

# **Chuitna Coal Project Status Update for February 2008**

## **Status of the Chuitna Coal Project**

At this time a complete permit application package for the Chuitna Coal Project has not been submitted to the Division and no formal review under AS 27.21 and 11 AAC 90 has been initiated. Once a complete permit application package has been submitted an evaluation of the cumulative impacts of the project can be made.

During the month of February, PacRim has submitted signed paper copies of large format drawings and maps included in section D1 of the mine application: "Operations Plan" These maps include Figures D1-1 to D1-21 which were distributed electronically during the December informational meeting.

## **Upcoming events**

### **Spring Chuitna Project Informational Meeting**

Thursday April 10, 2008  
6:30 PM to 8:30 PM  
Atwood Building  
550 West 7th Ave., Suite 240  
Anchorage AK 99501

#### **Agenda**

- Chuitna Coal Project update
  - Status of Applications
  - Summer Fish Studies
- Info on coal conveyor systems
- Unsuitability Petition
- Mental Health Trust Lands
- Schedule for Summer Information Meetings  
(Please be prepared to discuss meeting dates and locations)
- Questions and comments

***Visitor parking is available on the Corner of 8<sup>th</sup> and E Street or in the JC Penny Parking Garage.***

This informal meeting is an information exchange between the agencies and the affected communities regarding the status of the Chuitna Coal Project. Please keep in mind that we are not in a formal comment period, and while we will do our best to address concerns raised at the meeting, attendees are encouraged to also submit their concerns and comments during formal comment periods. Only issues that are raised during the agencies' formal public comment periods are eligible to be used in an appeal.

## **Other State and Federal Permits**

In addition to ASCMCRA permitting requirements, the Chuitna Coal Project must address the concerns of other state and federal agencies. As part of the Department of Natural Resources statutory roll as lead agency in matters relating to exploration, development and managements of mining activities, the DNR Office of Project Management and Permitting has developed a document describing some of the permits and approvals to help the public understand the permitting of mines in Alaska. This document and other useful information are available on the web at:

<http://www.dnr.state.ak.us/mlw/mining/largemine/index.htm>

## **Petition to Designate the Chuitna River Watershed Unsuitable for Surface Coal Mining Operations**

On February 14, 2008 the Commissioner for the Department of Natural Resources issued his decision on the request from Trustees for Alaska, on behalf of the Petitioners to reconsider his decision. In his letter, the commissioner decided to affirm his July 16 2007 decision. In the original decision the commissioner found that, 1. LMU-1 lands are ineligible from the petition process, on the grounds that they had previously been reviewed, underwent a comment period, and a decision to issue the permit was made, 2. the petition regarding the remainder of the “Chuitna River watershed” is incomplete, because the petitioner’s do not adequately describe how there interests are adversely impacted within the Chuitna Watershed, 3. the petition is frivolous because it covers too sweeping and arbitrary an area unsupported by evidence that reclamation of wetlands cannot be accomplished, and 4. assumes that applicable standards and regulations for surface coal mining operations cannot prevent the harms claimed in the allegations.

A copy of this decision is included as part of this months update.

## **Chuitna Project SEIS**

As part of the federal NEPA process the U. S. Environmental Protection Agency (EPA) determined that a Supplemental Environmental Impact Statement (SEIS) would be prepared for the Chuitna Coal Project. Scoping for the SEIS was completed in August of 2006. Currently agencies are reviewing the available baseline data in preparation to write the Draft SEIS.

Information concerning the SEIS process can be found at:

<http://www.chuitnaseis.com/>

# STATE OF ALASKA

## DEPARTMENT OF NATURAL RESOURCES

### OFFICE OF THE COMMISSIONER

SARAH PALIN, GOVERNOR

- P.O. BOX 111000  
JUNEAU, ALASKA 99811-1000  
PHONE: (907) 465-2400  
FAX: (907) 465-3886
- 550 WEST 7<sup>TH</sup> AVENUE, SUITE 1400  
ANCHORAGE, ALASKA 99501-3650  
PHONE: (907) 269-8431  
FAX: (907) 269-8918

February 14, 2008

Rebecca L. Bernard  
Counsel for Petitioners  
Trustees for Alaska  
1026 West 4<sup>th</sup> Avenue, Suite 201  
Anchorage, AK 99501

