

**ALASKA STATE LEGISLATURE
JOINT MEETING
HOUSE RESOURCES STANDING COMMITTEE
SENATE RESOURCES STANDING COMMITTEE
August 31, 2006
1:06 p.m.**

MEMBERS PRESENT

HOUSE RESOURCES

Representative Ralph Samuels, Co-Chair
Representative Jay Ramras, Co-Chair
Representative Paul Seaton
Representative Kurt Olson
Representative Carl Gatto
Representative Gabrielle LeDoux
Representative Harry Crawford

SENATE RESOURCES

Senator Tom Wagoner, Chair
Senator Ralph Seekins, Vice Chair
Senator Fred Dyson
Senator Bert Stedman
Senator Kim Elton

MEMBERS ABSENT

HOUSE RESOURCES

Representative Jim Elkins
Representative Mary Kapsner

SENATE RESOURCES

Senator Ben Stevens
Senator Albert Kookesh

OTHER LEGISLATORS PRESENT

Representative David Guttenberg

COMMITTEE CALENDAR

KENSINGTON MINE ISSUES

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

Presenters were:

REPRESENTATIVE BRUCE WEYHRAUCH
Alaska State Legislature

MIKE MENGE, Commissioner
Department of Natural Resources (DNR)

ED FOGELS, Acting Deputy Commissioner
Anchorage Office
Office of the Commissioner
Department of Natural Resources (DNR)

KURT FREDRIKSSON, Commissioner
Department of Environmental Conservation (DEC)

LYNN TOMICH KENT, Director
Division of Water
Department of Environmental Conservation (DEC)

CRAIG TILLERY, Deputy Attorney General (AG)
Civil Division
Department of Law (DOL)

HOWARD GREY
Alaska Miner's Association

RUSSELL HEATH, Executive Director
Southeast Alaska Conservation Council (SEACC)

TIM ARNOLD, Vice President/General Manager
Coeur Alaska, Inc.

ACTION NARRATIVE

CHAIR THOMAS WAGONER called the joint meeting of the House and Senate Resources Standing Committees to order at [1:06:27 PM](#). Representatives Samuels, Ramras, Seaton (via teleconference), Gatto, and LeDoux, and Senators Wagoner, Dyson, Stedman (via teleconference), and Elton (via teleconference) were present at the call to order. Representatives Olson (via teleconference)

and Crawford, and Senator Seekins arrived as the meeting was in progress.

[Chair Wagoner handed the gavel over to Co-Chair Samuels.]

KENSINGTON MINE ISSUES

1:08:02 PM

CO-CHAIR SAMUELS announced that the only order of business was the hearing on the Kensington Mine Issues.

1:08:40 PM

REPRESENTATIVE BRUCE WEYHRAUCH, Alaska State Legislature, stated the following:

I'm calling in to voice our district's strong support for Kensington Mine and the environmental stewardship it has shown in its permitting process in the work to date on this mine.

1:10:11 PM

MIKE MENGE, Commissioner, Department of Natural Resources (DNR), noted that years ago he worked for the Department of Environmental Conservation (DEC) pertaining to environmental quality, and, during that service, he had "a passing association with the permitting process." He stated that [the Kensington Mine] project has been under the regulator's scrutiny since 1990. Hundreds of studies on the issue have been completed, and every issue has endured major scrutiny. He said there comes a point where a fundamental decision must be made as to whether the state will support mining or not. He said the state has the most rigorous permitting program in the nation; Alaska's large project mining plan coordinates with the federal government's. He said at the end of the stringent process, when the permit writers have agreed on a plan, the chances of there being a problem have been reduced "as far as humanly possible." Commissioner Menge related that quality individuals have been involved on all sides of [the Kensington Mine] project, and he expressed pride in the decision that was reached and the role that DNR played in facilitating the permit process. He said "these folks" don't support anything that is unethical, and he asked the committee to keep that in mind while listening to the ensuing testimony.

1:14:20 PM

ED FOGELS, Acting Deputy Commissioner, Anchorage Office, Office of the Commissioner, Department of Natural Resources (DNR), noted that before he served in his present position, he was the state's mining coordinator and the main agency official on the Kensington Mine project during the three-year permitting effort. He offered a PowerPoint presentation on the permitting aspect of the Kensington Mine [hard copy handout included in the committee packet]. The second page of the handout shows an aerial photograph of the Berner's Bay area, Slate Creek Cove - the proposed dock site, and the proposed tailings disposal area at Lower Slate Lake. The next page, he noted, shows a closer view of Lower Slate Lake. He explained that a dam would be constructed across the outlet of the lake. After ore was extracted from the ore body, the mining operation would process the ore, and the tailings - the waste stream from the process - would be pumped back under ground and backfilled under the mine. However, not all the tailings will fit underground, so the plan is to pump the remainder into Lower Slate Lake. As the tailings settle to the bottom of the lake, the level of the lake would rise, and ultimately, behind the dam there would be a bigger lake with a bottom full of tailings.

1:16:56 PM

MR. FOGELS turned to the next page of the PowerPoint, which is titled, "State Agencies Large Mine Permitting Team," and which lists the following agencies: DNR, DEC, Alaska Department of Fish & Game (ADF&G), the Department of Transportation & Public Facilities (DOT&PF), the Department of Commerce, Community and Economic Development (DCCED), and the Department of Law (DOL). He named Tom Crafford as being the State Mining Coordinator, noting that that is a position that he himself currently held. He said the permitting team is experienced; many have been members for over 15 years. Mr. Fogels turned to the next page of the handout, which shows the major regulatory requirements. The following permits were issued through DNR: reclamation plan approval and bonding; Title 41 fish passage permit; water rights; right of way; dam safety certification; tidelands leases for dock facilities at Slate Cove and Cascade Point; and the coastal zone consistency determination. He listed the permits issued by DEC, which are: Section 401 certification of the U.S. Army Corps of Engineers (USACE) wetlands; Section 401 Certification of the U.S. Environmental Protection Agency's (EPA's) National Pollutant Discharge Elimination System (NPDES) permit; sewage treatment system approval; and air quality. In

response to a question from Co-Chair Samuels, he explained that USACE will issue the "404" wetlands permit and, by law, DEC has to certify that permit; it's a state concurrence for the wetlands permit.

[1:19:32 PM](#)

MR. FOGELS, in response to a question from Representative Gatto, explained that a wetlands permit allows the permittee to fill wetlands. He said:

Each time ... [USACE] goes through the process, they'll make a determination as to what the environmental impacts are of filling that wetland, and then in some cases they may require ... mitigation, and that might be replacement wetlands somewhere else, that might be a monetary contribution somewhere, so it ... varies case by case.

[1:20:02 PM](#)

REPRESENTATIVE LeDOUX asked what contribution or mitigation was required in the case of the Kensington Mine.

[1:20:16 PM](#)

MR. FOGELS answered he is not sure.

[1:20:27 PM](#)

MR. FOGELS continued to the next slide in the handout, which shows [an elevation] map of Lower Slate Lake. He explained that the heavy black line shows what the contour of the lake is projected to be at closure, and the straight line at the bottom of that contour is where the dam would be. He noted that the contour lines show that Lower Slater Lake is very deep, and light does not penetrate very far into it. Because of that, he said, there is very little productive habitat in the lake. Part of the reclamation plan is to create more productive habitat in the lake, because as the water line rises, there will be more shallow areas.

