

*Revised August 27, 2008, 3:05 p.m.*

*This transcript has been prepared as expeditiously as possible in order to provide information to the public. Editorial changes have been made for clarity. We apologize in advance for any inadvertent transcription errors.*

**BEFORE THE ALASKA PUBLIC OFFICES COMMISSION  
ANCHORAGE**

**August 22, 2008, Continuation of APOC hearing**

**Brian Kraft**

**v.**

**Department of Natural Resources**

**Chair Hickerson:** This is the continuation of the hearing on complaint 08-14-CD, Kraft v. Department of Natural Resources before the APOC. It is August 22, approximately 9:25 p.m. We have, participating, Commissioner Hickerson (in person), Commissioner Ballenger and Commissioner Dean (by teleconference). Both parties are represented by counsel. We had opportunity, once again, to consider all of the evidence that had been submitted, a lot of the old and all of the new. We also took into consideration arguments from the State's counsel on our order that was issued last evening, August 21, 2008, and on our motion, we have decided to reconsider that order.

There were two points raised by the state. One was that we incorrectly determined the application of AS 15.13.145(b) in light of changes that were made to that section by Section 24 Chapter 48 SLA 1996. Respondent says that neutrality should not be a standard that is used. We considered that and looked primarily at language contained in Senate Bill 221, and we find that the wording could have been clearer. But the way, we read it, and read it last night, that the primary reason for the allocation was to facilitate educating the public. The clause that included providing information that may "influence the outcome" of a ballot granted the State authority to educate the public and to avoid criticism if they, in fact, influenced the outcome.

Based on the further testimony from the state, their primary focus was to educate, and they wanted to be fair in their presentation. The commission agrees. Perhaps, in the future, a regulation needs to be adopted to clarify this section since it is not unreasonable to feel that you cannot influence an election and still be neutral. Because we based our order on the fact that the primary focus of Senate Bill 221 was to educate the public, we provided a standard of being fair to the public and also looking to see if the wording was neutral. But we were primarily looking at the education aspect of it in the order that we came down on the Web site. Some may argue that it is intended to influence the election. The statement of the State is they are not providing their opinion on the ballot measure, [and] that were we [basing] our decision on the application of AS 15.13.145 (b) on the constitutional reference. It is Article 9, Section 6 of the constitution. We still believe that

the Web site should be reviewed as to be a fair representation in order to educate the public.

The second item that the State raised was regarding our order that was issued last evening. [Respondent argued] that we did not have the authority to issue a cease and desist order against State officials for action they may take in their State position and we prohibited them from advocating a position on Ballot Measure 4. The commission, on reflection, agrees that it was a hasty discussion dealing with constitutional issues and that we have not received adequate briefing on. Therefore, we will ask the State to provide a brief on the issue within 30 days. Respondent will be given an opportunity to reply to that brief in 30 days, and the State will have an opportunity to submit a reply brief 10 days thereafter. And then the commission will revisit that issue. Until then, that order is suspended.

[The Commission reviewed Respondent's exhibit 9, along with requested proposed language by both parties. The original exhibit, with two pages of proposed inserts is Commission Exhibit 1. All references to item numbers refer to numbers handwritten on the exhibit to describe places where there are issues of contention amongst the parties. The Commission describes its decision in relation to that exhibit herein.]

Moving to the Web site, first of all on page 1, paragraph, 1 line 1, the commission would like some wording inserted. And I will read the statement. "This document contains information on mine permitting relevant to Ballot Measure # 4" and, at that point insert "the State's position" on how it could affect existing and future mining operations in Alaska.

On the item we had noted as number 1, that would be under Overview, and the third bullet, going down to the second line from the bottom. The sentence starts with, "The Alaska Supreme Court has already had to rule." Change this to, "The Alaska Supreme Court has ruled." Take out "already had to." And if you will look over to page 3, the 3rd paragraph that we had numbered 8 is basically the same as bullet number 3. And the commission will give the State the option to delete one or the other. With the change with the wording that, "The Alaska Supreme Court has ruled in both places." whichever one you want. Otherwise that paragraph may stay.

