STATE OF ALASKA

Sean Parnell, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5100
FAX: (907)269-5110

March 9, 2012

VIA E-MAIL TO McLerran.Dennis@epamail.epa.gov & 1ST CLASS MAIL

Mr. Dennis McLerran
Regional Administrator
EPA Region X
RA 140
1200 Sixth Avenue
Seattle, Washington 98101

Re: State of Alaska's Concerns Regarding the Environmental Protection Agency's Evolving Bristol Bay Watershed Assessment and Potential Section 404(c) Action

Dear Mr. McLerran:

The State of Alaska, and its resource agencies (Departments of Environmental Conservation (DEC), Natural Resources (DNR), and Fish and Game (ADF&G)), and the Department of Law, are increasingly concerned about the Environmental Protection Agency's (EPA's) work on the Bristol Bay Watershed Assessment. The EPA initiated the assessment to inform its decision-making on a May 2, 2010 petition asking EPA to invoke its Clean Water Act (CWA) Section 404(c) authority. The petition asks EPA to prohibit the disposal of fill in watersheds near Bristol Bay in which large mine development may occur in the future. Neither a petition process nor EPA's process for developing a response are described in the CWA or its associated regulations.

EPA's watershed assessment effort reaches well beyond any process or authority contemplated by the CWA. Physically, the assessment encompasses approximately 15 million acres of largely state-owned land – an area comparable in size to the entire state of West Virginia. Because the State has a vital interest in assuring that an action affecting natural resources and an area of this magnitude is consistent with law, I write to share the following concerns

(many of which the State has already expressed to EPA) about both the process EPA is following and the substance of its actions:

- **Premature assessment.** Both the EPA's watershed assessment and its potential exercise of its 404(c) veto authority in the absence of an actual Section 404 permit application are premature and unprecedented. A permit application describing a potential project will trigger the exercise of applicable state and federal regulatory permitting authority reviews, including an associated impacts analysis by the U.S. Army Corps of Engineers (Corps) pursuant to the Section 404(b)(1) guidelines. These regulatory reviews will address the same issues EPA is attempting to consider in its premature assessment. Until an application is filed describing a potential project, EPA will be speculating and prematurely "determining" unavoidable adverse impacts based on hypotheticals and inapplicable modeling, rather than waiting to evaluate real information on specific proposals, as Congress clearly intended.

- **Lack of EPA authority.** EPA has shared little information about its purported legal authority to conduct the watershed assessment. Section 404(c) allows EPA to prohibit or to place restrictions on proposed or future fill to "waters of the U.S." Although the avowed purpose of the assessment is to provide a basis for a response to the Section 404(c) petition, EPA's on-going watershed assessment process is neither delineated in the Section 404 statute, nor is it set forth in EPA's implementing regulations. EPA has stated that its assessment will review potential impacts of hypothetical mining alternatives and activities unrelated to the placement of materials in waters of the U.S. However, this unrestricted analysis of alternatives and activities appears to overstep the Section 404 authority Congress granted to EPA. And indeed, the Corps – the agency charged with issuing Section 404 permits – is not even listed among the federal agencies EPA has enlisted to develop the assessment.

- **Conflict with federal and state law.** The watershed assessment and a premature 404(c) determination by EPA conflict with other laws, including the Alaska Statehood Act, the CWA, and the National Environmental Policy Act (NEPA).

- Deciding the 404(c) petition without the benefit of a project application and substantial, scientifically vetted project-specific information would infringe on the State of Alaska's management and use of State lands. The State selected lands with natural resource potential to provide for the economic welfare of the residents of Alaska. A premature decision could thwart those objectives, as established by both Congress in the Alaska Statehood Act and the Alaska Legislature in a myriad of State laws.