[1:22:02 PM](#)

MR. FOGELS outlined the reclamation plan approval, as shown on the next slide in the handout. He said all mines must have a plan, which must be approved by DNR. As part of the plan, he

relayed, the mines must post a bond of financial assurance to ensure that the state or the federal government can reclaim the property if the mining company "can't do it for some reason." In response to a question from Representative LeDoux, he said Alaska Statute allows the state to accept bonds in various forms. Some examples, he said, are: maturity bonds that are managed through a third-party company, gold, and letters of credit. The latter, he noted, is the most common form of financial assurance. He offered further details.

[1:23:32 PM](#)

CHAIR WAGONER asked if there have been any cases in which letters of credit have been issued to the state and there has been a default.

[1:23:47 PM](#)

MR. FOGELS recalled one example having to do with the Illinois Creek Mine, in which the Dakota Mining Company went bankrupt and the state had to call in a letter of credit. He said unfortunately the bond was established too long ago and, thus, was too inadequate to "do the job." He noted that the story turned out okay, because the state found another way to reclaim the mine, but it learned a valuable lesson about paying attention to the amount of the bond. He directed attention to the next slide in the handout, which shows how financial assurance, or bonding, works. First, he said, a detailed engineering analysis is done to find out what the cost of reclaiming the project would be. The mining company provides information to assist in that analysis.

[1:25:45 PM](#)

MR. FOGELS said the bond for the Kensington Mine project includes capping of the tailings, if needed, which he said is significant. He said a cap of organic materials would enable the recolonization of the lake. Mr. Fogels said the bond is periodically recalculated throughout the life of the mine, which allows the bond to be adjusted for changing prices, such as the rising of fuel prices. He said the Kensington bond is approximately \$7.3 million, and it is in the form of a letter of credit.

[1:26:39 PM](#)

MR. FOGELS directed attention to the next slide regarding the Title 41 fish habitat/fish passage permit. This permit is required any time work has to be done in fish-bearing waters. He noted that there are three permits along Johnson Creek; however, the key permit is the Lower Slate Lakes Tailings Impoundment, which requires that the lake be reclaimed. He read a paragraph in the permit as follows:

The tailings in Lower Slate Lake are expected to have very low toxicity. Following reclamation, the larger and shallower lake is expected to provide habitat for macroinvertebrates and forage fish that will support a population of Dolly Varden [and] char. If monitoring shows the tailings are not suitable for colonization, the tailings will be capped with clean material. We anticipate the reclaimed area will provide overwintering, spawning, and rearing habitat for Dolly Varden [and] char.

[1:27:51 PM](#)

SENATOR DYSON asked if the rocks that will be put in the lake will be "very like the native rocks that are in and around the lake now."

MR. FOGELS answered yes.

SENATOR DYSON noted from the prepared materials that cyanide and other chemicals would not be used in the refining process. He asked, "Will there be anything in the process that would increase the toxicity of those rocks any [differently] than the native rock in the area?"

[1:28:33 PM](#)

MR. FOGELS confirmed that cyanide will not be used at the Kensington Mine site; however, he said there will be chemicals used to process the ore. He said the ore is ground finely into a dust-like consistency, mixed with water, and then mixed with flotation rations. He continued:

Essentially, they form like soap bubbles, and they bubble up ... this mixture of ore and water, and the bubbles will pick up certain minerals. And you can design the chemistry of the flotation rations to pick up the minerals that ... you want it to trap. They'll float to the top, get scrapped off, and what settle

down, that's the waste product and the tailing. So, these flotation rations are chemicals, and they are used in the process. They're nowhere near as toxic as cyanide is. They can be toxic in large quantities, but they do biodegrade, and all the projections show that once they're put in the lake, they'll be entrained within the tailings or biodegrade in the water above the tailings. It should eventually return to clean water standards.

1:29:50 PM

REPRESENTATIVE LeDOUX asked if other material is put over the tailings to ensure that the tailings don't leach into the water.

1:30:12 PM

MR. FOGELS replied yes. He explained that the tailings "settle out" and form "a discreet layer at the bottom of the lake," at which point, if needed, another organic layer can be added that would settle down and completely cover the tailings. He estimated that last layer would be about six inches deep.

1:30:24 PM

REPRESENTATIVE LeDOUX asked what guarantees that the tailings don't "get through the capping."

1:30:39 PM

MR. FOGELS responded that the tailings form a solid layer. He said, "The material that is going to be placed on top is likely to be some kind of ... organic material - ... ground up top soil material from the area - so it will form a layer of, essentially, mud. The tailings should not mobilize; they'll be deep enough where wave action won't really pick things up. And so, the projections are that it should settle out quite nicely."

1:31:16 PM

MR. FOGELS continued with his presentation, pointing to the slide in the handout relating to dam safety certification. He said the dam must be designed to certain standards, which include seismic standards. Moreover, there has to be financial assurance for the long-term care and maintenance of the dam. He brought attention to the next slide, which shows a cross section drawing of the Lower Slate Lake tailings, and he emphasized the

comprehensive technological engineering review that is used in the process of creating the dam.

1:32:18 PM

REPRESENTATIVE SEATON said recently the Fort Knox Mine operation has changed its permit from using the aforementioned operation to that using a "heap-leach cyanide operation." He asked what the potential is for the Kensington Mine to decide it is more economical to use this method.

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MR. FOGELS suggested that a mining company representative could better explain the nature of the ore body and the mining operation. Notwithstanding that, he shared his view that a heap-leach operation is more suited to a large, open-pit operation such as Fort Knox than it would be to [the Kensington Mine]. Irrespective of that fact, he said, if the Kensington Mine were to decide it wanted to change its mine plan so significantly, it would need a whole new set of reviews and most likely an entirely new environmental impact statement done on the mine, which would take a number of years to do.

MR. FOGELS turned to the next slide, which lists the other federal agencies involved in the review as follows: the U.S. Forest Service, which is the lead agency; the U.S. Environmental Protection Agency; USACE; the U.S. Fish and Wildlife Service; and the National Marine Fisheries Service. He brought attention to the next slide, which shows the major federal regulatory requirements, and he highlighted the first two on the list: The first is the U.S. EPA Section 402 NPDES Water Discharge Permit, related to any water leaving the lake and going over the dam into the creek below. Mr. Fogels said there is a treatment plant proposed for that water, which would monitor and test the water so that it meets water standards required by law. The second is the USACE Section 404 Dredge and Fill Permit, which is the wetlands permit subject to current litigation. He explained that the two key federal permits triggered the National Environmental Policy Act, which required the environmental impact statement, and that was the driver behind the most recent process that resulted in a recommendation of the Lower Slate Lake tailing facility as the preferred alternative.

MR. FOGELS stated that "the overall Kensington process" began in 1990, with the original application, and the first EIS was completed in 1992. The company then revised its mine plan and

submitted another operation plan, for which another EIS was done and completed in 1997.

1:35:45 PM

CO-CHAIR SAMUELS asked if another EIS would have to be done in the event that SEACC is successful in its court challenge and tailings are not allowed in the lake and instead must go back to the dry-stack. In other words, he asked, "Once you've gotten the second one, is the first one no longer valid?"

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MR. FOGELS said the answer to that question is complicated. He explained that the company changed its entire mine plan dramatically from that of the last EIS and would have to significantly change the plan again to utilize the dry-stack facility.

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CO-CHAIR SAMUELS asked the following question of Mr. Fogels, saying that he would ultimately like those representing the Department of Law to answer the question as well:

... If capital expenditures had been made on one side of the mountain because the permits were issued in good faith and everybody operated in good faith, and then it is turned around and thrown out by the federal courts, is there liability that either the state has or [USACE has] ... if that capital expenditure now has to be moved?