**SUBJECT: AUGUST 6, 2007 REQUEST FOR RECONSIDERATION OF THE COMMISSIONER'S JULY 16, 2007 DECISION ON PETITION REQUESTING THAT THE CHUITNA RIVER WATERSHED BE DETERMINED LANDS UNSUITABLE FOR SURFACE COAL MINING**

Dear Ms. Bernard:

This letter responds to your letter dated and received in this office on August 6, 2007 in which Trustees for Alaska, on behalf of Chuitna Citizens NO-COALition, Judy and Lawrence Heilman, Terry Jorgensen, Cook Inletkeeper, Alaska Center for the Environment, and Alaskans for Responsible Mining ("petitioners"), asked that I reconsider my July 16, 2007 decision rejecting the petition requesting that all lands within the Chuitna River watershed be determined lands unsuitable for surface coal mining. Your request was received within the time allowed by law (AS 44.37.001). This letter is my final decision on your request for reconsideration and the petition.

After careful review of the issues and materials submitted during my initial review of the petition, as well as petitioners' August 6, 2007 request for reconsideration, the applicable statutes, regulations and case law, and a legal memorandum containing the analyses and recommendations of counsel from the Alaska Department of Law (which legal memorandum is adopted and incorporated herein by reference), I have decided to affirm my July 16, 2007 decision (also adopted and incorporated herein by reference), in this final decision, along with the additional clarifications described in this letter.

**BACKGROUND:** On June 14, 2007, Trustees for Alaska ("Trustees"), on behalf of petitioners, filed a petition to have all lands within the Chuitna River Watershed deemed lands unsuitable for surface coal mining, pursuant to AS 27.21.260. PacRim Coal LP ("PacRim") submitted a timely intervention request pursuant to AS 27.21.260(b) and 11 AAC 90.705(e). I concluded PacRim holds "an interest which is or may be adversely affected by the outcome of the proceeding" (11 AAC 90.903(c)(2)) and therefore granted it intervenor status.

On July 16, 2007, I issued a decision regarding the petition. My decision found that the petition included certain lands exempt from the petition review process, the petition was incomplete, and the petition was frivolous and without merit. This is the decision that Trustees, on behalf of the

*"Develop, Conserve, and Enhance Natural Resources for Present and Future Alaskans"*

petitioners, requested that I reconsider. On August 13, 2007, I granted the petitioners' request for reconsideration.

Petitioners have raised several issues in their Request for Reconsideration that are beyond the scope of my July 16, 2007 decision on their petition and these issues are not addressed in this decision. This decision responds only to the three reasons, as stated above, on which I based my original decision for refusing and returning the petition, and as stated in petitioners' request for reconsideration.

## DISCUSSION AND ANALYSIS OF ISSUES:

1. **Trustees argue that the LMU-1 lands are not covered by the statutory exemption from the unsuitability process. Trustees argue that the LMU-1 lands are not entitled to a discretionary exemption from the unsuitability provisions.**

Petitioners urge that I rescind my decision that the Logical Mining Unit 1 lands (the "LMU-1 lands") are exempt from the petition process. Petitioners argue, among other things, that "federal and state regulations implementing the statutory exemption found in federal and state law improperly construe the statute and therefore are not a valid basis" for my decision. Petitioners maintain that even if the regulations are "legitimate," they do not apply to the LMU-1 lands and the LMU-1 lands are not entitled to discretionary exemption. Petitioners further state that the happening of public notice and closure of the comment period should essentially "not count" for the LMU-1 lands, inasmuch as the Alaska Supreme Court later found some aspects of the Department of Natural Resources' (DNR) 1987 permitting decision deficient in *Trustees for Alaska v. Gorsuch*.

**Department's Response:** There is no dispute that a permit decision was issued by DNR on an application dealing with the LMU-1 lands. As noted in the August 21, 1987 decision, DNR found the application to be complete on February 18, 1986. Notice of the completed application was properly published, public comments were received in response (including comments from Trustees and Alaska Center for the Environment, legal counsel and one of the petitioners, respectively, in this petition process), and the public comment period closed.

Both the state and federal coal statutes clearly contemplate the need to account for a fair balancing of the interests of both petitioners and responsible resource development. DNR and the federal Office of Surface Mining (OSM) further provided for this policy consideration in their respective regulations, and the regulations at both the state and federal level were subject to public review and comment before being finalized in the early to mid-1980s.