- Further, as the State has previously observed, the watershed assessment is an undefined and evolving process with no regulatory structure supporting it. It is difficult to tell where EPA is headed with some of its analyses, who is looking at certain questions, what assumptions are being made, or why certain work is being done in the context of 404(c). The State has tried to be helpful in supplying available data and other factual information, but this should not be construed as any endorsement of the way EPA is proceeding or consensus in any decisions EPA may eventually reach. As the State has also previously stated, the State does not endorse EPA using the assessment to usurp the Corps' and the State's primary regulatory authorities, nor is there any cooperative agreement between the State and EPA on the development of the watershed assessment. Nothing we have seen dispels the State's concerns that the watershed assessment will prematurely "determine" impacts based on hypotheticals and inapplicable modeling, thereby inappropriately and conclusively determining specific impacts dedicated to other regulatory authorities and reviews, or inappropriately narrowing the reasonable range of action alternatives for NEPA review during subsequent permit reviews. *National Mining Association v. Jackson*, 758 F. Supp. 2d 34, 45 (D.D.C. 2011) (despite EPA's contention that guidance was only "interim document," the process and conclusions reached in it and its application in practice nonetheless has a "practical impact on [those] who may seek permits"). *See also, Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) (holding that "[f]inality resulting from the practical effect of an ostensibly non-

binding agency proclamation is a concept [this Court has] recognized in the past"). Congress clearly did not intend for EPA to invoke such a novel and broad assertion of authority – apparently founded on an inapplicable general, cooperative research provision for establishing national programs (Section 104(a)) – that would insidiously displace other applicable state and federal regulatory processes in EPA's exercise of its Section 404(c) authority. *See, e.g., Minard Run Oil Company v. United States Forest Service*, 2011 WL 4389220, at *6 and *10, (3rd Cir. 2011) (holding, among other things, that agency action may be deemed final if "an agency determination of a particular issue that will not be reconsidered in subsequent agency proceedings may represent the consummation of the agency's decision making process on that issue," and that agency action should not be taken by "applying a general provision when doing so would undermine limitations created by a more specific provision").

For example, the formulation of alternatives, the consideration of direct and cumulative impacts, and the formulation of mitigation measures in response to potential dredge and fill activities are key components of the Section 404(b)(1) guidelines, and are the responsibility of the Corps, which is the sole agency authorized to apply the guidelines. But EPA's watershed assessment would usurp the Corps' role. As Judge Walton recently held in *National Mining Association v. Jackson*, 2011 WL 123194, at *10, EPA plays a "limited role" under Section 404, and "nothing in Section 404 ... gives EPA the authorization to develop a new evaluation or permitting process which expands its role." *See also*, 40 C.F.R. 230.2 (c) (stating that "[n]o modifications to the basic application, meaning, or intent of these Guidelines will be made without rulemaking" under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*). Indeed, the Corps, the agency charged with permitting dredge and fill activities under CWA Section 404, is not even among the federal agencies that EPA has enlisted to develop the assessment.

- **Reliance on draft guidance.** The watershed assessment appears to inappropriately rely on draft guidance relating to the delineation

of "waters of the U.S." The draft guidance was released by EPA and the Corps in the spring of 2011, but has never been adopted. Many commenters, including the State of Alaska, objected that this draft guidance illegally expands the scope of federal CWA jurisdiction. EPA should not rely on this draft guidance for its watershed assessment.

- **Lack of scientific credibility.** The State has previously advised EPA that EPA may not currently have sufficient scientifically vetted water quality and hydrological data for the area to conduct the review EPA proposes for its watershed assessment. EPA also proposes to use inappropriate modeling and documents that are internal or commissioned reports that have limited distribution and that have not been subject to external peer review. Further, in arranging for the preparation of various portions of the watershed assessment, EPA has contracted with at least one consultant who has publicly expressed actual bias against the Pebble project in particular. These aspects of the assessment are troubling, will undermine the scientific credibility of the watershed assessment, and will yield unreliable conclusions. We believe a meeting should be convened soon between EPA and the State to have an in-depth discussion of these and other technical aspects of the ongoing work EPA and its contractors are performing.

- **Use of hypothetical "large scale development" projects.** The assessment contemplates potential adverse impacts from hypothetical projects that could result in EPA placing unnecessary or inappropriate Section 404(c) limits on future development. The petition and any 404(c) decision should not be decided based upon hypothetical projects.