MR. FOGELS responded that he cannot answer the question and, thus, he deferred to the Department of Law. Continuing with his presentation, he brought attention to the PowerPoint slide showing the "Kensington Process," which notes that the current application was submitted in November 2001, followed by a public process in the summer of 2004, and a final EIS and record of decision (ROD) issued in December 2004. He said the state permits were issued in May 2005, and the federal permits were issued in June and July 2005. The next slide shows a row of binders filled with permit applications and mine studies. He offered his understanding that if all the studies that were done in the previous processes were added together, the total would be over 900.

MR. FOGELS directed attention to the next two slides, which show aerial photographs of the Red Dog and Fort Knox Mines. He said those mines are relevant to what is going on with the Kensington Mine currently. He said the Red Dog Mine pumps its tailings into Red Dog Creek. He continued:

I show this slide just to point out that I think one of the fundamental concepts of this litigation is that these tailings should be permitted under EPA's 402 process as a clean water discharge rather than as wetlands fill, which would prohibit, basically, putting those tailings in any water bodies or wetlands. And so, I think if you draw the litigation out to its logical conclusion, and if it goes in favor of SEACC, I doubt very seriously that Red Dog Mine would have been permissible.

MR. FOGELS, in response to a question from Co-Chair Samuels, said he does not think such a determination by the 9th Circuit Court would invalidate the Red Dog Mine's current permit; however, he said he is not 100 percent certain of that answer.

[1:40:09 PM](#)

REPRESENTATIVE LeDOUX asked, "What effect would this have on [the] Pebble [Mine]?"

[1:40:26 PM](#)

MR. FOGELS answered that the Pebble Mine, and any other future mine, could potentially have a much more difficult time getting permitted. He proffered that it would be difficult to build a mine in Alaska without putting tailings in wetlands. In response to a follow-up question from Representative LeDoux, he specified that it is his opinion that it couldn't be done.

MR. FOGELS, in response to a question from Co-Chair Samuels, clarified, "If you had to put tailings in wetlands, I think if you follow the reasoning behind this lawsuit, you could reach the conclusion that you shouldn't be putting mine tailings in wetlands - period."

[1:41:40 PM](#)

REPRESENTATIVE LeDOUX asked for a definition of "wetlands."

[1:41:57 PM](#)

MR. FOGELS answered that under the Clean Water Act, wetlands are defined broadly as including: lakes, streams, bogs, and swamps. He said there is a definition as to the type of soils and vegetation. Mr. Fogels concluded by emphasizing that there currently is a strong process between the state and the federal government that considers projects individually on their own merits. He said tailings from a mining project vary; every single mine has a different type of tailing stream that is produced. The Red Dog Mine, for example, has reactive tailings that have to be treated carefully, while other mines - Kensington being one - produce benign tailings that are not reactive at all. He indicated the importance of studying the tailings from each mine to discern their character, determining the type of wetland involved, and analyzing the environmental impacts. He relayed that agencies need to have the discretion to base their decisions on those factors, and he said it is the state's opinion that that process should happen on a project-by-project basis.

[1:43:37 PM](#)

SENATOR ELTON asked for a definition of wetland fill, mine waste, and mine tailings.

[1:44:02 PM](#)

MR. FOGELS stated that mine waste can include a number of different products from a mine, including development rock from the mine adit or, in the case of an open pit mine, the overburden that is on top of the ore body. The tailings, he explained, are the waste product that come out of the milling process and are subject to some kind of treatment, for example, cyanide or a floatation process. He said it is sometimes hard to handle, to get it to stack up - an expensive process. He said waste products essentially are either development rock or tailings, and both, in certain circumstances, have to be handled with care. Mr. Fogels said wetland fill is defined in federal law and statute and the current definition lists mine tailings as being included in possible fill product.

SENATOR ELTON remarked:

There has been an evolution over a long period of time. Just to let the members know, ... the original proposal for tailings was to go straight into Lynn

Canal off the beach. The second was the dry-stacking, and then Slate Lake obviously is the third.

1:47:01 PM

KURT FREDRIKSSON, Commissioner, Department of Environmental Conservation (DEC), said the department has issued 401 certification related to the Kensington Mine project. He directed attention to page 3 of the DEC handout, describing the information as useful in guiding DEC's review of the project. He explained that DEC's permit authority is exercised in conjunction with the federal agencies, in this case primarily with USACE, under the 404 fill permit, and with EPA, under 402 of the Clean Water Act. The latter, he said, relates to the discharge off the dam into the lake creek. He said the issue with DEC is a question of where the point of compliance occurs related to water quality standards. The federal government regulates the activity and DEC undertakes 401 permits for both the federal 404 and 402 permits.

1:49:37 PM

LYNN TOMICH KENT, Director, Division of Water, Department of Environmental Conservation (DEC), offered further details on the topic of the permits.

The committee took a brief at-ease to address some technical difficulties.

MS. TOMICH KENT continued with her presentation. She relayed that it is the federal permit framework that is at the center of the challenge that has been filed by SEACC and "others." She said the previously mentioned 402 and 404 permits are known by the authorizing sections under the federal Clean Water Act. She noted that a 404 permit is required for the discharge of fill material to waters of the U.S. She said the federal definition for discharge of fill material includes the discharge of almost any substance that has the effect of changing the bottom elevation of a water body. The definition specifically includes the placement of mine tailings. The federal definition for waters of the U.S. is broad and includes: lakes, rivers, streams - including intermittent streams, mud flats, sand flats, wetlands, slues, prairie potholes, wet meadows, "file" lakes or natural ponds, and the territorial sea. Basically, she summarized, the definition includes anything on the surface that is wet. Essentially, she explained, a 404 permit is required "when almost anything is placed into almost any kind of a water

body or a wetland." She said that in the particular case of a mine tailings impoundment, a Section 404 permit is typically required both to fill an area to construct a dam and to "place the tailings within the impoundment that occurs behind the dam."

MS. TOMICH KENT, addressing the Section 402 permit, said it is a permit that is required of a point source discharge, which she described as "things that come out the end of a pipe." The permit covers discharge of any pollutant other than fill that goes to a "surface water body." Section 402 permits are also known as national pollutant discharge elimination system (NPDES) permits, she noted. Federal framework requires a Section 402 NPDES permit for discharge of wastewater from the impoundment into the receding waters. Whether or not a fill material can be placed into a wetland or water body hinges on the results of a series of tests that are established in federal regulation, and those tests are referred to as the 404(b)(1) guidelines. These guidelines require a comparison between the practicable alternatives for tailings disposal and a finding by both USACE and EPA that the permitted alternative is the least environmentally damaging of the practicable alternatives. In the case of the Kensington Mine, she noted, the 404(b)(1) process concluded that the Slate Lake tailings impoundment would be the least environmentally damaging practicable alternative. Thus, USACE issued its Section 404 permit to place the fill, to construct the dam, and to discharge the tailings behind the dam into the impoundment that's resulted there in Lower Slate Lake. She said the EPA then issued the Section 402 permit - the NPDES permit - for the discharge from the dam into Slate Creek down below the dam.