[The next item is to go right before] bullet number 4 under overview on page 1, back to page 1, second sentence of bullet 4, "New facilities or development of new sites at existing mines may fall under the initiative."

**Ruth Hamilton Heese:** I'm sorry commissioner, could you repeat where you are?

**Chair Hickerson:** I'm back on page 1. Okay, before the fourth bullet that says, "The Ballot Measure exempts existing large-scale metallic mines." Before that the commission would like the state to put in section 3 of the ballot measure (scope) with the lead-in sentence that it is the text of the ballot measure as provided in section 3 of the ballot measure, on scope. Just put the wording in. And then under that bullet [(scope of ballot

measure), the next bullet says], “The Ballot Measure exempts existing large-scale metallic mines that have all their permits. New facilities or development of new sites at existing mines may fall under the initiative.” That may stay as is.

And let me just go back and say something first. We feel like our first insert, putting in “the State’s position” makes it clear this is the State’s position. Most people would understand that, but this is just kind of to make sure that it is the State’s position. We think inserting the scope would provide the public the opportunity to review the scope, and since there is disagreement over the scope, it is the State’s position that the item in number 2 should stay in. [The commission agrees.]

Under item 3 the commission looked at that and determined we do not know if all facilities are presently permitted at the Red Dog, Fort Knox and Pogo mines, and so we cannot say that it does not apply to those existing facilities. So that paragraph stays as presented by the State.

On page 2 insert A and B [as presented by the State] are approved and will be located according to where the state had indicated they want it to be along with the change that’s in number 4.

[Under item 5] insert B and change the wording of the lead-in to the link according to what the state had recommended. Under item C the complainant wanted to insert “permissible discharge level can vary depending on site conditions.”

The commission acknowledges that the Department of Environmental Conservation has extremely technical statutes and regulations both on the state and federal level, and we will defer to the Respondent’s recommendation that the Complainant’s insert not be included.

On page 3 paragraph 2, last sentence, “It is the opinion of the Alaska Department of Law that passage of the initiative would not require a change in either the rules or practices that apply to mines in Alaska.” The question of changing it from “would” to “may” was discussed by the commission. [We] will allow “would” to stand because this is the Department of Law, and we acknowledge the fact that the Department of Law does a review of initiatives, and if that is their opinion, that is their opinion, that it would work.

[Item 8] has already been discussed that this is redundant to the first page under Overview paragraph 3. [Respondent can choose] one or the other. It’s the State’s option.

[With respect to item 9,] I believe there is no disagreement that the sentence next to the last paragraph on page 3, “While the State does not see the initiative changing how mines are regulated, others apparently do,” that is okay. Deleting the next sentence is okay.

The complainant wanted to remove the very last sentence of page 3, [which is item 10]. “Any development of new sites or facilities at existing mines such as Red Dog, Fort

Knox and Pogo could be subject to Ballot Measure 4's provisions." may stay in. We believe that is not an incorrect statement, "could be subject to."

**Scott Kendall:** Madam Commissioner, this is Scott Kendall. My phone just went to static and I had to get back in.

**Chair Hickerson:** Where was I when you left?

**Scott Kendall:** You had just said going to the bottom of page 3, second paragraph at the bottom. You just approved of placing "apparently" in and lining out the next following sentence.

**Chair Hickerson:** Okay. The next one was number 10. The complainant wanted to [delete the last sentence regarding] "at existing mines." We believe by putting the scope of the initiative on page 1 and the fact that it addresses "any new development of new sites or facilities at existing mines such as Red Dog, Fort Knox and Pogo could be subject to Ballot Measure 4's provision" is a fair statement that can remain in.

On number 11, complainant requested the insert, [which is insert D], "The purpose of these regulations is to prevent harmful discharge, however violations can and do occur." I believe that is obvious to the public, and there is no need to insert that since we are talking about regulations. So that is not required to be inserted.

The commission would also like a link to the Division of Elections to be provided so that more information on Ballot Measure 4, including their sponsors and any other information that might be in Election that might be available for the public through this Web site. You could just say, "For more information about the ballot measure or any other ballot measure, here is the link to Elections."

Commissioners, do either of you wish to add anything to what I've just said. And have I correctly stated your decision?