- **Disregard of federal and state laws, processes, and permits, and the Alaska Constitution.** Any assessment and consideration undertaken under section 404(c) must consider the legal permitting framework that is designed to protect water quality. Enclosed is a list of laws and other documents that EPA should recognize in considering whether it is even appropriate for it to evaluate potential impacts of hypothetical development prior to submittal of a Section 404 permit application. This host of federal and state permitting authorities (including the Alaska Water Quality Standards and the Bristol Bay Area Plan) clearly apply to

protect waters, wetlands, fish, wildlife, fisheries, subsistence, and public uses of the Bristol Bay watershed.

- **Limited review time.** The area EPA is reviewing for its watershed assessment is enormous. The watershed assessment area encompasses roughly 15 million acres, comparable to the size of West Virginia, and consists largely of State-owned lands. EPA states it intends to release a draft watershed assessment of this enormous area in late April 2012, and a final by the fall of 2012. This aggressive schedule further undercuts the reliability of this premature assessment, when compared to the intensive, multi-year NEPA review schedules that are required to address specifically proposed projects. Further, EPA's entire Section 404(c) process may be completed in as little as 111 days. This rushed process is woefully insufficient for a final decision that could significantly affect the economic future of such a large region.

- **Disregard of potential benefits.** EPA indicates that the watershed assessment will not consider any potential benefits of large scale development to water quality or to human health, safety, and welfare. The assessment will therefore present a limited and biased assessment of only negative impacts, and will fail to disclose the state and regional benefits that might result from large mine development. The assessment would therefore bypass the consideration by the Corps and other regulatory authorities of key social, economic, public interest, and environmental justice issues that are required to be addressed during review of a proposed fill activity.

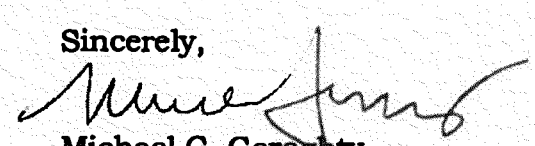
- **Other ramifications of 404(c) action.** EPA's exercise of its 404(c) authority has the potential to extinguish both the State of Alaska's mineral rights under the Statehood Compact and the mineral interests held by locators and lessees. The State will explore all available legal options in response to an exercise by EPA of its Section 404(c) authority, including remedy from the federal government for breach of the Statehood Act. According to the U.S. Supreme Court, even if the federal government prohibits a development right under a *valid* invocation of authority, it cannot do so without being held liable and responsible for the payment of damages if rights to ownership and the development of those same rights have already vested. *See Mobil Oil Exploration & Producing*

> *Southeast, Inc. v. United States*, 530 U.S. 604 (2000). *See also, e.g.*, *Minard Run*, 2011 WL 4389220, at *10 (holding that broad and unreasonable assertion of regulatory authority that upsets mineral rights owned by other parties would "'call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the takings clause.'")

As you know, while the State of Alaska has provided or made available factual information to EPA over the last few months at EPA's request, this information sharing by the State should, again, not be construed as endorsing the process or conclusions that come out of EPA's assessment. We believe that EPA's actions in using the watershed assessment to address the pending petition are unlawfully preemptive, premature, arbitrary, capricious, and vague.

The State asks that EPA cease its work on the Bristol Bay Watershed Assessment. We also ask that EPA refrain from exercising its Section 404(c) authority until a Section 404 permit application has been submitted and other applicable regulatory reviews are conducted. We look forward to EPA's prompt written responses to the substantial legal and process concerns raised in this letter and, on a parallel path, to a meeting to discuss the technical questions and issues we have at this time.

Sincerely,



Michael C. Geraghty
Attorney General

Enclosures: Alaska Statehood Act (excerpts)
State of Alaska Constitution (excerpts)
List of Alaska Statutes and Regulations Applicable to Large Mines
Disc containing Bristol Bay Area Plan for State Lands (2005)

Alaska Statehood Act; July 7, 1958
(Excerpts)

An act to provide for the admission of the State of Alaska into the Union

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8 (c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held an April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

SEC. 2. The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska.

