



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Natural Resources

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VIA EMAIL

SUBJECT: Decision on Appeals of Division of Mining, Land and Water Decision on LAS 27436

To Whom It May Concern:

This letter is the Department of Natural Resources ("DNR") Commissioner's Decision on the Appeals of the DNR Division of Mining, Land, and Water's Decision to Grant a Reservation of Water to Chuitna Citizens Coalition, Inc. for the Lower Reach of Middle Creek/Stream 2003 (LAS 27436).

Decision at Issue: On October 6, 2015, the DNR Division of Mining, Land and Water ("DMLW" or "Division"), Water Resources Section, issued its "Findings of Fact, Conclusions of Law, and Decision on Applications by the Chuitna Citizens Coalition, Inc. for the Reservation of Water Under AS 46.15, the Alaska Water Use Act" ("Decision"). In its Decision, DMLW decided it would issue a certificate of reservation of water to Chuitna Citizens Coalition, Inc. ("CCC") for Middle Creek/Stream 2003 - Lower

Reach, LAS 27436. The Decision also denied CCC's applications for reservations of water for the Main Reach of Stream 2003 (LAS 27340) and for the Middle Reach of Stream 2003 (LAS 27347) and closed those two files. Only the decision to *issue* a certificate of reservation for the Lower Reach is at issue in the appeals, and nothing herein affects DMLW's decision to deny certificates of reservation for the Middle and Main Reaches, which denials were not appealed and are final.

Appeals Received: On October 26, 2015, the Department of Natural Resources Commissioner's Office received ten appeals of the Decision. The appeals were received from PacRim Coal LP ("PacRim"), the Alaska Mental Health Trust Land Office ("AMHTLO"), the Alaska Miners Association, the Council of Alaska Producers, the Resource Development Council, the Pacific Seafood Processors Association, the Alaska Chamber, Howard J. Grey, Borell Consulting Services LLC, and the Alaska Oil and Gas Association.

Each party challenged only the Division's Decision to grant the Instream Flow Reservation ("IFR") for the Lower Reach (LAS 27336). No party appealed the Decision to deny IFRs for the Middle and Main reaches and those denials are final.

Upon receipt of the appeals, the Commissioner's office provided acknowledgement letters to each of the parties. These letters stated that the appeals were timely received.¹ In addition, the letters outlined that, pursuant to 11 AAC 02.060(a), receipt of the appeal automatically stays the Division's October 6, 2015 decision while the appeal is pending.² In this matter, only that part of the decision that has been appealed – to issue a Certificate of Reservation of Water for LAS 27436 – is stayed.

The Commissioner's office also determined that PacRim and the AMHTLO had standing to appeal the Decision.³ For the other eight parties, the Commissioner's office requested additional information to determine if each party had standing. In February 2016, five of the parties responded to the request.

In addition, PacRim requested an oral hearing on the matter, which was denied. On February 13, 2016, PacRim filed a motion requesting reconsideration of DNR's decision to deny a hearing. On October 20, 2016, CCC provided a response to the appeals. CCC also filed a request to lift the automatic stay. AMHTLO and PacRim filed responses to CCC's request on November 14, 2016.

On May 15, 2017, while the appeals were under consideration, PacRim provided notice to DNR that it was withdrawing applications filed under the Alaska Surface Coal Mine Control and Reclamation Act (ASCMCRA) (see attachment 1). The applications withdrawn included:

1. Application for Permit dated December 21, 2012 with numerous revisions (File #S0701) referred to as the Chuitna Coal Project Facilities Permit on lands in the Kenai Peninsula Borough;
2. Application for Permit dated December of 2014 with numerous revisions (File #S0702) referred to as Chuitna Coal Project Mine Permit on lands in the Kenai Peninsula Borough.

¹ As provided by 11 AAC 02.040(a), "To be timely filed, an appeal... must be received by the commissioner's office within 20 calendar days after issuance of the decision, as determined under (c) or (d) of this section..."

² 11 AAC 02.060(a) provides in pertinent part, "Except as provided in (c) and (d) of this section, timely appealing ... a decision in accordance with this chapter automatically stays the decision during the commissioner's consideration of the appeal. . ."