MS. TOMICH KENT stated that the role of DEC in the Clean Water Act permitting of the mine falls under yet another section of the Act, which is Section 401. That section says that the Corp of Engineers cannot issue one of its permits under 404 or 402 unless the state has either waived its opportunity to review those permits or has certified that those permits will comply with state law. In Alaska, she related, DEC is the certification authority for the Clean Water Act permit. The operative state law is the state's water quality standards which are established in state regulation under 18 AAC Chapter 70. The water quality standards are limits on allowable changes in water quality, and are designed to protect a variety of uses of water. She stated that the federal Clean Water Act permits issued under Sections 404 and 402 are reviewed by DEC to determine if there is "reasonable assurance" that the federal permits will result in compliance with Alaska's state water

quality standards. The state may, and often does, include conditions in its certification of those federal permits to provide additional assurance that the state water quality standards are going to be met, she said. In response to a question from Co-Chair Samuels, she confirmed that the state may add additional provisions, but cannot detract from the base minimum standards.

1:56:29 PM

REPRESENTATIVE GATTO asked if there is a federal standard that requires that any water life killed off as a result of the tailings be replaced by a biological equivalent, or if the federal government will say, "Nope, you're going to kill off this group, then you've essentially violated the rules."

1:56:59 PM

MS. TOMICH KENT responded that USACE maintains requirements for mitigation related to wetlands fill projects. She said she does not know the answer to the previously asked question as to whether or not there are mitigation requirements for [the Kensington Mine] project, but she suggested that the question be asked of the representative from the Kensington Mine. She continued with her presentation as follows:

In the case of these major mine developments or other large, new projects, DEC conducts that certification in concert with the overall project permitting team that's managed or supervised by [the] Department of Natural Resources, and it's that coordination that helps ensure that DEC's permits or - in this particular case - our certification of those federal permits, is done on schedule in conjunction with the other activities for the project development.

MS. TOMICH KENT, regarding DEC's role in the Kensington Mine water and water quality permitting, said DEC analyzed both the federal permits and found that with some additional stipulations, those permits would provide Alaska with reasonable assurance that the water quality standards would be met. She reported that DEC certified the Section 404 permit in May 2005, after adding 15 additional conditions to the permit. Furthermore, DEC certified the Section 402 permit in June 2005, after adding 8 conditions. She noted that the Department of Law is prepared to provide an overview of the legal issues in the court case.

1:58:42 PM

SENATOR DYSON requested information from a neutral and objective source that would outline the attributes of select chemicals used in flotation processes, including information regarding how the chemicals degrade in fresh water at various temperatures and what kind of delusion is necessary to ensure no significant biological damage.

1:59:57 PM

MS. TOMICH KENT said she would be happy to provide that information to the committee.

2:00:08 PM

SENATOR DYSON asked how often the capping process on tailings happens.

2:00:25 PM

MS. TOMICH KENT answered that it is a one-time process done at the end of the mine's life.

SENATOR DYSON asked why the capping wouldn't be done every six months to a year if there is some environmental byproduct present that is less than ideal.

MS. TOMICH KENT answered that because the operation will be actively placing additional tailings into the pond during the life of the mine, it doesn't make sense to put a cap down and then put more tailings on top of it.

SENATOR DYSON responded that that seems like a strange answer. He said, "If what's going into the water with the tailings has some bad effect, why would we wait for 30 years to cap it?"

MS. TOMICH KENT explained that the discharge that comes from the impounded area through the treatment system has to meet certain water quality standards.

SENATOR DYSON asked if it would be logical to infer that there are no concerns about an impact on biological life in the water, upstream of the dam towards the pipe.

MS. TOMICH KENT answered, "During the life of the project, we're not concerned about the water quality in the pond at the time they're still operating the mine."

SENATOR DYSON concluded that "it will be probably somewhat biologically inert," which is what he said he thought the answer would be.

[2:02:47 PM](#)

CO-CHAIR SAMUELS asked Ms. Tomich Kent to confirm that the order of the process is to test the tailings, then test the slurry that goes into the water, and finally to test the water coming out of the lake.

MS. TOMICH KENT answered that's correct.

[2:02:58 PM](#)

REPRESENTATIVE GATTO asked if the purpose of the cap is to protect substances below it and keep them from escaping, or if the cap actually modifies the substances below to "let time enough pass so they become inert."

[2:03:20 PM](#)

MS. TOMICH KENT replied that the cap would confine the tailings below, as well as create a substrate suitable for recolonization.

CO-CHAIR SAMUELS pointed out, "The tailings are tested before they're put into the water."

MS. TOMICH KENT said that's correct.

CO-CHAIR SAMUELS continued, "If there are toxins, then ... it becomes a bit of a moot point, because you're going to stop immediately. The cap isn't for toxins leaking up into the water; the cap is ... so you can have more biological growth in there."

MS. TOMICH KENT indicated that the cap is a "contingency" having to do with the following circumstances occurring at the end of the mine life: water quality not meeting the water quality standards or substrate not being suitable for recolonization.

[2:04:19 PM](#)

REPRESENTATIVE LeDOUX asked for clarification regarding the purpose of the cap.

2:04:30 PM

MS. TOMICH KENT said the cap serves two purposes: one, to cap the tailings, so that the materials in those tailings do not get back into the "water column"; and two, to create a substrate - a suitable surface - for recolonization.

2:04:51 PM

REPRESENTATIVE LeDOUX asked if the department anticipates earthquakes as a potential problem.

2:05:30 PM

COMMISSIONER FREDRIKSSON addressed Representative LeDoux's concern. He said a cap is not a guarantee; there are other events that can cause it to be breached. He noted that throughout Alaska there are caps on landfills that, at times, due to slope instability or earthquakes, can crack and have to be restored, and he said he would assume the same would apply to a tailings cap.

2:06:53 PM

CRAIG TILLERY, Deputy Attorney General (AG), Civil Division, Department of Law (DOL), discussed issues surrounding the litigation. He noted that in using the Section 404 permit, USACE relied upon a revised definition of fill material that it and the EPA had jointly promulgated in 2002. That revised definition, he noted, had eliminated some prior contradictions related to the definition of "spill," and specifically listed mine tailings as spill materials to be regulated under Section 404. He continued as follows:

In September of 2005, the three plaintiffs, which [are] SEACC, the Sierra Club, and the Lynn Canal Conservation Group - which I would just refer to generally as SEACC here - brought this law suit in federal court. They sued the [U.S. Army] Corps of Engineers and they sued the [U.S.] Forest Service; they did not sue the State of Alaska. Coeurs Alaska, [Inc.] - the company, Alaska, and Goldbelt, [Inc.] - a local [Alaska Native Claims Settlement Act (ANCSA)]

corporation - moved to intervene in the suit as defendant. Goldbelt was in there because they had a proposed project to build the dock that would be part of the ferry terminal for the mine.

SEACC's complaint, as it was originally done, had two counts. The first one raised a purely legal issue of whether the disposal of mine tailings should be regulated by the [U.S. Army] Corps of Engineers, under the Clean Water Act, Section 404, or whether it should be regulated by the EPA, under Section 402. The second count challenged the [U.S. Army] Corps of Engineers' then underlying rationale in selecting this disposal option. And among other arguments, SEACC alleged that the [U.S. Army] Corps of Engineers should have considered the impact of Goldbelt's proposed marine terminal, as part of [the] Kensington Mine project. They asked the court to declare that the [U.S. Army] Corps of Engineers' 404 permit was inconsistent with the Clean Water Act, and to reverse the [U.S.] Forest Service's approval of Coeur's plan of operation.

The court sort of took this one at a time, and said, "let's start with count one, the purely legal issue." Very shortly thereafter, the [U.S. Army] Corps of Engineers asked for a voluntary remand of its permit so that it can conduct a further review. The court granted that motion, and essentially everything stopped for several months while the court did this review. Then, in March 29 or 2006, the court issued a revised record of decision. They reaffirmed their original conclusion that the selected tailings disposal options complied with the regulatory guidelines that governed the issue of the 404 permits, and then they added some more matters to deal with some of the other issues that had been raised.