SEC. 3. The constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property, (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation:

EPA-7609-0003736_0008

Provided, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

SEC. 5. The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

SEC. 6. (a) For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied: *Provided further*, That for the purposes of this section the term "public lands of the United States in Alaska which are vacant, appropriated, and unreserved" shall include, without limiting the use thereof, the retained or reserved interest of the United States in lands which have been disposed of with a reservation to the United States of all minerals or any specified mineral or minerals.

EPA-7609-0003736_0009

(b) The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied: *And provided further*, That no selection hereunder shall be made in the area north and west of the line described in section 10 without approval of the President or his designated representative.

(c) Block 32, and the structures and improvements thereon, in the city of Juneau are granted to the State of Alaska for any or all of the following purposes or a combination thereof: A residence for the Governor, a State museum, or park and recreational use.

(d) Block 19, and the structures and improvements thereon, and the interests of the United States in blocks C and 7, and the structures and improvements thereon, in the city of Juneau, are hereby granted to the State of Alaska.

(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U. S. C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U. S. C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U. S. C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. Sums of money that are available for apportionment or which the Secretary of the Interior shall

EPA-7609-0003736_0010

have apportioned, as of the date the State of Alaska shall be deemed to be admitted into the Union, for wildlife restoration in the Territory of Alaska, pursuant to section 8 (a) of the Act of September 2, 1937, as amended (16 U. S. C., sec. 669g-1), and for fish restoration and management in the Territory of Alaska, pursuant to section 12 of the Act of August 9, 1950 (16 U. S. C., sec. 777k), shall continue to be available for the period, and under the terms and conditions in effect at the time, the apportionments are made. Commencing with the year during which Alaska is admitted into the Union, the Secretary of the Treasury, at the close of each fiscal year, shall pay to the State of Alaska 70 per centum of the net proceeds, as determined by the Secretary of the Interior, derived during such fiscal year from all sales of sealskins or sea-otter skins made in accordance with the provisions of the Act of February 26, 1944 (58 Stat. 100; 16 U. S. C., secs. 631a-631q), as supplemented and amended. In arriving at the net proceeds, there shall be deducted from the receipts from all sales all costs to the United States in carrying out the provisions of the Act of February 26, 1944, as supplemented and amended, including, but not limited to, the costs of handling and dressing the skins, the costs of making the sales, and all expenses incurred in the administration of the Pribilof Islands. Nothing in this Act shall be construed as affecting the rights of the United States under the provisions of the Act of February 26, 1944, as supplemented and amended, and the Act of June 28, 1937 (50 Stat. 325), as amended (16 U. S. C., sec. 772 et seq.).

(f) Five per centum of the proceeds of sale of public lands lying within said State which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to such sales, shall be paid to said State to be used for the support of the public schools within said State.

(g) Except as provided in subsection (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses of the lands involved, and each tract selected shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection. The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act,

EPA-7609-0003736_0011

except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation. Such preferred right of selection shall have precedence over the preferred right of application created by section 4 of the Act of September 27, 1944 (58 Stat. 748; 43 U. S. C., sec. 282), as now or hereafter amended, but not over other preference rights now conferred by law. Where any lands desired by the State are unsurveyed at the time of their selection, the Secretary of the Interior shall survey the exterior boundaries of the area requested without any interior subdivision thereof and shall issue a patent for such selected area in terms of the exterior boundary survey; where any lands desired by the State are surveyed at the time of their selection, the boundaries of the area requested shall conform to the public land subdivisions established by the approval of the survey. All lands duly selected by the State of Alaska pursuant to this Act shall be patented to the State by the Secretary of the Interior. Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. As used in this subsection, the words "equitable claims subject to allowance and confirmation" include, without limitation, claims of holders of permits issued by the Department of Agriculture on lands eliminated from national forests, whose permits have been terminated only because of such elimination and who own valuable improvements on such lands. As to all selections made by the State after January 1, 1979, pursuant to section 6(b) of this Act, the Secretary of the Interior, in his discretion, may waive the minimum tract selection size where he determines that such a reduced selection size would be in the national interest and would result in a better land ownership pattern.