³ See AS 44.37.011(b); 11 AAC 02; 11 AAC 93.300.

Also on May 15, 2017, PacRim provided DNR with “Notice of Termination of Agreement and Withdrawal of Project Permit Applications and Requests” (see attachment 2). PacRim withdrew the following applications and requests that had been filed with the State of Alaska:

1. Application for Tidelands Lease, ADL # 230016, submitted in 2006, revised July 9, 2013, covering lands in Kenai Peninsula Borough;
2. Forty four (44) applications for water rights submitted by cover letters dated November 11, 2013, and June 13, 2014, covering waterbodies in the Chuit River Watershed in the Kenai Peninsula Borough, as listed on Attachment “A” to the May 15 letter;
3. Application for permit coverage under Title 16 for protection of fish habitat, managed by the Alaska Department of Fish and Game, filed March 16, 2016, with subsequent revisions submitted (no permit number assigned by the agency);
4. Request for Site Specific Criteria with the Alaska Department of Environmental Conservation (ADEC), beginning with a study plan submitted in April 2009 and numerous supporting documents submitted in support of the request;
5. Application for a water discharge permit under the APDES program managed by the ADEC, filed October 15, 2014, with numerous revisions subsequently submitted (no permit number assigned by the agency).

The withdrawn applications included applications for water rights over portions of Middle Creek/Stream 2003. Additionally, on May 15, 2017, PacRim signed a Release of Coal Leases, releasing its leases on Alaska Mental Health Trust Authority land in the vicinity of and including portions of the stream at issue in these appeals (see attachment 3). The Release was recorded the next day.

On May 24, 2017, PacRim also withdrew its request for reconsideration of the Commissioner’s denial of its request for hearing. However, it did not withdraw its appeal of the Decision.

Commissioner’s Decision on the Appeals: In reviewing CCC’s applications, the Division assumed that “PacRim’s coal mine can be fully permitted for development, and that development will occur in the foreseeable future.”⁴ The Division emphasized throughout its analysis under the applicable statutes and regulations that it relied on that assumption, in addition to the expectation that PacRim’s competing water right applications would not be withdrawn.⁵ Simply put, the Division’s conclusions and determinations were made “with the assumption that the PacRim project will go forward.”⁶ However, that is no longer the case.

In light of the aforementioned changes that have occurred with the PacRim project, and because those changes affect the factual assumptions that served as a basis for the Division’s decision, I am remanding this matter back to the Division for further review and consideration. The Department shall make new findings of fact and conclusions of law, and issue a new decision regarding CCC’s application for a reservation of water on the Lower Reach of Middle Creek/Stream 2003, taking into account the changed circumstances.

This decision does not address the issue of standing of any appellants. Because I am remanding this matter back to the division for further consideration, and because the Department will issue a new

⁴ See Decision at 22.

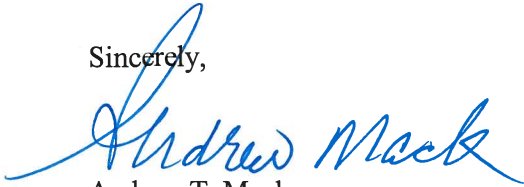
⁵ See *id.* at 21-25, 32, 34, 37-43.

⁶ See *id.* at 24, 39, 40.

decision, the question of appellants' current standing and CCC's request to lift the automatic stay under 11 AAC 02.060 are moot.

No Appeal to Court: Because this decision is a remand for additional review and action within the Department of Natural Resources, this Commissioner's Decision is not a final administrative order or final decision of the department and is not appealable to the Superior Court.

Sincerely,



Andrew T. Mack
Commissioner
Department of Natural Resources

cc: Chuitna Citizens Coalition, Katherine Strong, Trustees for Alaska, kstrong@trustees.org
Chuitna Citizens Coalition, c/o Bob Shavelson at bob@inletkeeper.org
Brent W. Goodrum, Director, DMLW
David W. Schade, Chief, Water Resources Section, DMLW