**Commissioner Ballenger:** This is Commissioner Ballenger, Chair Hickerson, on the top of page 2, I did not hear you say where it says "are currently three proposed mines." We do want that to change to two.

**Chair Hickerson:** That is correct.

**Commissioner Ballenger:** Okay. I didn't hear you say that.

**Chair Hickerson:** I didn't.

**Commissioner Ballenger:** OK. I guess I was not 100 percent sure on adding the scope. We did in fact decide that, right?

**Chair Hickerson:** Yes

**Commissioner Ballenger:** Okay. Thank you. I do not have other corrections.

**Chair Hickerson:** Commissioner Dean?

**Commissioner Dean:** No, I think you have covered it all.

**Chair Hickerson:** I would ask the State if they have any questions.

**Ruth Hamilton Heese:** I do, Commissioner Hickerson. The first one I will bring out was the Overview on page 1, the third bullet down that begins with ballot measure language. You have stated that either that paragraph must disappear from there or from page 3 under “Ballot Measure 4 Effects on Mining Regulation,” that we cannot have it in both places?

**Chair Hickerson:** It seems to be redundant, and the Complainant argued that they felt that it was unnecessary and they can speak for themselves. What the commission found is that it was pretty much duplication.

**Ruth Hamilton Heese:** Well, Commissioner Hickerson, if we were to agree to eliminate one or the other would, you leave it to our discretion which place to put the language?

**Chair Hickerson:** Absolutely

**Ruth Hamilton Heese:** And the other point that I point out it is on page 3. There is a lead-in sentence that is not found on the front page.

**Chair Hickerson:** That is correct and you can leave that in

**Ruth Hamilton Heese:** And then the last sentence we recognized to revise that the Supreme Court “has ruled” as opposed to “has already had to rule.” But I do want to make sure that somebody is actually looking at these words while talking to you. Trying to make sure that the wording is precisely the same, and I do not know if any of you had the opportunity to do that. Just curious.

**Chair Hickerson:** We the commission?

**Ruth Hamilton Heese:** Yes.

**Chair Hickerson:** We did. We looked at it, and in essence we thought with the exception of that lead-in sentence on page 3, we thought it was all the same. But take a look at that. I will tell you what you will do. Go through additional concerns, then we will give you some time.

**Ruth Hamilton Heese:** Okay.

**Chair Hickerson:** Okay. Ms. Hamilton Heese, if you have any other questions, let us do those, and then we will give you an opportunity to compare those sections.

**Ruth Hamilton Heese:** Thank you. The overview at the fourth bullet we understand you are asking for the actual text for section 3 on the Ballot Measure to be inserted. Where in that bullet are you asking for that?

**Chair Hickerson:** Before the 4<sup>th</sup> bullet just have some intro language like “Ballot Measure 4 under section 3 contains the scope of the initiative” and just put the wording verbatim. That does seem to be the biggest difference of opinion that has been presented to us and so that does two things, one, puts the wording right there, and two, it allows the department to put its interpretation down as to the scope.

**Ruth Hamilton Heese:** I think that is probably okay, and just for the commission and the opposing counsel, rather than before the bullet, introduce it as part of the start of the bullet. Otherwise the formatting will look strange.

**Chair Hickerson:** It does not matter. Put it wherever you want it in the Web site, but put it before you get into the discussion of the application.

**Ruth Hamilton Heese:** Okay.

**Scott Kendall:** This is Scott Kendall. I think essentially it can just go on its separate bullet point that precedes the one that talked about the scope, and it could simply say that the initiative describes its scope as follows and just put a quote of section 3.

**Commissioner Hickerson:** Okay, just a second. It is up to the State where it will put the verbatim language of the initiative under section 3 that related to the scope as long as it goes in before the discussion of application so the public has an opportunity to read the wording from the ballot measure.

**Scott Kendall:** That sounds fine to me, Commissioner Hickerson.

**Ruth Hamilton Heese:** We're okay with that. That might be it, but hold on. Commissioner Hickerson, I believe we're okay with what you described to put into the Web site.