The Corp of Engineers then reinstated the 404 permit, allowing the tailings to be placed in Lower Slate Lake. In response, SEACC then filed an amended complaint, which was similar to the original, except that it now was composed only of count one - just strictly the legal challenge on whether you ... should deal with these under Section 404. The court ordered expedited briefing, and all of that was completed in May of 2006.

A few months later, on August 3 of 2006, the court ruled in the case, and it ruled in favor of the defendant, and upheld the [U.S. Army] Corps of Engineers' permit. The state, of course, along with Coeur, had intervened as defendants at this time. In so ruling, the court recognized that under supreme court case law, it should use a deferential standard of review - and I'm not going to go through and sort of bore you with the standards of review - but it was fairly key with the decision, and it said that basically we should defer to an agency in interpreting a law and interpreting its regulation.

In approaching the Kensington case, the court looked at whether Congress had specified how the disposal of tailings should be permitted, that is, should it be permitted by the [U.S. Army] Corps [of Engineers] or ... by EPA? The court noted that Congress had not defined fill material. Instead, Congress left it to the [U.S. Army] Corps of Engineers and EPA to figure it out, and that is what they had done in 2002 through their joint rule-making.

The court then considered whether that revised definition was correctly applied, and in that they quoted from the preamble to the ... 2002 rule-making where it was stated, and I'll quote here, that "the placement of overburden, slurry, or tailings, or similar mining-related materials have been added to the definition of discharge or fill material." And this provided further clarification, and that was very much its intent.

Given these clear statements in the preamble to the rule, the court rejected the argument by SEACC that the agencies never intended for mine tailings ... - like these generated at Kensington - to be included and regulated as spill. In short, then, they found no merit to the lawsuit and dismissed the complaint on August 3. SEACC immediately appealed the District Court's decision to the 9th Circuit Court of Appeals, and then moved for an injunction in front of that court on activities, pending a decision on the merits of the appeal. All of the defendants, including the interveners and including the state, opposed that, arguing that first of all it lacked merit, that the

answer was clear, and that in any event there would be no irreparable injuries for the types of activities that would be occurring, pending a decision on the appeal, which we fully expected to be expedited.

[2:13:42 PM](#)

MR. TILLERY continued:

Now, pursuant 9th Circuit [Court of Appeals] procedures, that motion was considered by a two-judge motion panel, which is not typically, but can be I believe, the same panel that would actually consider the case. ... The ... two-judge motion panel granted the injunction and then also entered an order setting an expedited briefing schedule to be completed by mid-October. We anticipate that the case would then be ready for decision by the 9th Circuit [Court of Appeals] in November 2006, unless an oral argument scheduled; and if that happens, then it stands upon ... the 9th Circuit [Court of Appeals'] and the panel's availability.

We're at a position where, in looking at this injunction, we went to the court rules to see what our prospect would be for seeking reconsideration for trying to get a larger panel - sort of an en banc reconsideration of this - and we determined that that really was not feasible. Under the court rules it says in one place that such filings are discouraged, it says in another place that they are rarely granted, and our practice and experience tells us that that is the case.

What we have concluded is that legally the best option at this point is for us and for the defendants and the plaintiffs to move forward with the expedited briefing schedule and try to complete this and get a decision as quickly as possible.

[2:15:29 PM](#)

MR. TILLERY summarized the view of the department in regard to the state's perspective of legal issues going forward, as follows:

The definition of fill, adopted by the federal agencies charged with administering the Clean Water Act, clearly includes mine tailings such as Kensington. That is what we think is the most important issue. Secondly, we believe that the Corp of Engineers therefore acted properly in permitting them under Section 404. SEACC will have a different view of the result of those issues. But again, at this point, one of our major concerns is to move forward ... quickly.

[2:16:23 PM](#)

MR. TILLERY, in response to a question from Co-Chair Samuels, stated that he sees no realistic chance that the state would "be on the hook." First, he explained, the permit is a federal one. Second, he said, even if it were a state action, the department believes that it would be protected under discretionary immunity. As to whether the federal government would have any liability, he said, "they would have to speak for themselves." However, he added, "But as a veteran of some amount of litigation against the federal government, they have a raft of reasons why they are never liable for anything."

CO-CHAIR SAMUELS asked, "If this permit is found to be illegal or invalid, is there a possibility that you go back on them and revoke theirs and have to have them go through a whole EIS all over again?"

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MR. TILLERY responded that this would not be a retroactive kind of decision. Furthermore, he said, this issue is being decided under rules promulgated in 2002; the Red Dog [Mine] was "under a prior set of rules." He stated, "It ... is highly unlikely that there would be anything that would come back on Red Dog because of this. As to future mines, it ... definitely would impact mines ... upcoming the next few years."

[2:18:05 PM](#)

REPRESENTATIVE LeDOUX asked, "Does the decision of the 9th Circuit [Court of Appeals] give enough leeway that certain activities of the mine - of Kensington - could have continued without shutting the whole thing down?"

[2:18:32 PM](#)

MR. TILLERY deferred to a representative of the Kensington mine to answer that question.

2:19:06 PM

HOWARD GREY, Alaska Miner's Association, told the committee that the association represents Alaska's mining industry statewide and works to promote mining and advocate responsible development to provide an economic base for Alaska. He reviewed that the Kensington Mine project was the subject of a rigorous, 3-year environmental review, at the conclusion of which the State of Alaska, USACE, and the U.S. Forest Service selected an alternative that included [Lower] Slate Lake as the location for a tailings facility. He said this was an environmentally preferred alternative. He related that recently the U.S. Bureau of Land Management awarded Coeur Alaska, Inc. the prestigious 2006 Hardrock Mineral Commodity Outreach and Economic Security Award, presented to those hardrock mining projects that have shown both responsible mineral resources development and an understanding of sustainable development.

MR. GREY said Kensington Mine is a small, underground mine in an area with a long history of mining. Mining there would not require a new area to be opened, and there is little land and no wilderness affected by the operation. The project will not be visible from the water surface of Berner's Bay, he said, with the exception of a modest dock facility at Slate Cove. He echoed previous testimony that Kensington Mine will not use cyanide or other harsh chemicals on site; the concentrates will be shipped offsite for final processing. The rock material left after gold removal is relatively inert, he said. In fact, the material could likely be used for recreational beaches. The proposed use of Lower Slate Lake is temporary; the company will rehabilitate the lake at the end of the project.

2:22:35 PM

MR. GREY said the agencies and the association believe that the Kensington Mine is an environmentally responsible project. The environmental impact statement clearly demonstrates that the project will protect the public resources of Berner's Bay, protect fish habitat in Slate Creek, and will ultimately enhance the fish habitat in Slate Lake. Mr. Grey stated that the lawsuit by the environmental plaintiffs threatens to eliminate approximately 200 jobs for Alaskans and put in jeopardy millions of dollars that could be spent in Southeast Alaska's economy.

He emphasized that both the legal briefs and the Clean Water Act are equally applicable to all types of U.S. waters. If the court were to adopt the environmental plaintiff's view of the Clean Water Act, placement of tailings would not only be forbidden in Lower Slate Lake, but also in many other waters of the U.S. Tailing ponds, he relayed, are almost always constructed in the point of a valley, and the dams in this location, by definition, must cross a stream. In other words, he explained, tailing ponds and facilities almost always affect waters of the U.S. Because so much of Alaska is identified as wetlands, he noted, that interpretation would eliminate the ability to place tailing facilities in most location in Alaska. If the plaintiff's view of the Clean Water Act had been adopted years ago, he said, it would have probably been impossible for federal agencies to have authorized Red Dog Mine, Greens Creek Mine, and possibly Fort Knox and True North, among others. Tailings placement for each of those mines, he related, received a USACE Section 404 permit. He pointed out that arguments being advanced against the Kensington Mine are similar to those advanced against the Pogo Gold Mine "until community pressure sort of saved the day."

