



## TRUSTEES FOR ALASKA

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VIA EMAIL AND HAND DELIVERY

November 15, 2011

Commissioner Dan Sullivan  
Alaska Department of Natural Resources  
550 West 7<sup>th</sup> Avenue, Suite 1400  
Anchorage, AK 99501-3650

*Re: Request for Reconsideration; October 24, 2011, Decision on Petition Requesting that the Chuitna River Watershed Be Determined Lands Unsuitable for Surface Coal Mining*

Dear Commissioner Sullivan:

On June 14, 2007, Petitioners Chuitna Citizens Coalition, Cook Inletkeeper, and several others submitted a petition requesting that DNR designate the Chuitna River watershed as unsuitable for surface coal mining on the ground, among others, that reclamation of the area following surface coal mining would be technologically infeasible. On July 16, 2007, then-Commissioner Irwin issued a “Decision on Petition Requesting that the Chuitna River Watershed Be Determined Lands Unsuitable for Surface Coal Mining,” denying the petition on three grounds: (1) the lands within PacRim Coal’s Logical Mining Unit 1 (“LMU-1”) are “expressly exempt and ineligible for designation under the petition process” because of the 1987-88 permit proceedings concerning the Diamond Chuitna Coal Project; (2) the petition is incomplete; and (3) the petition is without merit. DNR never considered the substantive grounds raised by petitioners. Petitioners filed a request for reconsideration, which DNR granted. A new decision was issued on February 14, 2008, which also failed to consider the merits of the petition.

On January 21, 2010, Trustees for Alaska submitted a Petition to Designate the Streambeds of Anadromous Water Bodies and Riparian Areas within the Chuit River Watershed as Unsuitable for Surface Coal Mining (“Petition”) on behalf of Chuitna Citizens Coalition and Cook Inletkeeper (“Petitioners”). The Petition requested a smaller area than the original petition to be designated as unsuitable for surface coal mining and provided substantial new information supporting the request to designate certain lands as unsuitable for coal mining. This request was based on the mandatory requirements of ASCMCRA, requiring designation when reclamation is not technologically feasible, and also on the discretionary provisions of ASCMCRA, which allow DNR to designate lands as unsuitable for surface coal mining when mining would destroy habitat or adversely impact fragile lands resulting in significant damage to important cultural, scientific, and aesthetic values and natural systems within a watershed.

On October 24, 2011, you issued a decision on the Petition (“Decision”), denying the Petition on both mandatory and discretionary grounds. Your decision was based on the administrative record, which you stated “demonstrates that reclamation throughout the Chuitna watershed is, in fact, technologically feasible.” October 24, 2011, Decision at 6.

Petitioners now seek reconsideration of your Decision as provided for in 11 AAC 02. We respectfully request that you reconsider your decision for the reasons listed below. Consistent with your November 11, 2011 letter granting Petitioners’ request for additional time, additional written documents in support of our request will be submitted on or before November 22, 2011.

**Basis Upon Which Reconsideration is Requested and Disputed Material Facts**

1. The decision erroneously concludes that a legal requirement or permit condition for compliance with performance standards presumes the technological ability to comply with the performance standards or permit conditions.
2. The decision erroneously concludes that the dismissal of the litigation over the previous petition was a dismissal on the merits, operating to bar future litigation on a subsequent petition.
3. The decision erroneously relies on prior permitting processes to substitute for the application of the correct legal standard for review for this Petition.
4. The decision erroneously relies on a prior, now defunct project application and litigation over permitting that project to conclude that reclamation of the streambeds and riparian areas in the Chuitna Watershed is technologically feasible.
5. The decision erroneously relies on the 1990 FEIS prepared for a former application for surface mining.
6. The decision erroneously relies on a 1990 Alaska Supreme Court decision.
7. The decision improperly relies on ASCMRA policy goals balancing U.S. energy needs and environmental protection. Nothing in the record supports any conclusion other than that coal mined from the Chuitna watershed will be sold in foreign markets.
8. The decision improperly relies on general policy goals to fulfill DNR’s obligation to make a factual, objective inquiry into, and decision about, feasibility of reclamation and the harm that is likely to occur to food supplies and natural systems in the watershed.
9. The decision improperly relies on the desire of some landowners and leaseholders in the Chuitna watershed to strip mine for coal.
10. The decision erroneously relies on the financial interests of the intervenors and potential adverse financial impacts to the intervenors to reject the petition.
11. The record does not support the conclusion that an unsuitable lands designation for stream beds and the associated riparian area would render all mining in the area uneconomical.
12. The decision improperly relies on a conclusion that local residents would benefit from coal strip mining in the watershed, ignoring the record evidence that local residents have been, and continue to be, almost unanimously in favor of the Petition.
13. The decision erroneously concludes that because all issues regarding reclamation, water quality, wetlands, the hydrological balance and fish and wildlife habitat can be addressed during permitting of any proposed strip mine, further consideration of unsuitability of the lands for surface coal mining based on these factors is not required.