**Chair Hickerson:** Okay. Mr. Kendall, do you have any questions?

**Scott Kendall:** Yes, I actually just have two questions. Bullet point 3, we do appreciate that you're eliminating one or the other of those. I had highlighted on my sheet that we objected and maybe you have discussed this and I missed it. I'm just taking notes as I go. That we objected to the use of the language “in general and less precise” and maybe you said the language could stay, and maybe I just missed it.

**Chair Hickerson:** Yes. It may stay.

**Scott Kendall:** And the only other question I had was the link to the Division of Elections. Exactly where are we going to place that? I just want to know essentially where we are going to place that information. My preference would just be, maybe early on, up above in that very first paragraph when you first mention the Ballot Measure 4. Essentially more information about Ballot Measure 4 could be found here and then link to where they can view the text and so forth.

**Chair Hickerson:** I think that is a good placement for that. Is there any objection?

**Ruth Hamilton Heese:** I'm sorry I couldn't quite follow where he was suggesting it go.

**Scott Kendall:** The very first paragraph of the document where you say, "This document contains information on mine permitting relevant to Ballot Measure 4 and how it could affect existing and future mining in Alaska." Just right there or the end of the paragraph I would insert a line that says, "Further information or more details regarding Ballot Measure 4 could be found here" and just a hyperlink to the Division of Elections where you can view the full text of the initiative and who the sponsors are and so forth.

**Ruth Hamilton Heese:** Can I please preface it by saying further information regarding Ballot Measure 4 can be found at the following link.

**Scott Kenadall:** Yes

**Chair Hickerson:** And what was your other comment, Mr. Kendall?

**Scott Kendall:** Those are my two questions.

**Ruth Hamilton Heese:** Can I ask for one more clarification, Commissioner and opposing counsel? The statement we are adding, "further information," I prefer we indicate that it's on the Division of Elections Web site in the textual part even though that's reflected perhaps in the link. But I do want it to be pointed out; it is different from the state position with respect what the Department of Natural Resources and the Department of Environmental Conservation have set forth.

**Chair Hickerson:** That's fine.

**Scott Kendall:** I would agree to that. Perhaps in addition, rather than saying for "further information," perhaps the full text of Ballot Measure 4 and further information. Is there any opposition to that? Assuming someone just wants to find it and read it.

**Ruth Hamilton Heese:** The full text?

**Scott Kendall:** [Say] "Ballot Measure 4 as well as additional information about it can be found at the Division of Elections Web site" and then put the link.

**Ruth Hamilton Heese:** I'm concerned about the statement. That might confuse what's on the Division of Elections Web site with information that we are incorporating here. It is the Department's position we are taking on the Web site.

**Chair Hickerson:** The State of Alaska can figure out the wording that they feel comfortable with just so the public at the top of page 1 has an ability to go to the Division of Elections Web site for additional information and for the full text of the ballot measure.

**Ruth Hamilton Heese:** Thank you, commissioner.

**Scott Kendall:** Yes. If the state needs to insert a disclaimer that says the "Division of Elections opinions are not necessarily those of DNR" or something along those lines as long as it says the full text or more information are available there. I don't anticipate having a problem with such a disclaimer.

**Chair Hickerson:** Are there any questions?

**Ruth Hamilton Heese:** Commissioner Hickerson, not with respect to the edits that you have described for the information on the Web site.

**Chair Hickerson:** Does the state need additional time to check the paragraphs on pages 1 and 3.

**Ruth Hamilton Heese:** We would appreciate maybe two minutes.

**Chair Hickerson:** That will be just fine. We go off record.

Off Record.

On Record.

**Chair Hickerson:** Please proceed.

**Ruth Hamilton Heese:** With this explanation, we will accept the change to the last sentence where you have struck the words "already had." We find that sentence made sense with respect to the previous sentence, which noted that the initiative terminology leaves room for differing interpretations that will likely have to be resolved by the court. Then we said that the Alaska Supreme Court "has already had to rule," which indicated that could be a problem. That is why we pointed it out, however, having expressed the concern that we were highlighting there, by expressing those words, that concern, is, I think, diminished in terms of its presentation. It's cumbersome. But, we will accept the change.