MR. GREY stated that this lawsuit is a threat to mining throughout Alaska and could affect communities and citizens throughout the state, as well as [negatively] impact "other types of operations outside of mining."

[2:27:14 PM](#)

RUSSELL HEATH, Executive Director, Southeast Alaska Conservation Council (SEACC), told the committee that SEACC is a conservation group that is a coalition of 17 citizen conservation groups throughout Southeast Alaska. He stated that the mission of SEACC is to protect the region's extraordinary resources and to ensure a wise and sustainable use of those resources. He said many important issues are at stake related to jobs, economic development, the future of mining in Alaska, and the management of natural resources. He stated, "The more broadly and the more fully that ... these issues are understood, the better we Alaskans can make the ... correct decisions regarding them."

MR. HEATH clarified that SEACC's legal challenge is against the U.S. Army Corp of Engineer's permit authorizing Coeur Alaska, Inc. to dump its chemically processed mine tailings into Lower Slate Lake. He stated that it's not a challenge against the Kensington Mine itself, and he relayed that the injunction that was issued by the 9th Circuit Court of Appeals does not require

the construction of the mine to shut down, but rather to maintain a status quo around the tailings facility.

MR. HEATH, in response to a previous statement that all federal and state agencies consider the Kensington Mine's tailings facility alternative as the preferable one, stated that the EPA does not. He read a statement by the EPA as follows:

Alternative A is the only alternative that will avoid the habitat loss in Lower Slate Lake during mine operations and the uncertainty in terms of Slate Lake's long-term recovery. It is also the only alternative that avoids significant impact to sensitive habitat and resources in Berner's Bay. Alternative A is EPA's preferred alternative, because in addition to being environmentally preferable, it appears to be a practical and feasible alternative. The dry tailings facility proposed under Alternative A is a standard industry technology in use at other mines in Alaska.

MR. HEATH, in response to the comment that the lawsuit will shut down mining in Alaska, said that is not SEACC's intent, nor is it the understanding of SEACC or its lawyer that that would be the outcome. He said the practice of the Pogo and Greens Creek mines is to take out the wetlands, put fill on top of the bedrock, and then place the tailings on top of that layer. He indicated that that is Alternative A, and although it may be a "bureaucratic kind of way around how you put tailings [in] wetlands," that is a practice that would not be in any way limited by the lawsuit.

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MR. HEATH offered SEACC's history of involvement with this issue. He stated that in 1998, Coeur Alaska, Inc. received all necessary permits for "the project that ultimately the corporation chose on its own not to pursue." Instead, it redesigned the mine and reinitiated the review and permitting processes to arrive at the current mine proposal. He noted that SEACC has participated in every step "of these processes." He named SEACC's two chief concerns about the new design: the impact on Berner's Bay and the implication the tailings design has in regard to water quality both in Alaska and in the rest of country. In an attempt to address and resolve the concerns and avoid litigation, SEACC negotiated with Coeur Alaska, Inc. for a number of months [in 2005]. In terms of the impacts on Berner's

Bay, he stated his belief that SEACC found ways to adjust the design of the mine or its plan of operations that would protect the bay. However, he noted, SEACC was unable to find common ground with Coeur Alaska, Inc. related to the tailings disposal. An attempted mediation sponsored by the City and Borough of Juneau also failed to resolve the issue, he said.

MR. HEATH stated that in 1972, when President Nixon signed the Clean Water Act into law, the American people committed to stopping the disposal of industrial waste into America's waters and to clean up those waters that had been damaged by past practices. He said that as a result of that massive task, fish have returned and children are swimming in many lakes and rivers that were once dead and poisonous.

MR. HEATH related that one of the problems SEACC sees related to the management of natural resources is that their economic value is often overlooked. Clean water, for example, supports the commercial and sport fishing industries, tourism, and the recreation system. He offered an example of gillnetters marketing their fish as "rain forest wild."

MR. HEATH stated that the Kensington Mine will be the first mine since the Clean Water Act was signed in 1972 to dump its chemically treated mine tailings into a natural water body, which is a big step backward, undercutting the hard work that U.S. citizens have done in the past 30 years and setting a bad precedent for other mines in the future.

[2:36:07 PM](#)

MR. HEATH said Mr. Tillery gave a good overview of the legal issues; however, he said SEACC's opinion differs from that of the Department of law, in that it thinks it has a legitimate challenge to the permit. He said he thinks the 9th Circuit Court of Appeals, in issuing the injunction, sees the merits in SEACC's case. He mentioned a regulatory change that occurred in 2002, having to do with the definition of "fill," and he said clearly there were mines prior to 2002 that were adequately permitted and went forward without this regulatory change, and SEACC believes that mining can continue in Alaska using a realistic definition of fill. Tailings, he remarked, are not fill; they are chemically processed waste from the mines.

MR. HEATH said it is SEACC that has requested an expedited hearing, because the issue is so important to Juneau and mine workers. He offered his understanding that oral arguments are

scheduled for the first week of November. He reiterated his point about the efforts that had been made to settle the issue out of court. He said the corporation claims that any other option is too expensive, and SEACC thinks that the dangers of the current approach are too great. He stated that safeguarding Alaska's water is worth the investment, and he expressed the organization's willingness to work with the agencies involved and with Coeur Alaska, Inc. to expedite the implementation of alternatives.

2:39:10 PM

CO-CHAIR SAMUELS asked, "If the testing is all done and the water's coming out fine, then what's the problem?" Furthermore, he asked if SEACC supported Alternative A, using the dry stacking method, and if there would be the possibility of yet another group filing suit over that option.

2:40:13 PM

MR. HEATH, to the first question, stated that he has been impressed with the state's regulatory procedure and has no doubt it will conduct adequate testing. However, he said that to this day, the testing of the toxicity of the tailings is inconclusive. He noted that the effluent that comes out of the pipe is toxic; there's no dispute about that. He stated that all aquatic life in the lake will be killed under the proposed procedure during the time that the mine is in operation. Mr. Heath indicated that regarding a 1998 plan, the mining company withdrew its proposal; the permits were on the table, but the company decided not to pursue the project. In response to Co-Chair Samuel's question related to the possibility of another group filing suit in the event that Alternative A is used, he mentioned a possibility of putting a dry stack tailing facility on the other side of a ridge in the Berner's Bay site. He continued:

We would be willing to work with the company to site this in such a way that SEACC would not file a law suit. ... It is not that any environmental group can come in and file a lawsuit. ... To have standing in a court, you must have demonstrated that you've actively participated in the planning and the permitting process in the beginning. It's not a random thing here. SEACC has put hundreds and hundreds of staff hours into examining this process to be sure that it's

being done in the best possible way. So, no one can come in without having participated in the process.

CO-CHAIR SAMUELS suggested that if the SEACC board chose not to take action, one of SEACC's 17 members could come forward on its own and, having been part of SEACC, announce that it will now individually file suit.

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MR. HEATH deferred to the lawyers for a definitive answer. Notwithstanding that, he offered his understanding that an individual group that is a coalition member of SEACC can't "jump on" SEACC's work to achieve standing.