(h) Any lease, permit, license, or contract issued under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U. S. C., sec. 181 and following), as amended, or under the Alaska Coal Leasing Act of October 20, 1914 (38 Stat. 741; 30 U. S. C., sec. 432 and following), as amended, shall have the effect of withdrawing the lands subject thereto from selection by the State of Alaska under this Act, unless such lease, permit, license, or contract is in effect on the date of approval of this Act, and unless an application to select such lands is filed with the Secretary of the Interior within a period of ten years after the date of the admission of Alaska into the Union. Such selections shall be made only from lands that are otherwise open to selection under this Act. When all of the lands subject to a lease, permit, license, or contract are selected, the patent for the lands so selected shall vest in the State of Alaska all the right, title, and interest of the United States in and to that lease, permit, license, or contract that remains outstanding on the effective date of the patent, including the right to all rentals, royalties, and other payments

EPA-7609-0003736_0012

accruing after that date under that lease, permit, license, or contract, and including any authority that may have been retained by the United States to modify the terms and conditions of such lease, permit, license, or contract: *Provided*, That nothing herein contained shall affect the continued validity of any such lease, permit, license, or contract or any rights arising thereunder. Where only a portion of the lands subject to a lease, permit, license, or contract are selected, there shall be reserved to the United States the mineral or minerals subject to that lease, permit, license, or contract, together with such further rights as may be necessary to the full and complete enjoyment of all rights, privileges, and benefits under or with respect to that lease, permit, license, or contract, upon the termination of the lease, permit, license, or contract, title to the minerals so reserved to the United States shall pass to the State of Alaska.

(i) All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

(j) The schools and colleges provided for in this Act shall forever remain under the exclusive control of the State, or its governmental subdivisions, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

(k) Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission. Effective upon the admission of the State of Alaska into the Union, section 1 of the Act of March 4, 1915 (38 Stat. 1214; 48 U. S. C., sec. 353), as amended, and the last sentence of section 35 of the Act of February 25, 1920 (41 Stat. 450; 30 U. S. C, sec. 191), as amended, are repealed and all lands therein reserved under the provisions of section 1 as of the date of this Act shall, upon the admission of said State into the Union, be granted to said State for the purposes for which they were reserved; but such repeal shall not affect any outstanding lease, permit,

EPA-7609-0003736_0013

license, or contract issued under said section 1, as amended, or any rights or powers with respect to such lease, permit, license, or contract, and shall not affect the disposition of the proceeds or income derived prior to such repeal from any lands reserved under said section 1, as amended, or derived thereafter from any disposition of the reserved lands or an interest therein made prior to such repeal.

(l) The grants provided for in this Act shall be in lieu of the grant of land for purposes of internal improvements made to new States by section 8 of the Act of September 4, 1841 (5 Stat. 455), and sections 2378 and 2379 of the Revised Statutes (43 U. S. C., sec. 857), and in lieu of the swampland grant made by the Act of September 28, 1850 (9 Stat. 520), and section 2479 of the Revised Statutes (43 U. S. C., sec. 982), and in lieu of the grant of thirty thousand acres for each Senator and Representative in Congress made by the Act of July 2, 1862, as amended (12 Stat. 503; 7 U. S. C., secs. 301-308), which grants are hereby declared not to extend to the State of Alaska.

(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

EPA-7609-0003736_0014

Excerpts from the Alaska Constitution:

Article 8 - Natural Resources

§ 1. Statement of Policy

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

§ 2. General Authority

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

§ 3. Common Use

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

§ 4. Sustained Yield

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

§ 5. Facilities and Improvements

The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.

§ 6. State Public Domain

Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.

§ 7. Special Purpose Sites

The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from

the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.

§ 8. Leases

The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

§ 9. Sales and Grants

Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

§ 10. Public Notice

No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

§ 11. Mineral Rights

Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface uses of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.

§ 12. Mineral Leases and Permits

The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these

minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.

§ 13. Water Rights

All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

§ 14. Access to Navigable Waters

Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

§ 15. No Exclusive Right of Fishery

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State. [Amended 1972]

§ 16. Protection of Rights

No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.

§ 17. Uniform Application

Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

§ 18. Private Ways of Necessity

Proceedings in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization of resources. Just compensation shall be made for property taken or for resultant damages to other property rights.