**Chair Hickerson:** Do you have any additional comments?

**Ruth Hamilton Heese:** Beyond the edits that you suggested or instructed?

**Chair Hickerson:** Anything else with the edits. Let's do that first. Questions about the edits?

**Ruth Hamilton Heese:** Not from the state.

**Scott Kendall:** I have one question, I guess, for the State. Has the State decided which one of those two paragraphs would be deleted or that's something they will decide.

**Chair Hickerson:** That is beyond what we are here for. They will decide. If you want to talk to them, when we are finished, then you may. Did either party have anything further they wanted to bring before this commission? Ms Hamilton Heese, is there something else you want to discuss or argue or mention other than the edits?

**Ruth Hamilton Heese:** Yes, just a minute. With respect to your interpretation of the State's appropriation in light of AS 15.13.145 (b) and how you interpreted it, we still have significant concerns and will likely appeal it, and it could be on an expedited motion filed as soon as Monday, but I'm not sure of that. I just thought I would get it on the record and also express that I have shared that likelihood with opposing counsel by virtue of my statement here.

**Chair Hickerson:** Okay. Anything else?

**Scott Kendall:** Nothing from the complainant. We obviously didn't get everything we asked for. At this time we have no intention to file an appeal.

**Chair Hickerson:** Okay. You know, what the parties want to do, they will do, and we do not take a position on that. This is going to be a final decision. It is not a written decision. I believe this resolves, well, it addresses all of the items in the complaint, as soon as the Web site is corrected as ordered and most of this has been a stipulation by the parties, according to the existing State recommendations. But as soon as the Web site is corrected according to the order, the cease and desist order will be lifted.

**Ruth Hamilton Heese:** Commissioner, could you repeat the last one more time?

**Chair Hickerson:** Okay. As soon as the Web site is corrected, the cease and desist order is lifted, and in order to expedite that we will let the State work with the Departments, with the advice of their attorney, to ensure that the Web site has been modified consistent with this order. And once you feel that has been achieved, you may run your Web site, because if you do it tonight at 2 a.m., and want to get it going, we are not going to be here at 2 a.m. to look at it. And I would just leave it to the complainant to bring it to the Commission's attention in the event that he does not believe it is consistent with the Commission order.

**Ruth Hamilton Heese:** Understood on behalf of the State.

**Scott Kendall:** I understand on behalf of the complainant. I just have one thing to say if someone already thought of this. I know we have created this 5-page document that we have worked off together. I don't know if that's made part of the record, but I guess I would suggest that we do that for the sake of completeness.

**Chair Hickerson:** Well, I will tell you what is wrong with that, not wrong, but since we made it available. ( To Maria Bulfa APOC recording clerk:) Do you have a clean copy of what we made available, and do you have copies of the insertions?

**Maria Bulfa:** I do have a copy of those.

**Scott Kendall:** I believe a clean copy of the record, coupled with the transcript, would be clear enough record.

**Chair Hickerson:** Okay, and we would make that Commission exhibit 1.

**Scott Kendall:** Thank you, Commissioner

**Chair Hickerson:** Okay. I'm looking at the dates for briefing. And the State brief will be due September 23, 2008; Complainant's brief will be due October 27, 2008; State's reply brief will be due November. 5, 2008. And this is on the issue of the Commission's authority to impose a cease and desist order to restrain state officials from advocating against Ballot Measure 4 under the facts of this case, the appropriation of this case, the Senate Bill 221, so it's kind of a narrow focus. Questions about that?

**Scott Kendall:** No, commissioner

**Ruth Hamilton Heese:** Commissioner, this is Ruth Heese. You did say that you were suspending that order pending the briefing? And so that is not imposed on public officials at this time?

**Chair Hickerson:** The commission has suspended that order. That is correct.

**Ruth Hamilton Heese:** Thank you.

**Chair Hickerson:** Any further comments from the parties?

**Scott Kendall:** Nothing from the complainant other than to thank the commission and the staff and the opposing counsel as well. We have been working for several days straight, and the complainant does appreciate the commission and the commission staff for their hard work, and we just want to emphasize, we thank you for that.

**Chair Hickerson:** Thank you. From the state?

**Ruth Hamilton Heese:** This is the state, and I appreciate everyone's effort. We are sorry we ended up here, but we are thankful that we have some resolution on this issue.