14. The decision is not adequately supported by the administrative record, including the database and inventory system.
15. The decision fails to adequately consider the scientific review and supporting information provided by Margaret Palmer, Lance Trasky, Mark Wipfli, Tom Myers and Kendra Zamzow.
16. The decision erroneously rejects all applicability of three of reports listed in #15 above, Palmer, Trasky and Wipfli, because they are partially based on project information from PacRim.
17. The decision erroneously rejects the reclamation information submitted as unsupported by competent and scientifically sound data.
18. The decision erroneously relies on project and baseline information for PacRim's project that is not part of the administrative record.
19. The decision erroneously concludes that reclamation is feasible based on placer mining reclamation projects, and other reclamation projects that are not similar to the scale and depth of coal strip mining that is foreseeable in the Chuitna watershed.
20. The decision erroneously rejected the possibility of finding any kind of surface coal mining unsuitable in the petition area.
21. The decision erroneously relied on Article VIII of the Alaska Constitution as a justification for denying the Petition.
22. The decision fails to undertake an independent, objective review of reclamation feasibility in the petition area.
23. The decision improperly assumes that a post-mining land use determination for a specific project must be made before DNR can determine whether reclamation is technologically feasible.
24. The decision erroneously concludes that premining land use is not the proper standard for determination of the feasibility of reclamation for this petition area.
25. The decision concedes standing while also erroneously implying that petitioners do not have standing for the entire petition area. Petitioners request reconsideration of this standing determination to the extent DNR meant to preserve some kind of challenge to petitioners standing. Petitioners have standing under Alaska law to request designation of all the lands in the petition area.
26. The decision erroneously substitutes DNR's authority to deny future permits for the analysis required of the technological feasibility of reclamation.
27. The decision erroneously relies on legislative history about "adverse impacts" to reject the petition. The inevitability of adverse impacts is relevant to the determination of whether lands are unsuitable for surface coal mining.
28. The decision fails to consider whether achieving performance standards is feasible.
29. The decision erroneously relies on unsupported statements by PacRim to conclude that reclamation can be achieved in the petition area.
30. The decision erroneously relies on the ability to predict impacts as proof of the ability to achieve reclamation.
31. The record does not support the conclusion that reclamation of surface coal mining in the Chuitna watershed is technologically feasible.
32. The decision erroneously relies on a letter from the Alaska Department of Fish and Game, which in turn erroneously concludes that feasibility of reclamation cannot be determined until there is specific project.

33. The decision erroneously concludes that groundwater recharge impacts can be prevented.
34. The decision erroneously concludes that aquatic productivity can be restored.
35. The decision erroneously relies on a list of examples of “Successful Stream and Wetlands Reclamation Projects,” that do not demonstrate the technological feasibility of reclamation for the petition area from surface coal mining.
36. The decision erroneously concludes that there is insufficient evidence to support the petition.

### **Conclusion and Remedy Requested**

Based on the foregoing, Petitioners request that you reconsider and rescind your determinations that the streambeds of anadromous water bodies and riparian areas within the Chuitna River Watershed as unsuitable for surface coal mining and should not be designated as unsuitable for surface coal mining. Petitioners request that you reconsider both your determination that the entire area requested should be set aside as unsuitable for all surface coal mining activity, and your determination in the alternative that the Petition should not be granted in part.

Any notice or decision concerning this request should be mailed and sent electronically to me at Trustees for Alaska, 1026 W. 4<sup>th</sup> Avenue, Suite 201, Anchorage, AK 99501 and [vbrown@trustees.org](mailto:vbrown@trustees.org). You can also reach me at 907-276-4244 x 114.

Respectfully submitted,



Valerie Brown  
Counsel for Petitioners  
TRUSTEES FOR ALASKA

cc: Ed Fogels, DNR  
Russell Kirkham, DNR  
Judy & Lawrence Heilman, Chuitna Citizens Coalition  
Bob Shavelson, Cook Inletkeeper