The purpose of these regulations is to prevent what the petitioners are attempting to do – to subject lands to a petition review process after a permit application process has clearly been completed and the public comment period closed. This issue was raised in the 1983 OSM rulemaking on 30 C.F.R. § 764.15(a)(7), now codified as § 764.15(a)(6), when one commenter stated:

*...that after an initial petition is rejected, the petitioner could continue to raise new issues in subsequent petitions, thereby blocking permits year after year. OSM agrees that this type of situation would be undesirable and has included several safeguards to help prevent this type of situation, including the provision to allow the regulatory*

*authority to determine not to process any petition received insofar as it pertains to lands for which a complete permit application has been filed and the first newspaper notice published.*

48 Fed. Reg. 41333 (Sept. 14, 1983).

The state's regulations (including 11 AAC 90.703(g) and 11 AAC 90.715(a)(2)) have been in place since 1983 and are largely modeled on the federal regulations in 30 C.F.R. § 764.15(a)(6) and 30 C.F.R. § 769.14(g). 11 AAC 90.703(g) and 11 AAC 90.715(a)(2) act as a "gatekeeper" on the timing of the petition process and in order to protect mining applicants' interests. There must be some assurance to the applicants that they can rely on the result of the permit process. This gatekeeping function is not diminished by subsequent administrative or legal challenges, such as the decision in *Gorsuch*. If it was, then the regulation would be meaningless and lands would be subject to the petition process time and again. The agencies charged with administering the coal programs (DNR and OSM) clearly have the latitude, authority and obligation to guard against such a result, which is entirely consistent with their statutory authorities.

Petitioners further argue that it is an abuse of discretion for the commissioner to reject their petition under 11 AAC 90.703(g), in large part stating that this section can only guide a process involving a more recent permit application. This argument is not persuasive. The purpose of the regulations is to provide fair notice and a balance between the interests of a permit applicant and a petitioner. This purpose is even more important when applied to a permit application that is not "more recent." To accept an unsuitability petition years after the public comment period is closed defeats the balance the regulation is trying to maintain.

As explained in my July 16, 2007 decision and as clarified above, I found the LMU-1 lands are exempt from the petition process because these lands were the subject of a permit application that was deemed administratively complete, for which legal notice has been published and the public comment period closed.

The applicable statutes and regulations clearly provide me with the discretion to exempt these lands from any petition request. A review of DNR's records, the petitioners' arguments, and those previously supplied by intervenor PacRim, indicate that there would likely be substantial factual debate and legal argument on the question of whether a permit was issued to mandate exemption of the LMU-1 lands. Accordingly, I am not addressing the question of whether the LMU-1 lands must be exempted by virtue of the issuance of a permit. However, I have the discretion to exempt the LMU-1 lands from the petition, and I continue to believe that exemption of the LMU-1 lands is appropriate in this case.

**2. Trustees argue that the decision finding the petition is incomplete is based on an incorrect standard and is erroneous.**

Petitioners assert that the requirement in AS 27.21.260(a) that "[t]he commissioner shall use competent and scientifically sound data and information in order to make objective decisions as to which areas of land are unsuitable for all or certain types of surface coal operations" only applies if the petition is found complete and adjudicated on its merits. Petitioners further assert that they do not need to prove their allegations, but need only submit evidence tending to establish allegations in the petition.

**Department's Response:** The standard set forth at the outset of AS 27.21.260 in subsection (a) applies to all of the information upon which the commissioner shall rely in the petition process and it is a standard that must apply throughout the petition review process. As stated in my July 16, 2007 decision, its applicability is a mandated, not discretionary, standard.

However, I believe the petition cannot be accepted under the standard set forth in AS 27.21.260(b) because the petition does not "contain allegations of facts with supporting evidence that would tend to establish the allegations" in the petition. While the term "tend to establish" is not defined in the coal statutes and regulations, BLACK'S LAW DICTIONARY, 1315 (5<sup>TH</sup> Ed. 1979) defines the term "tend" in relevant part as: "[t]o ... serve, contribute, or conduce in some degree or way, or have a more or less direct bearing or effect; to be directed ... [or] to have a tendency ... to any end, object, or purpose."