**Chair Hickerson:** Other commissioners? Commissioner Dean?

Conclusion: Chair Hickerson, Commissioner Dean and Commissioner Ballenger thank the staff and recognize the staff's hard work.

**Off Record.**

Mine Permitting Background for Initiatives

Alaska Department of Natural Resources  
Alaska Department of Environmental Conservation

Deleted: BALLOT MEASURE #4

Deleted: Information for Voters

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This document contains information on mine permitting relevant to Ballot Measure #4, and how it could affect existing and future mining operations in Alaska. Ballot Measure #4 will be on the August 26, 2008 primary election ballot, and seeks to prevent mining discharges to water that adversely affect human health or salmon.

OVERVIEW

- There are existing federal and state laws that prohibit discharges and other activities that would adversely affect salmon and human health. State water quality standards specifically prohibit discharges and other activities that could cause adverse effects on aquatic life, including salmon. The standards also protect water quality for drinking water use.
- In the event that new science suggests that water quality standards need to be changed to fully protect salmon, human health, or other uses, the standards must be modified so that they are fully protective. State water quality standards must be reviewed at least every three years to ensure they stay current.

*no re  
Self monitoring  
New State*

The Ballot Measure's language is general and less precise than language used in current federal and state law. For example, it uses but does not define terms such as "releases" or "discharges." In contrast, these terms are specifically defined within the existing body of water quality law. The initiative's terminology leaves room for differing interpretations that will likely have to be resolved by the courts. The Alaska Supreme Court has already had to rule that the initiative's use of the term "effect" should be interpreted as meaning "adversely affect."

*adversely affect -*

*Chesnut*

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- The Ballot Measure exempts existing large-scale metallic mines that have all their permits. New facilities or development of new sites at existing mines may fall under the initiative.
- This Ballot Measure would apply to all new large-scale metallic mines (disturbing over 640 acres), not just the proposed Pebble mine.

*discharges*

*discharges  
OK*

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Deleted: However, existing mines will likely need changes to their permits to accommodate future changes in their operations.

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water*

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BACKGROUND

Ballot Measure 4 is an initiative which seeks to prevent mining discharges to water that would adversely affect human health or salmon. This document summarizes current laws for protecting water quality and provides factual information on the likely impacts of the initiative if it were voted into law. It is intended to be an objective assessment and does not advocate for or against the initiative. Anyone interested in the initiative or its potential effects is encouraged to read the language of the initiative, become familiar with existing state and federal laws pertaining to water quality and mine permitting, and take whatever additional steps they need to understand how the initiative might change existing laws and what the effects of the changes might be.

*OK*

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Ballot Measure 4 would apply on a statewide basis to new mines extracting metallic minerals, but only those mines that use or disturb more than 640 acres (including disturbance of land and water as well as underground activities and infrastructure such as roads. For purposes of comparison, there are currently three metal mines in Alaska exceeding 640 acres: the Red Dog, Fort Knox and Pogo mines. Also, there

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*(3) It disagrees  
doesn't apply to  
those existing facilities*

COMMISSION EXHIBIT 1 R-9

<sup>two</sup> are currently ~~three~~ proposed mines in Alaska, Donlin Creek and Pebble, that would exceed 640 acres. The Greens Creek and Kensington mines are less than 640 acres.

**Deleted:** It is anticipated that most new significant mines in Alaska would exceed the 640-acre threshold.

**Deleted: HOW STATE LAWS ARE CHANGED**

¶ In Alaska, citizens can sponsor initiatives to make or change Alaska laws. Initiatives are not subject to the legislative development and review process which includes committee hearings and opportunity for public testimony. The Lieutenant Governor, with the assistance of the Department of Law, processes citizen initiative applications. The Lieutenant Governor ensures the initiative applications meet certain threshold requirements of Alaska laws, and are supported by a sufficient number of signatures by Alaska residents, before an initiative is placed on the ballot for voters' action. If approved by the voters, the initiative language becomes new state law, effective 90 days after the election is certified by the Division of Elections. While the legislature may amend the new law, it may not repeal or make changes that would have the effect of repealing the law for two years.¶

¶ In addition to citizens' initiatives, rules that apply to mines can be changed using other methods. Federal and state regulations can be amended through the public rulemaking process. In addition, federal and state statutes can be amended through the legislative process. Both administrative rulemaking and legislative processes include public notice and comment and opportunities for amendment prior to enacting new laws.¶

### CURRENT REGULATION OF MINES

There are currently state and federal laws that apply to mines. The federal Clean Water Act and state laws make it illegal for mining and other activities to adversely impact water quality and the beneficial uses of the nation's and state's waters. These laws prohibit or limit activities that could pollute water.