[2:43:40 PM](#)

SENATOR DYSON, regarding Mr. Heath's comment that the effluent would kill the aquatic life, asked him if he meant the whole lake or "just upstream of the new dam."

MR. HEATH responded that the entire lake is upstream of the dam, and he stated his belief that all aquatic life will be killed during the operation of the mine. He suggested confirming that belief with Mr. Fogels. He noted that there is a stream that comes from Upper Slate Lake to Lower Slate Lake, and he said he doesn't believe the effluent will make any difference in Upper Slate Lake.

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MR. HEATH, in response to a question from Chair Wagoner, estimated that there are probably few if any fish in Lower Slate Lake currently. He said the lake has been partially "dewatered." He explained that the photograph of Lower Slate Lake that the committee was shown previously was taken before any mine activity began. He said the trees around the lake have been cleared; there is a road there, and there is a partial dam.

CHAIR WAGONER shared how he became aware of the issue at hand when he first was elected. He said he is a commercial fisherman who has been involved with a group that brands his fish and sells them, and he considers himself an environmentalist. That said, he questioned SEACC's motive in waiting until the mine company had done all its preparation work and invested millions of dollars - probably close to \$100 million in the permitting process - before filing the lawsuit, rather than addressing the

issue four years ago before the project got so far advanced. He asked, "Are you really trying to make sure the project goes according to the way you want it to go, or are you trying to kill the project?"

MR. HEATH reiterated that SEACC has been part of the process and has stated its concern from the beginning. He said SEACC could not and would not file a law suit until it saw the actual permit. He offered his understanding that the permit was issued in June 2005, at which time SEACC was still in negotiations with the company. He explained that SEACC withheld the lawsuit at that point until it realized that the negotiations with the company were not going to resolve the problem. He said he believes it was in late July that SEACC filed the lawsuit, asking at that point for an expedited briefing; however, the lawsuit was put on hold because USACE voluntarily remanded the permit. He offered his understanding that the day before the briefs were to be issued, USACE withdrew the permit, at which point the lawsuit "was essentially on ice" for almost five months. He echoed Mr. Tillery's summary, stating that when the permit came back, SEACC reevaluated it and withdrew one count, but pursued the most important point regarding the precedent that this kind of tailings disposal would be setting.

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CHAIR WAGONER asked Mr. Heath if, in his mind, he considers the lawsuit to be primarily about precedent than about pollution.

MR. HEATH answered, "It's about both."

CHAIR WAGONER said when he toured the Kensington Mine area, he saw the glacial streams, the condition of the lakes, and the manner in which the mine is looking after the water quality, and he opined that SEACC's fears are unfounded. He said he thinks the corporation is doing a fine job in complying with the permitting process and working the mine, and he thinks a terrible message is being sent out nationwide to mining companies being asked to come to Alaska, because of the SEACC organization's actions.

MR. HEATH expressed appreciation for Chair Wagoner's concern. He clarified that this is the first time in a generation that a mining company is planning to put its effluent in a lake. Notwithstanding the high quality of the agencies involved and the review they have exercised over the project, he said, this precedent will be nationwide. He stated his concern that other

mines across the country will be putting their tailings in water. He reiterated that there are other alternatives to use.

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REPRESENTATIVE LEDOUX, regarding Mr. Heath's previous remark that in order to have standing, it is necessary to be part of the permitting process, asked if that means that a member of the public could not bring a law suit under the Clean Water Act.

MR. HEATH deferred to the Department of Law, but offered his understanding that the Clean Water Act does have a citizen suit provision. He said he does not know what kind of standing a person must have in order to exercise that provision. For example, an individual may have to demonstrate harm. He said in order for SEACC to have had standing, it had to have participated throughout the process.

REPRESENTATIVE LEDOUX asked, "As an organization?"

MR. HEATH replied that an individual could have done it, as well, but SEACC is bringing the law suit as an organization.

2:51:27 PM

REPRESENTATIVE GATTO noted that after Hurricane Katrina, water was pumped into Lake Ponchartrain in huge amounts. He asked if there have been any studies showing that that lake has suffered.

MR. HEATH said that is an excellent question for which he has no answer. He said he thinks sometimes national emergencies trump other laws. He recalled when that incident occurred, the water that was sitting in New Orleans was horribly polluted from human waste and toxic chemicals. He pointed out that one of the reasons that Hurricane Katrina was so devastating was because of how the wetlands were being managed in Louisiana. He said if the wetlands had been better protected, New Orleans probably wouldn't have sunk as far below sea level as it did. He concluded, "So, that's part of the reason why ... we're here ... defending Alaska's waters."

2:52:39 PM

CO-CHAIR SAMUELS remarked that some of the comments made previously by Mr. Fogels and Mr. Grey were onerous. He said if SEACC had filed and won a lawsuit related to the Red Dog Mine, that mine would not exist. He said, "And so, from here on out,

if you can't get a permit to get tailings in wetlands - if that's what the 9th Circuit Court [of Appeals] comes out and says ... - we're done. And that is a huge concern to me." He stated that he would rather look at every case individually rather than making a blanket regulation or ending up with a blanket court ruling.

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MR. HEATH respectfully disagreed that the lawsuit will result in mining being shut down in Alaska. He said the Red Dog Mine was permitted under other circumstances. He said he is not a lawyer, but he reiterated that the Kensington tailings facility was permitted under regulatory change that was made in 2002, and mines were adequately and fully permitted under an earlier regime and are working currently in the state.

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CHAIR WAGONER qualified revealed that twelve of his constituents are working on the Kensington mine project, and he emphasized that the mine is a statewide issue, more than just a local one.

MR. HEATH concurred.

CO-CHAIR SAMUELS asked Mr. Tillery to address the previous question regarding who might have standing.

[2:55:32 PM](#)

MR. TILLERY said Mr. Heath is correct that earning standing is a result of having participated in the process. It could have been individuals who had participated and can demonstrate some important standing. Not just anybody can jump into the process at this point, he indicated, but he reminded the committee that already involved are three plaintiffs, as previously noted. He said he does not know the makeup of SEACC, and he said the department would probably argue that "someone else could not come in now and challenge this if a resolution was to be reached." However, he said, "I cannot guarantee you that if it was one of their constituent organizations that we would keep them out."

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TIM ARNOLD, Vice President/General Manager, Coeur Alaska, Inc., said the company is currently constructing the Kensington Gold

Mine in Southeast Alaska. He stated that he would be limited in his testimony to his prepared remarks and would not be entertaining question, due to the pending litigation in the 9th Circuit Court of Appeals. He expressed appreciation to those in the community and political positions who have stated their support of the mine. He said the Kensington Mine is critically important to the economy of Southeast Alaska and is rightly the subject of ongoing legislative interest.

MR. ARNOLD offered his background working in and around mines of all types and living in many different places. He stated:

From stem to stern, the permitted Kensington Gold Mine has the best environmental design of any project that I've ever been associated with. It's blessed with natural attributes that make it unique in mining and [is] designed utilizing attributes especially appropriate for Southeast Alaska.

MR. ARNOLD said the Kensington Mine has been the subject of intense study, collaboration, and design for more than 17 years, during which time the objective was always to ensure that the plan would embody the highest principles of environmental stewardship, which Mr. Arnold said the company calls, "producing and protecting." He expressed pride in the mine, characterizing it as a unique project that protects Alaska's clean water while providing significant, long-term economic benefit for the region and the state. He spoke of the previously mentioned 2006 Hardrock Mineral Community Outreach and Economic Security Award from the U.S. Bureau of Land Management and said the award is meaningful in that it recognizes responsible and sustainable resource development - the cornerstone of the Kensington Mine plan.