Based on the foregoing definition, the evidence the petitioners submitted in support of their petition does not serve or contribute, or have a direct bearing or effect on their allegations. The petition's allegations themselves do not allege sufficient facts in some instances, nor does the petition include evidence that tends to support any of the allegations. Something more than the evidence the petitioners have thus far provided must be submitted with a petition in order to support their allegations. In order to justify an adjudication of the petition on the merits, that evidence must correlate to the allegations of a petition and the scope of the lands sought to be designated unsuitable. As I stated in my July 16, 2007 decision, not only did the petitioners fail to provide sufficient evidence to support each of their allegations, the petitioners also failed to describe how the allegations are specific to petitioners' interests. There must be a correlation between the affect of surface coal mining operations and the petitioners' interests to support the allegations. Requiring anything less renders AS 27.21.260(b) a meaningless standard.

The standard is in the regulation for a purpose: to assess the petition and determine whether it is complete. It is not a meaningless standard, and because this standard has not been met, the petition is incomplete and must be returned.

**3. Trustees argue that the decision finding the petition is without merit is based on an incorrect standard and is erroneous.**

Petitioners disagree with my determination that, based on 11 AAC 90.703(d), the petition is frivolous and without merit.

**Department's Response:** Although the petitioners claim that I did not expressly state that I found the petition or "the allegations of harm lack serious merit," I believe that that determination is reflected in my findings on the petition in my July 16, 2007 decision.

The petition did not assume, as it must, that contemporary mining practices required under applicable regulatory programs would be followed if the areas were mined. Therefore, the petition -- by failing to acknowledge such practices and instead leaping to alleged harms -- has no merit.

**DECISION ON RECONSIDERATION:** After a careful review of the issues raised, I have decided to affirm my July 16, 2007 decision returning the petition requesting that lands within the Chuitna River watershed be determined lands unsuitable for surface coal mining. This decision,

expressly clarifies, adopts and incorporates by reference my July 16, 2007 decision, as well as the attached February 6, 2008 written analyses and recommendations of Department of Law counsel.

As noted in my July 16, 2007 decision, petitioners are welcome to submit a new petition, including supporting evidence that fulfills the standards noted in both my July 16 decision and as described above. A new petition may not request review and designation of the LMU-1 lands.

Assuming, for purposes of the administrative record in this matter, that the LMU-1 lands were ultimately deemed by a court to not be exempt from the petition process, my reasons for returning the petition on the basis that it is incomplete and without merit with respect to the larger Chuitna watershed area delineated by petitioners would also apply to the LMU-1 lands, as it is clear that petitioners intend for the petition's allegations and evidence to apply with equal force to all lands within the delineated Chuitna watershed area, including the LMU-1 lands.

**APPEAL:** This is a final administrative order and decision of the department for purposes of an appeal to Superior Court under AS 44.37.011(c) and 11 AAC 02.020(d). An eligible person affected by this final order and decision may appeal to Superior Court within 30 days in accordance with the Alaska Rules of Court and to the extent permitted by applicable law. AS 44.62.560.

Sincerely,



✓ Thomas E. Irwin  
Commissioner

Attachment: February 6, 2008 Legal Memorandum by Ruth Hamilton  
Heese, Alaska Department of Law, to Commissioner Irwin

cc: Dick Mylius, Director, DNR, Division of Mining, Land & Water  
Tom Crafford, Large Mine Project Manager, DNR, Office of Project Management &  
Permitting  
Eric Fjelstad, Esq., Perkins Coie LLP  
1029 West Third Ave, Ste 300, Anchorage, AK 99401-1981  
Robert Stiles, DRVEN Corporation  
711 H Street, Ste 350, Anchorage, AK 99501-3459

# MEMORANDUM OF LAW

STATE OF ALASKA  
DEPARTMENT OF LAW

**To:** Commissioner Tom Irwin  
Department of Natural Resources

**Date:** February 6, 2008

**FROM:** Ruth Hamilton Heese  
Senior Assistant Attorney General  
Environmental Section

**File No:** 663-07-0200

**Tele No:** 465-3600

**Re:** Recommendation for Final  
Decision on Request for  
Reconsideration of Petition  
Requesting that the Chuitna  
River Watershed be Designated  
Lands Unsuitable for Surface  
Coal Mining