Article 12 - General Provisions

§ 1. State Boundaries

The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, included in the Territory of Alaska upon the date of ratification of this constitution by the people of Alaska.

§ 2. Intergovernmental Relations

The State and its political subdivisions may cooperate with the United States and its territories, and with other states and their political subdivisions on matters of common interest. The respective legislative bodies may make appropriations for this purpose.

§ 3. Office of Profit

Service in the armed forces of the United States or of the State is not an office or position of profit as the term is used in this constitution.

§ 4. Disqualification for Disloyalty

No person who advocates, or who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the United States or of the State shall be qualified to hold any public office of trust or profit under this constitution.

§ 5. Oath of Office

All public officers, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska, and that I will faithfully discharge my duties as . . . to the best of my ability." The legislature may prescribe further oaths or affirmations.

§ 6. Merit System

The legislature shall establish a system under which the merit principle will govern the employment of persons by the State.

§ 7. Retirement Systems

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

§ 8. Residual Power

The enumeration of specified powers in this constitution shall not be construed as limiting the powers of the State.

§ 9. Provisions Self-Executing

The provisions of this constitution shall be construed to be self-executing whenever possible.

§ 10. Interpretation

Titles and subtitles shall not be used in construing this constitution. Personal pronouns used in this constitution shall be construed as including either sex.

§ 11. Law-Making Power

As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of article XI.

§ 12. Disclaimer and Agreement

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

§ 13. Consent to Act of Admission

All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

§ 14. Approval of Federal Amendment to Statehood Act Affecting an Interest of the State under that Act

A federal statute or proposed federal statute that affects an interest of this State under the Act admitting Alaska to the Union is ineffective as against the State interest unless approved by a two-thirds vote of each house of the legislature or approved by the people of the State. The legislature may, by a resolution passed by a majority vote of each house, place the question of approval of the federal statute on the ballot for the next general election unless in the resolution placing the question of approval, the legislature requires the question to be placed before the voters at a special election. The approval of the federal statute by the people of the State is not effective unless the federal statute described in the resolution is ratified by a majority of the qualified voters of the State who vote on the question. Unless a summary of the question is provided in the resolution passed by the legislature, the lieutenant governor shall prepare an impartial summary of the question. The lieutenant governor shall present the question to the voters so that a "yes" vote on the question is a vote to approve the federal statute. [Amended 1996]

Alaska Statutes and Regulations Applicable to Large Mines

Alaska Department of Environmental Conservation (DEC) Authorities

Alaska Statutes
AS 17.20 – Alaska Food, Drug, and Cosmetic Act
AS 44.46 – Department of Environmental Conservation
AS 46.03 – Environmental Conservation
AS 46.08 – Oil and Hazardous Substances Releases
AS 46.09 – Hazardous Substance Release Control
AS 46.14 – Air Quality Control
AS 46.35 – Permit Extension

Alaska Regulations
18 AAC 15 – Administrative Procedures
18 AAC 30 – Alaska Food Code
18 AAC 50 – Air Quality Control
18 AAC 60 – Solid Waste Management
18 AAC 70 – Water Quality Standards
18 AAC 72 – Wastewater Disposal
18 AAC 75 – Oil and Hazardous Substances Pollution Control
18 AAC 80 – Drinking Water
18 AAC 83 – Alaska Pollutant Discharge Elimination System Program

Alaska Pollutant Discharge Elimination System (APDES) Permits. Mines that have a discharge to surface or marine waters of the U.S. are required to obtain an APDES permit prior to discharging.

Air Quality Open Burn Permits. Burning cleared vegetation requires a permit from the Department of Environmental Conservation.

Air Quality General Permits. Diesel electric generators may qualify for a General Operation Permit if they meet certain criteria. Rock crushers that emit under 100 tons per year (TPY) of emission may qualify for a General Minor Permit.