MR. ARNOLD relayed that Coeur Alaska, Inc. is spending approximately \$190 million of capital to build the Kensington Mine in an area that has been home to gold mining for over 100 years. He noted that in fact, the Kensington Mine is in the same "geologic gold belt" that Bart Thane mined and Juneau was built upon. When completed, he stated, the Kensington Mine will be among the newest and most environmentally responsible gold mines in all of North America. The company currently holds about 60 environmental and regulatory permits and has 300 workers working at the mine. More than \$25 million has been spent on nearly 900 environmental studies. He related that the mine has already proven to be a huge boost for the region's

economy, and enjoys widespread support among business, community leaders, Native corporations, and area residents.

MR. ARNOLD said the Kensington Mine is designed to produce approximately 100,000 ounces of gold annually. Once it begins operations, the mine will have about 200 permanent workers, with a \$16 million annual payroll and benefit. The mine is expected to generate millions more in annual state and local tax revenues, and additionally has already established itself as a pillar of charitable contribution in the region, and a staunch supporter of the Native community and local businesses, he said.

MR. ARNOLD said project opponents want people to believe that Kensington Mine's environmental permits pose a threat to clean water and set "some sort of precedent for other mines in Alaska." He stated that Coeur Alaska, Inc. contends that both those assertions are false. He explained that because no two mines are alike, permits for any given mine are always evaluated and issued based on an exacting set of specifications unique to each mine. He offered three characteristics of the Kensington Mine, as contrasted with other mines: it is an underground mine with very little to mark the landscape, other than various tunnel entrances and some relatively compact processing facilities; it uses fairly simple milling, followed by a relatively benign flotation process to separate the metal from the crushed rock, without the use of chemicals such as cyanide to leach metal from the ore; and its crushed waste rock or tailings will be inert and will look much like the sand at Sandy Beach in Juneau. Mr. Arnold said about 40 percent of the tailings will be recycled back into the mine and be used for fill material; USACE has twice validated a disposal plan for the remainder of the tailings that will have the least possible impact on the environment. He reviewed that the plan also includes a complete reclamation of the disposal area once mining at Kensington is complete. The mining operation, he summarized is recognized as the best environmental option by state and federal agencies.

MR. ARNOLD said the temporary injunction granted to SEACC from the 9th Circuit Court of Appeals affects "some of our construction activities in the area of the tailings facility." The injunction was granted, he said, even after the Alaska District Court validated the permit by dismissing SEACC's lawsuit earlier this month. Work continues elsewhere on the project site, he said, because Coeur Alaska, Inc. remains convinced that the project is sound and the company will "prevail on the merits upon appeal."

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MR. ARNOLD said that despite its many differences with SEACC, it is in full agreement with SEACC on one key point: Alaskans do indeed deserve clean water. He said Alaska must demand responsible mineral development. He expressed pride in being involved in the Kensington Mine. He stated, "It's a project that will operate in compliance with the highest standards of environmental protection, while providing much needed long-term economic benefits to the community."

[3:06:45 PM](#)

REPRESENTATIVE GATTO noted that the workers at the Kensington Mine are commuters, and he asked what percentage of the workers is Alaskan, versus from out of state.

[3:07:28 PM](#)

MR. ARNOLD replied that last time the statistic was checked, 76 percent of the workers were Alaskan.

REPRESENTATIVE GATTO asked if that is considered a good percentage compared to other mines. He stated that he is hopeful that mines will employ people from the area.

MR. ARNOLD said he does not know, because he is only focusing on one mine.

[3:08:07 PM](#)

MR. ARNOLD, in response to questions from Senator Dyson, said the dam effects "the entire current lake."

SENATOR DYSON asked, "Are there several or many tailing handling ... schemes like this around North America that have operated arguably successfully, without doing any detrimental damage to the water quality?"

MR. ARNOLD indicated that he would like to get an answer from another source because he cannot answer that question properly [because of ongoing litigation].

SENATOR DYSON asked, "May I imply from your answer, then, that you haven't worked on other similar tailing handling schemes in wetlands?"

MR. ARNOLD responded, "What you can imply is that I'm unable to take questions about the tailings facilities because we're in litigation."

3:10:36 PM

REPRESENTATIVE LeDOUX asked if Coeur Alaska, Inc. has had to fire or lay off any of its workers and, if so, how many.

MR. ARNOLD responded that he cannot answer that question right now.

3:11:02 PM

SENATOR ELTON said Representative Gatto's point about hiring locally may be an issue that the next legislature wants to address. He expressed that one of his fears after speaking with some mining people around the state is that mines are "starting to cannibalize each others' work force." He opined that a role for the state would be to attempt to get more Alaskans trained for the good jobs that are out there in the mines. He said he thinks 76 percent is a good number, but he is concerned that the number will not improved unless more Alaskans are trained for those jobs.

3:13:00 PM

MR. FOGELS, in response to a request from the chair to speak to Senator Dyson's previous question to Mr. Arnold, said the permitted mine calls for a dam that is at the outlet of the lake, thus the entire lake would be behind the dam. He reiterated that it is the working assumption that once the 4.5 million tons of tailings go into the lake, all the fish in the lake will die.

SENATOR DYSON indicated that he may have been confused by the photo.

MR. FOGELS noted that the lake itself has a very narrow gorge, across which the dam will be built. The dam will be approximately 300 feet long and 90 feet tall.

SENATOR DYSON asked if there are other schemes in which, after some period of time, the turbidity will settle out and the body of water will once again be a suitable fish habitat.

MR. FOGELS offered his understanding that this is the first time in modern permitting history that a lake has been proposed for a tailings disposal facility. He pointed out that there are other lakes currently in Alaska "behind tailings dams," and the tailings do settle out. He said a lot of work was done to find out whether tailings would settle out or stay suspended, and the modeling done shows that the tailings will settle. Sometime after closure, he said, there will be clean water on top of those tailings. He added, "They have to meet clean water standards at some point."

SENATOR DYSON asked if [Lower Slate Lake] is currently bioactive.

MR. FOGELS responded that he has not recently seen the lake, but he knows that the water level has been "drawn down." He added, "But I can't tell you whether any of those fish are still happy fish there or not."

CO-CHAIR SAMUELS noted that it would not necessarily be the toxins from tailings that would kill fish, but rather the sheer amount of silt or dirt going into the water.

MR. FOGELS answered that's correct. He added, "Actually, right where the pipe would enter the lake water itself, ... there are floatation regions that come out with that, and there will probably be ... low PH levels and some additional toxicity from those regions around where the pipe is discharging. That was anticipated to dissipate pretty quickly or get entrained with the tailings."

[3:16:51 PM](#)

REPRESENTATIVE GATTO recalled that taconite tailings were dumped into Lake Michigan back in the 1950s, or earlier. He asked if Mr. Fogels has any information regarding Lake Michigan and whether it recovered on its own.

MR. FOGELS said he doesn't have that information but could look into the matter.

[3:18:38 PM](#)

MR. FOGELS, in response to a question from Senator Dyson, explained that the dam will be a permanent fixture, with a spillway cut around the dam in solid bedrock in order that the water can discharge naturally from the lake to Lower Slate

Creek. He reminded the committee that that would only occur once the water in the lake met clean water standards.

[3:19:12 PM](#)

CO-CHAIR SAMUELS asked participants to act as contacts and to get information to his office as it becomes available.

ADJOURNMENT

There being no further business before the committee, the Joint House and Senate Resources Standing Committee meeting was adjourned at [3:19:43 PM](#).