United States Senate
WASHINGTON, DC 20510

August 3, 2009

Colonel Reinhard Koenig
U.S. Army Corps of Engineers – Alaska District
Post Office Box 6898
Elmendorf AFB, AK 99506

Dear Colonel Koenig:

On July 9th, in the wake of the Supreme Court's decision in Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, we wrote you to urge that you proceed as rapidly as possible with updating the Kensington Mine work period under its 404 permit and acceptance of minor modifications to its work plan. The Corps, in accordance with your regulations, has issued a public notice that a permit modification request has been received and public comments will be accepted on the modification.

We believe the update of the work period and correction of minor discrepancies to the previously authorized permit and plans are in the public interest and there are no significant changes in the attendant circumstances since the authorization was issued.

Because we care about the environment and also the people of Alaska, we found it profoundly distressing to have the EPA suggest yet another tailings disposal option in its letter of July 14, 2009 to you, 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 who are member of federally recognized tribes. EPA's apparent advocacy of a tailing disposal option that is demonstrably worse for the environment, might very probably 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 believe the U.S. Army Corps of Engineers March 29, 2006 Revised Record of Decision and accompanying 404(b)(1) evaluation , which was affirmed by the Supreme Court, was correct in its detailed reasoning on why the Lower Slate Lake disposal option is environmentally preferred. We also refer you also to the Final Supplemental Environmental Impact Statement (Dec 2004) for further detailed evaluation.

Our staff has reviewed the details of this issue with EPA staff, but the principle point that we would make is that after mine closure and reclamation, the Lower Slate Lake (LSL) preferred option, 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 also 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.

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 "elevate" 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. We believe none of the three issues raised are either "new" information, or, in any case, significant or substantial.

In particular the EPA letter's first point, the settlement discussions over the "paste tailings facility" ("PTF") as providing allegedly "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 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 "permittable." 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."

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."

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.

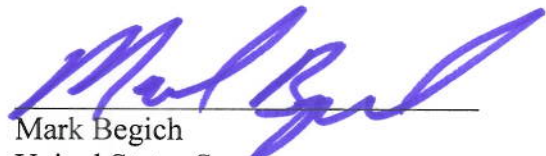
The low pH drainage of approximately 3 gpm is a condition created solely because of the Ninth Circuit Court of Appeals injunction. Due to the injunction, Coeur was prohibited from taking actions beyond the best management practices it employed under Alaska Department of Environmental Conservation (ADEC) 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 update of the work period, allowing halted construction to proceed, that will end the acidic runoff.

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 trust that, after full consideration of the law and the facts regarding the Kensington mine, the Corps will find that the minor modifications of the permit are in the public interest and the Kensington Mine is allowed to continue operations as soon as possible.

Sincerely,

Lisa Murkowski
United States Senator



Mark Begich
United States Senator