Anyone wishing to discharge wastewater to a surface or underground water must first obtain a permit or other form of approval from the federal and/or state government. These permits or approvals prohibit discharges that have the potential to exceed water quality standards. These standards are set by the State to protect water quality for all fish and other aquatic life, for recreation, and for drinking and other human uses. As regulations, adopting and amending state water quality standards require public notice and comment and opportunity for amendment. The Clean Water Act requires that states review their water quality standards at a minimum of once every three years to help assure that standards stay current with the latest science. Changes in the state standards require the approval of the U.S. Environmental Protection Agency (EPA). In approving state standards, EPA is required to consult with other agencies and tribal governments. EPA cannot approve state water quality standards that are not protective of aquatic life (including salmon) and human uses.

In addition to protecting water quality, state law also includes provisions for such matters as restoring lands disturbed by mining activities, for monitoring of permitted discharges and downstream water quality, for protecting fish habitat and passage, for preventing spills of fuels and other hazardous substances, for air emissions, for dam safety, for protecting wetlands, for waste disposal, and for penalizing violations of the law.

Federal agencies also have significant permitting authority and regulatory oversight of mine projects in Alaska. The National Environmental Policy Act requires that an Environmental Impact Statement be prepared for virtually all new large mines. Discharges to surface waters require permits from the EPA. Building dams or storing mine wastes in wetlands require a permit from the U.S. Army Corps of Engineers. The National Marine Fisheries Service and U.S. Fish and Wildlife Service must be consulted on matters of fish habitat and activities that could affect endangered species.

A description of the permitting process and the major state and federal permits and approvals required for large mines can be found at: <http://www.dnr.state.ak.us/mlw/mining/largemine/index.htm>

The state's water quality standards are available at: [http://www.dec.state.ak.us/water/wqsar/wqs/pdfs/18%20AAC\\_70\\_WQS\\_Amended\\_July\\_1\\_2008.pdf](http://www.dec.state.ak.us/water/wqsar/wqs/pdfs/18%20AAC_70_WQS_Amended_July_1_2008.pdf)

A summary of the state water quality standards is available at: <http://www.dec.state.ak.us/water/wqsar/wqs/wqs.htm>

The state's process for updating Water Quality Standards is available at: [http://www.dec.state.ak.us/water/wqsar/trireview/pdfs/Triennial\\_Review\\_Process%203.pdf](http://www.dec.state.ak.us/water/wqsar/trireview/pdfs/Triennial_Review_Process%203.pdf)

The Alaska Water Quality Criteria Manual for Toxic and Other Deleterious Organic and Inorganic Substances is available at: <http://www.dec.state.ak.us/water/wqsar/wqs/pdfs/70wqsmanual.pdf>

LINK?

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Page 2 of 3

Donlin Creek  
Pebble  
Insert A

agree

OK

Change wording (5)

Insert B (OK W/C)

move to top

(4) State offers: Insert A (OK W/C)  
(11) C wants insert D before links

## BALLOT MEASURE 4 EFFECTS ON MINING REGULATION

Ballot Measure 4 seeks to regulate the adverse effects of large mine activities on human health and salmon. It is difficult to assess what, if any, changes from the current regulatory regime might be required if the initiative is approved by the voters.

The difficulty in determining the impact of the Ballot Measure is that while it seeks to prevent mining discharges that would adversely affect human health or salmon, existing federal and state laws already do so. It is the opinion of the Alaska Department of Law that passage of the initiative would not require a change in either the rules or practices that apply to mines in Alaska.