Air Quality Permits. Facilities that produce air pollutant emissions are required to have a state Air Quality Control Permit to Construct (Title I Permit) and a state Air Quality Control Permit to Operate (Title V Permit). Compliance with the Clean Air Act (CAA)

Certificate of Reasonable Assurance for Corp of Engineers 404 Permits. Activities involving dredging or plan fill materials within waters of the United States require a Section 404 permit from the Army Corp of Engineers. The

Clean Water Act Section 401 requires the applicant to obtain state certification that any discharge under the Clean Water Act will comply with applicable state water quality standards. These standards include designation of the beneficial uses of the water, as well as numerical and narrative water quality criteria established to protect the beneficial uses.

Construction Stormwater General Permit. DEC approves Storm Water Pollution Prevention Plans (SWPPPs) which may be covered under a general permit authorization or combined with an APDES wastewater permit.

Domestic and Non-Domestic Wastewater Disposal Permit. Required for the discharge of wastewater into or upon waters and land surfaces of the state. Plans for the disposal of wastewater from milling operations and other non-domestic wastewater are to be submitted to DEC for approval for either a Wastewater Disposal Permit or an APDES permit.

Domestic Sewage Treatment System. Facilities that collect, treat and dispose of domestic sewage are governed by a plan review to ensure that minimum environmental standards are met. Detailed construction plans, specifications and engineering reports must be certified by a Registered Professional Engineer.

Drinking Water Systems. Prior to construction DEC must approve detailed engineering plans and specifications for a public drinking water system. Once the construction has been completed, DEC must approve the operations of the system.

Food Sanitation Permit. Required for the operation of a food service facility, either at a construction camp or permanent facility.

Oil Discharge Prevention and Contingency Plan. Approval of an oil discharge prevention and contingency plan is required prior to the operation of a facility with above ground fuel tanks that hold more than 420,000 gallons of refined petroleum products or 210,000 or more gallons of crude oil.

Solid Waste Management Permit. Required if tailing or waste rock has the potential for impacting state waters.

Alaska Department of Fish and Game (ADF&G) Authorities

Alaska Statutes

AS 16.05.841	Fishway required
AS 16.05.861	Penalty for violating fishway and hatchery requirements

AS 16.05.871 - 901	Protection of fish and game, construction without approval prohibited, exemption for emergency situations, penalty for causing material damage, penalty for violations
AS 16.05.930	Exempted activities

Alaska Regulations

5 AAC 95	Fish and Game Habitat

Title 16 Permit. This permit, regardless of land ownership, is required for any activity conducted within fish-bearing waters, such as bridges, culverts, fords (winter or summer), material sites, tailings facilities, and water-withdrawal structures. ADF&G's Division of Habitat issues this permit.

Special Areas Permit. If a project is within a state refuge, sanctuary, or critical habitat, any activity within the special area will require a Special Areas Permit from ADF&G.

Scientific Collection Permit. A permit from ADF&G, called a Scientific Collection Permit, is required for any sampling of fish or wildlife resources.

Alaska Department of Natural Resources (DNR) Authorities

Alaska Statutes

AS 27.19.010 – 100	Reclamation: plans, bonding, exemptions for small operations, cooperative management agreements, violations
AS 27.30.010 - 099	Exploration incentive credits
AS 38.05.185 – 195	Qualifications and mining claims
AS 38.05.200 – 242	Leasing, annual labor requirements, liens, labor, rentals, recording
AS 38.05.245 – 275	Prospecting sites, prospecting on submerged and tidal lands, surface use of land and water, abandonment, transfers, recognition of mining locations
AS 43.65.010 – 212	Mining License Tax: mining license, production royalties.
AS 46. 15	Water rights; reserving water for instream use, including fish spawning
AS 46.17	Dam safety: basis for program and state jurisdiction

Alaska Regulations

11 AAC 02 – Appeals

11 AAC 05 – Filing fees for water rights and dam safety; in-stream flow certificates; water appropriations

11 AAC 86 – Administrative Procedures
Article 01: Payments; notices; locations on state selected lands; mineral deposits open to location; surface use; sale, lease or other transfer; plans of operation in lieu of land use permits
Article 02: Staking, recording and maintaining claims and leasehold locations.
Article 03: Upland mining leases
Article 04: Prospecting sites
Article 05: Offshore permits and leases
Article 06: Millsites

