposal, and does not reference a fill rate. A decrease in mill rate may extend the mine life, which is a good thing for the Southeast Alaska economy, but it has no effect on total tonnage of tailings, total footprint of tailings, nor environmental impacts.

Comments filed by EPA last September during the environmental assessment for the PTF reflect EPA's on-going confusion regarding this point. EPA provides a formula for calculating tailings production that reflects the lower throughput, but does not change the expected life of the mine, which results in a lower total amount of tailings produced. This flawed calculation is the principal support for EPA's allegation of "changed circumstances," and its argument that the Corps should reconsider the impacts of the PTF based upon a supposedly lower volume of tailings.

In fact, in its April 25, 2008, letter asking for an environmental assessment of the PTF option, EPA made an attempt to resurrect its preferred dry stack option based upon this information: "While the dry stack alternative was previously analyzed in past NEPA

documents, we believe it is important to evaluate the dry stack with an equal mining rate as the PTF (i.e. 1,250 tons per day) to fairly compare conclusions about impacts to resources.”

EPA’s third issue was acid rock drainage. The letter said, “Finally, Coeur Alaska excavated an area near Lower Slate Lake and exposed some sulfide-bearing rock. This newly exposed rock resulted in acid rock drainage that flowed into a settling pond near the outlet of the lake and into East Fork Slate Creek. The acid rock drainage is an unauthorized discharge that was not anticipated in the FSEIS or 404 permit process and is not authorized under the current 402 permit. This source of new environmental harm needs to be part of an assessment of the least environmentally damaging practicable alternative.”

We are certain that your further research will show this is a not a significant issue in any way. During authorized excavation of borrow material at Slate Lake, a localized pocket of sulfide bearing rock was exposed. Sulfide bearing rock produces acidic runoff when it is exposed to water and air. In the normal course of events in completing construction at the site, Coeur would have covered the exposed rock within a short period of time, installed the water treatment plant already permitted by the EPA for the outfall at the site, and likely would never have encountered any problematic runoff.

The low pH drainage of approximately 3 gpm is a condition created solely because of the Ninth Circuit Court of Appeals injunction. Due to the injunction, Coeur was prohibited from taking actions beyond the best management practices it employed under Alaska Department of Environmental Conservation (ADEC) and EPA oversight. The amount of drainage involved is very small and has not resulted in any environmental harm in East Fork Slate Creek. Coeur has shifted its borrow material site to avoid the sulfide formation. Once the Corps approves the modification of the work period, allowing halted construction to proceed, the acidic runoff will end.

We firmly believe that the facts, as well as the law, continue to support the validity of the existing Kensington Corps 404 Permit and its finding that the disposal option contained therein the best option for the environment of Southeast Alaska. We also believe that, after full consideration of the law and the facts regarding the Kensington mine, EPA will reach the same conclusion.

Sincerely,


Lisa Murkowski
United States Senator


Mark Begich
United States Senator