By introducing new terminology, however, the Ballot Measure creates room for differing legal interpretations. The Ballot Measure's language is general and less precise than language used in current federal and state law. For example, it uses but does not define terms such as "releases" or "discharges." In contrast, these terms are specifically defined within the existing body of water quality law. The initiative's terminology leaves room for differing interpretations that will likely have to be resolved by the courts. The Alaska Supreme Court has already had to rule that the initiative's use of the term "effect" should be interpreted as meaning "adversely affect."

There are two prohibitions at the heart of the initiative:

- The first prohibits release of a toxic pollutant, in a measurable amount that will adversely affect human health or salmon, into any surface or subsurface water or tributary that is utilized by humans for drinking water or by salmon.
- The second prohibits the storage or disposal of metallic mineral mining wastes in ways that could result in the release of pollutants that could adversely affect surface or subsurface water or tributaries used for human consumption or salmon.

However, water quality is already protected for human, salmon and other uses under the federal Clean Water Act and state water quality standards. If Ballot Measure 4 were to pass, the State would continue to permit discharges from, and otherwise regulate, large metallic mines as it does now, and provide the protections reasonable and necessary for human health, salmon and other protected uses.

While the State does not see the initiative changing how mines are regulated, others clearly do. The basis for these other interpretations, however, is often left unstated and consequently difficult to ascertain.

One aspect of the initiative that remains unclear is its effect on large mines that are already authorized to operate. The initiative does not apply to existing mines or to future operations of existing facilities at existing mine sites. It appears, however, that development of new facilities at existing mines might be subject to the initiative. Any development of new sites or facilities at existing mines such as Red Dog, Fort Knox and Pogo could be subject to Ballot Measure 4's provisions.

Deleted: imprecise

Deleted: Ballot Measure 4 does not contain any provisions relating to the public process to be followed in changing water quality standards or issuing permits for mines.

Deleted: as might any expansion of the mines

Deleted: expansion, modification or routine renewal of permits, along with development of new facilities

### Deleted: ¶ LEGAL SUMMARY ¶

¶ The Lieutenant Governor certified 07WATR3 (the proposed initiative) for the ballot, and identified it as Ballot Measure 4 for the upcoming August election. An organization representing mining companies, as well as the Pebble project proponent, appealed that decision, asserting that 07WATR 3 was, among other things, an impermissible appropriation of state resources (i.e., land and water resources). Fairbanks Superior Court Judge Blankenship agreed with the State's position that it was appropriate to imply the word "adverse" before the word "effect" for this initiative, and that the "State's summary of 07WATR3 using the term 'adversely,' as in adversely affect human health and the salmon life cycle, is appropriate to convey the obvious intent of the initiative." Feb. 28, 2008 Memorandum Decision and Order at p. 39. Judge Blankenship agreed with the Lieutenant Governor's conclusion that 07WATR 3 was permissible regulation, rather than an impermissible appropriation. Judge Blankenship also stated that the Department of Environmental Conservation may need to promulgate regulations to implement 07WATR 3 if it passes, but because many of the State's existing regulations should already suffice to implement the initiative's provisions, it is likely that the State would incur few additional regulatory costs. ¶

¶ On appeal, the Alaska Supreme Court issued an order on July 3, 2008, upholding Judge Blankenship's decision that, among other things, Ballot Measure 4 is not an impermissible appropriation of state resources and is not s[... [1]

(A) All mines need approved monitoring plans that include monitoring for air, surface water, and ground water quality. Typically, samples are ~~sent to a~~ collected by the mine operator, and are sent to a certified lab. Lab reports are then sent to the agencies.

Agencies can also conduct independent monitoring, and also conduct regular inspections of minesites. State and federal environmental agencies have enforcement authority to ensure compliance with ~~the~~ their permits.

(B) Information on the state water quality criteria, protected water uses, and other provisions of the state water quality regulations is available at:

a summary of the state water quality standards,

For purposes of monitoring ~~the~~ whether compliance with permits has occurred,

Insert C

(Add in front of Insert B)

"Permissible discharge levels can vary depending on site conditions."

Insert D

(Last Paragraph before links)

"The purpose of these regulations is to prevent harmful discharge however violations can and do occur."