11 AAC 88 – Administrative regulations

11 AAC 93 – Water Management
Articles 01 and 02: Existing water rights; appropriation and use of water; dam safety hazard classification; dam inspections and emergency actions; dam certificates of approval; temporary water use
Article 03: Appeals

11 AAC 96 – Miscellaneous Land Use Activity
Article 01: Provisions for general land use activity; operations requiring permits; applications; bonds; completion of operations; appeals; general stipulations

11 AAC 97 – Administrative Regulations
Article 01: Mining reclamation: Applicability;
Article 02: Reclamation Performance Standards: Land reclamation performance standards; disposal of structures and debris; underground mines; heap leach operations; acid rock drainage; material sites
Article 03: Reclamation plan: reclamation plan approval; reclamation plans; plan amendments; record keeping; transfer of interest
Article 04: Reclamation bonding: bonding instruments; acreage to be bonded; bonding amounts; bonding pool; liability exceeding bond; release and refund of bond; assignment of bonds
Article 05: Exemptions of small operations
Article 06: Violations and penalties: Failure to file reclamation statement; violations of plans; risk assessment fee.
Article 07: Cooperative management agreements
Article 08: General provisions

15 AAC 65 – Administrative regulations: Mining license tax
Article 01: Licensing and filing requirements
Article 02: Computation of tax

Article 03: Exemption from taxes
Article 04: General provisions
Article 08: Mining production royalty

Plans of Operation Approval. This approval authorizes the plan of operations for non-coal mines, and is required for all mining projects on state land. DNR's Division of Mining, Land and Water/Mining Section issues this approval.

Reclamation Plan and Bond Approval. This approval authorizes the reclamation plan and bond cost estimate for non-coal mines on all lands in Alaska. DNR's Division of Mining, Land and Water/Mining Section issues this approval.

Right-of-Way for Access and Utilities. For projects on state land, a right-of-way (ROW) is required for infrastructure such as roads, pipelines, and powerlines. Other access authorizations may be required for non-State lands as well. DNR's Division of Mining, Land and Water/Lands Section issues this approval. If pipelines for fuel or natural gas ROWs are part of the project, these are reviewed and permitted through the State Pipeline Coordinator's Office.

Millsite Lease. A Millsite Lease is required for mine project facilities on State land. This lease gives the proponent a surface property right for the facilities. DNR's Division of Mining, Land and Water/Mining Section issues this lease.

Permit to Appropriate Water. Appropriation of a significant amount of water on other than a temporary basis requires authorization by a Water Rights Permit. A Water Right is a property right for the use of public surface and subsurface waters. Temporary uses of a significant volume of water, for up to 5 years, require a Temporary Water Use Permit. DNR's Division of Mining, Land and Water issues this permit.

Dam Safety Certification. A Certificate of Approval to Construct and a Certificate of Approval to Operate must be obtained for any significant dam in the State. These certificates involve a detailed engineering review of the dam's design and operation. The certificates are issued by DNR's Division of Mining, Land and Water/Dam Safety Unit.

Upland or Tideland Leases. A project may require a property interest in lands not adjacent to the minesite itself. For use of state-owned tidelands, a tideland lease is issued for marine facilities such as docks. Likewise, for use of state-owned uplands, a lease is required for facilities such as transportation and staging facilities. DNR's Division of Mining, Land and Water/Lands Section issues these leases.

Material Sale. If materials such as sand, gravel, or rock, are needed from state lands off the millsite lease, then a separate material sale must be issued. DNR's Division of Mining, Land and Water/Lands Section issues this sale.

Winter Travel Permits. Cross-country travel on snow or ice roads is commonly used to stage equipment and supplies for a project. A permit from Division of Mining, Land and Water/Lands Section must be obtained before constructing such roads on state land, or conducting overland travel. Crossings of fish-bearing water bodies by snow or ice roads will require authorization by Alaska Department of Fish & Game Habitat prior to construction.

Cultural Resource Protection. Clearance must be obtained from the State to ensure that a project will not significantly impact cultural and archaeological resources. If significant disturbance cannot be avoided, then a compensation strategy is developed. Cultural resource clearances are obtained from DNR's State Historic Preservation Office.