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Trustees for Alaska, on behalf of Petitioners Chuitna Citizens NO-COALition, Judy and Lawrence Heilman, Terry Jorgensen, Cook Inletkeeper, Alaska Center for the Environment, and Alaskans for Responsible Mining (collectively "petitioners") requested on August 6, 2007 that you reconsider your July 16, 2007 decision returning their unsuitable lands petition, which decision found that the petition included lands exempt from the petition review process, that the petition was incomplete, and that the petition was frivolous and therefore without merit. On August 13, 2007, you granted the request for reconsideration. Based on a review of the materials submitted during your initial review of the petition, as well as petitioners' August 6, 2007 request for reconsideration (hereinafter "Request") and the relevant authorities, and as further clarified below, I recommend you uphold your July 16, 2007 decision, adopt and incorporate it by reference in your final decision, along with the additional clarifications described in this memorandum.

## **I. Lands Exempt from the Petition Process (LMU-1 Lands)**

Petitioners urge you to rescind your decision concerning your determination that Logical Mining Unit 1 lands (the "LMU-1 lands") are exempt from the petition process. Petitioners assert, among other things, that "federal and state regulations implementing the statutory exemption [found in federal and state law] improperly construe the statute and therefore are not a valid basis" for your decision. Request at 4. Petitioners assert that even if the regulations are "legitimate," they do not apply to the LMU-1 lands, and the LMU-1 lands are not entitled to discretionary exemption. *Id.*

I believe you have the discretion -- if not the obligation -- to find that the LMU-1 lands are exempt for the reason that those lands were the subject of a permit application that was deemed administratively complete and for which the public comment period closed. 11.AAC 90.715(a)(2) specifically provides that an unsuitability petition "will not be considered" for "land covered by ... a permit application for which the public comment period has closed according to 11 AAC 90.113." Moreover, 11 AAC 90.703(g) provides that "[p]etitions received after the close of the public comment period on a permit application relating to the same area will not prevent the commissioner from issuing a decision on that permit application." (Emphasis added.) This regulation also provides that the commissioner may "return the petition to the petitioner with a statement of why the petition will not be considered."

Both the state and federal coal statutes clearly contemplate the need to account for a fair balancing of the interests of both petitioners and responsible resource development. See, e.g., AS 27.21.010(b)(5)-(7) (expressing the need to assure environmental standards be in place to protect and reclaim mined lands while allowing for the reasonable development of coal resources for energy, economic, and social reasons). The Department of Natural Resources (DNR) and the federal Office of Surface Mining (OSM) further provided for this policy consideration in their respective regulations, and the regulations at both the state and federal level were subject to public review and comment before being finalized.

The state's regulations (including 11 AAC 90.715(a)(2) and 11 AAC 90.703(g)) have been in place since 1983 and are largely modeled on the federal regulations found at 30 C.F.R. § 764.15(a)(6) and 30 C.F.R. § 769.14(g). The regulation at 30 C.F.R. 764.15(a)(6), which is closely mirrored by 30 C.F.R. 769.14(g), provides that "[t]he regulatory authority may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published." The state regulations are consistent with AS 27.21.260 and the purposes identified in ASCMCRA. See also, AS 27.21.030(1) and AS 27.21.260(i) (authorizing DNR's Commissioner to adopt and enforce regulations pertaining to coal mining and reclamation operations, as well as for the petition process) and AS 27.21.040 (providing DNR's Commissioner with some latitude to promulgate regulations "for particular conditions ... if the provisions are consistent with the purposes" of ASCMCRA); *O'Callaghan v. Rue*, 996 P.2d 88 (Alaska 2000) (holding that Alaska Department of Fish and Game salmon roe stripping regulation was consistent with salmon waste law); *Libertarian Party v. State*, 101 P.3d 616 (Alaska 2004) (Public Offices Commission's campaign contribution regulations that were promulgated to prevent corruption and coercive influence were consistent with Campaign Disclosure Act).<sup>1</sup>

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<sup>1</sup> Petitioners cite *State, Dep't of Fish & Game v. Manning*, 161 P.3d 1215 (Alaska 2007) in support of part of its argument, but petitioners' reliance on the decision in that case is misplaced. The Alaska Supreme Court majority decision in *Manning* did not rely on the principle of law which petitioners assert for support in their Request for Reconsideration at 7.

As you noted in your July 16th Decision, OSM stated that it developed its federal regulation with the intent of striking “a fair balance between the petitioner’s interest and an operator’s commitment to mine.” July 16 Decision at 4-5 (quoting 48 Fed. Reg. 41333 (Sept. 14, 1983)). OSM stated that it would “prevent the administrative processing of petitions from being used to impede surface mining operations on lands for which petitioners could earlier have filed petitions.” *Id.* (quoting 48 Fed. Reg. 41332).

OSM’s development and construction of the relevant provisions, upon which Alaska’s are based, are compelling. And, as OSM noted in comments on its 1983 rulemaking, the exemption of certain lands from a suitability determination do not preclude public input on those lands, including from would-be petitioners, in the coal permitting process, and thus, “the means for participation and consideration of issues change, they are not eliminated.” *Id.* Petitioners and Trustees will continue to have opportunity to review and comment upon any actions the federal and state agencies may propose for the LMU-1 lands, including those opportunities provided under ASCMCRA and the federal National Environmental Policy Act (NEPA) reviews.

There is no dispute that a permit decision was issued by DNR on an application dealing with the LMU-1 lands. As noted in the August 21, 1987 Decision, DNR found the application to be complete on February 18, 1986. 1987 Decision at xx. Notice of the completed application was properly published, public comments were received in response (including comments from Trustees for Alaska and Alaska Center for the Environment, counsel and petitioner respectively in this petition process), and the public comment period closed. *Id.* at xxi. As a consequence, I believe you may find in your discretion that the LMU-1 lands are exempt from the petition process.

Petitioners argue that it is an abuse of discretion for you to exercise your discretion to reject their petition under 11 AAC 90.703(g), in large part stating that this section can only guide a process involving a more recent permit application. This argument is not persuasive and does not recognize earlier permitting efforts that involved substantial and complex efforts on the part of an applicant, as reflected in OSM’s concerns on the federal rulemaking. To construe this section as petitioners request to allow new petitions to be filed every time an application for a permit or a permit renewal was filed, even though the application covers the same lands, simply because Trustees, Alaska Center for the Environment, or some other member of the public failed to do so when the opportunity was available 20 years ago at the time of the earlier application would turn the regulation’s underlying purpose -- that of providing fair notice and balance between petitioner and permit applicant’s interests -- on its head.

Petitioners assert that the happening of public notice and closure of the comment period should essentially “not count” for the LMU-1 lands, inasmuch as the Alaska Supreme Court later found some aspects of DNR’s 1987 permitting decision deficient in *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239 (Alaska 1992). Petitioners, however, fail to recognize that 11 AAC 90.703(g) and 11 AAC 90.715(a)(2) are procedural in nature. These provisions provide a gatekeeper/timing mechanism instituted with the intent of protecting mine applicants’ interests. This threshold mechanism is not overtaken by

virtue of a decision in a subsequent administrative or legal challenge, such as the decision in *Gorsuch*. If such were the case, then the regulation would be rendered meaningless, and would lead to a continual loop that lays open lands to a petition process time and again, regardless of the complex and detailed nature of a coal permit mining application for specific lands.<sup>2</sup> The agencies (OSM and DNR) charged with administering the coal programs clearly have the latitude and authority to guard against such a result, which is entirely consistent with their statutory authorities.

A review of DNR's records, the petitioners' arguments, and those previously supplied by intervenor PacRim, indicate that there would likely be substantial factual debate and legal argument on the question of whether a permit was issued to mandate exemption of the LMU-1 lands. I do not believe you need to reach this question for purposes of making your final decision, and that, based on the foregoing analysis and the analysis in your July 16<sup>th</sup> decision, you may in your discretion reject and return the petition with respect to LUM-1 lands.

## **II. Allegations of Fact and Evidence and Information Pertaining to Petitioned Lands**

Petitioners assert that the requirement that "the commissioner shall use competent and scientifically sound data and information in order to make objective decisions as to which areas of land are unsuitable for all or certain types of surface coal operations" (AS 27.21.260(a)) only applies if the petition is found complete and adjudicated on its merits. There is no basis for this assertion. Indeed, the quoted standard is set forth at the outset of AS 27.21.260(a), applies generally to all of the information upon which the commissioner shall rely in the petition process, and is a standard that must apply throughout the petition review process. To interpret the statute otherwise would require the unreasonable conclusion that incompetent and scientifically unsound data and information may apply to a review in the initial processing of a petition, a result I do not believe the legislature intended. Thus, I believe you were correct in citing its applicability -- as it is a mandated, not discretionary standard -- in your July 16<sup>th</sup> decision, which decision also applied the other standard that petitioners assert is the only standard that should apply.

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<sup>2</sup> This legitimate concern was noted elsewhere in OSM's rulemaking on 30 C.F.R. § 764.15(a)(7), now codified at § 764.15(a)(6):

One commenter was concerned that after an initial petition is rejected, the petitioner could continue to raise new issues in subsequent petitions, thereby blocking permits year after year. OSM agrees that this type of situation would be undesirable and has included several safeguards to help prevent this type of situation, including the provision to allow the regulatory authority to determine not to process any petition received insofar as it pertains to lands for which a complete permit application has been filed and the first newspaper notice published.

Even assuming for the sake of argument that you are not obligated to use competent and scientifically sound data for a completeness determination on a petition, I believe that the petition cannot be accepted under the other standard set forth under AS 27.21.260(b), which requires that for a petition to be accepted for detailed review on its merits, it must “contain allegations of facts with *supporting* evidence that would *tend to establish* the allegations” in the petition. (Emphasis added.) While the term “tend to establish” is not defined in the coal statutes and regulations, BLACK’S LAW DICTIONARY, 1315 (7<sup>th</sup> Abridged Ed. 1979) defines the term “tend” in relevant part as “to be disposed toward (something)”... [t]o serve, contribute, or conduce in some degree or way; to have a more or less direct bearing or effect.... To be directed or have a tendency to (an end, object, or purpose).”

Based on the foregoing definition, the evidence that petitioners have submitted in support of their petition is not disposed toward supporting, does not serve or contribute to support, or does not have a direct bearing or effect on their allegations. The petition’s allegations themselves do not allege sufficient facts in some instances, nor does the petition include evidence that tends to support any of the allegations. Something more than the evidence that petitioners have thus far provided must be submitted with their petition, and that evidence must correlate to the allegations of their petition and the scope of the lands sought to be designated unsuitable, to justify an adjudication of the petition on its merits. Requiring anything less renders AS 27.21.260(b) a meaningless standard.

As you noted in the your July 16th decision, for example, the petitioners’ reports do not deal with disturbances caused by surface coal mines, nor do the reports assess the effectiveness -- or the lack thereof -- in the reclamation of lands subjected to coal mining, even assuming that contemporary surface coal mining standards used in operational and reclamation phases would be followed. This is the type of information that would *tend* to support the allegations. Thus, the reports fall short of providing evidence that tends to support petitioners’ allegations. As described in your July 16<sup>th</sup> Decision, this same flaw applies to the other allegations of harms. See July 16<sup>th</sup> Decision, at 6 – 12.

### ***III. Character of the Petition***

Petitioners disagree with your determination that, based on 11 AAC 90.703(d), the petition is frivolous, and therefore without merit. While, as petitioners state, you did not expressly state that you found the petition or the allegations of harm “lack serious merit,” I recommend that you do so now, and I believe that that determination is reflected in your findings on the petition in the July 16<sup>th</sup> Decision. I believe your determinations regarding the character of the petition and its allegations are accurate, reasonable and founded on the relevant standards.

Petitioners take you to task for your statement that “the petition appears to assume in the first instance that applicable standards and regulations for surface coal mining operations will not prevent the alleged harms.” Request at 17 (quoting July 16<sup>th</sup> Decision at 14). Petitioners assert this is not the correct standard, that the petition must assume, per 30 C.F.R. § 764.13(b)(v), that “contemporary mining practices required

under applicable regulatory programs would be followed if the area were to be mined.” Regardless of whichever phrase is applied, either underscores the key reasons for rejecting the petition, both as to the completeness of the petition and on the question of whether it is frivolous: it does not appear that the petition assumed, as it must, that contemporary mining practices required under applicable regulatory programs would be followed if the areas were mined; the petition appears to jump directly to alleged harms without making the necessary assumptions. *Cf.* 48 Fed Reg 41312, 41328-29 (September 14, 1983) (stating that the petition must assume that “any mine would have to meet the requirements of the Act; a petitioner may not assume mining impacts that would be prevented by the environmental protection requirements mandated by the Act. Any petition based upon such preventable impacts would have no merit”).

### *Conclusion*

For the foregoing reasons, I recommend you uphold your July 16, 2007 decision.