

**AUDUBON ALASKA – GREAT BEAR FOUNDATION – EARTHJUSTICE
LYNN CANAL CONSERVATION – RIVERS WITHOUT BORDERS
SOUTHEAST ALASKA CONSERVATION COUNCIL**

April 26, 2022

BY EMAIL

Randy Bates
Director, Division of Water
Alaska Department of Environmental Conservation
E: randy.bates@alaska.gov

Re: Constantine Mining LLC's Revised Application for Waste Management Permit for the Palmer Phase II Exploration Project

Dear Director Bates:

On behalf of our members and supporters, the undersigned groups request that the Alaska Department of Environmental Conservation (ADEC): (1) provide public notice and a 30-day comment period on Constantine Mining LLC's (Constantine) revised "Application for Waste Management Permit for the Palmer Phase II Exploration Project" (revised permit application); and (2) clarify when it will make a final decision on the September 2019 remand of the permit.

Wastewater discharge from Constantine's mine operations has the potential to significantly affect the ecologically rich and culturally and economically critical Chilkat River watershed. Constantine is seeking approval for a substantially modified wastewater discharge plan that the public has not had an opportunity to review. ADEC must provide an opportunity for the public to review and comment on this plan prior to making a decision that could have very significant consequences for the environment and for the people who live in and rely on the Chilkat River watershed. Additionally, ADEC now has all the information necessary to reach a final decision on the remand of the previously issued waste management permit, which was ordered in September 2019. ADEC should make that decision concurrently with a decision on the revised permit application or announce a timeline for promptly making that decision.

I. Background

Constantine applied for a Waste Management Permit (WMP) for its mine exploration plan in March 2019. ADEC approved the permit in July 2019.¹ On August 6, 2019, Southeast Alaska Conservation Council (SEACC) and several other organizations timely requested informal review of the WMP, raising a number of issues, including that the permit would allow discharge to reach surface waters in violation of the Clean Water Act (CWA) and the Alaska

¹ ADEC, Waste Management Permit 2019DB0001 (Jul. 17, 2019).

Pollutant Discharge Elimination System (APDES) program.² On September 9, 2019, Acting ADEC Division of Water Director Amber LeBlanc remanded the permit decision to Division of Water staff for additional review, including for evaluation of the applicability and potential implications of the Ninth Circuit Court of Appeals' decision in *Hawai'i Wildlife Fund v. County of Maui*.³ In her decision, Acting Director LeBlanc stated that ADEC expected staff would complete that review in approximately 90 days, and she advised of the right to seek informal review or adjudicatory hearing "after division staff issues a final decision on remand."⁴

On November 12, 2019, Acting Director LeBlanc sent a letter to SEACC explaining that ADEC had approved groundwater transport dye studies to evaluate the surface water connection and the applicability of the *Hawai'i Wildlife Fund* case, which at that time was on appeal to the U.S. Supreme Court.⁵ The letter stated that ADEC expected the results of the dye studies by the end of February 2020, and that in the interim, the permit remained in effect and ADEC would continue to evaluate other aspects of the remand.⁶ The letter further stated that "[ADEC] does not have a regulation-based timeline to complete the remand, but is dedicated to assuring the issues raised during the informal review are addressed."⁷

In April 2020, the Supreme Court issued its decision in *County of Maui v. Hawai'i Wildlife Fund*, confirming that the CWA applies to regulate point-source discharges that reach surface waters through the functional equivalent of a direct discharge, including where the discharge travels through a short stretch of groundwater.⁸

More than two-and-a-half years after remanding the WMP, and two years after the Supreme Court clarified applicable provisions of the CWA, ADEC still has not issued a final decision on the remand. In the most recent formal correspondence from ADEC on this issue, in October 2021, ADEC Division of Water Director Randy Bates explained that the remand was "still with the Division staff as they consider the issues and the [Supreme Court's] ruling."⁹ Director Bates stated that Constantine had not submitted the dye test results that ADEC previously said it expected in February 2020.¹⁰ Director Bates further explained that while the permit remains in effect during the remand, "Constantine is unable to discharge until [ADEC] reviews and approves their wastewater system plans."¹¹

² SEACC, Request for Informal Review (Aug. 6, 2019).

³ ADEC Acting Director LeBlanc, Re: Decision on Request for Informal Review of Waste Management Permit 2019DB0001 (Sept. 9, 2019).

⁴ *Id.*

⁵ ADEC Acting Director LeBlanc, Re: Remand of Waste Management Permit 2019DB0001 (Nov. 12, 2019).

⁶ *Id.*

⁷ *Id.*

⁸ 140 S. Ct. 1462, 1476 (2020).

⁹ ADEC Director Bates, Re: Public Hearing Request for WMP 2019DB0001 (Oct. 12, 2021).

¹⁰ *Id.*

¹¹ *Id.*

On April 14, 2022, Constantine submitted a revised permit application.¹² In the cover letter for this permit application, Constantine disclosed that in August 2020, at Constantine’s request, ADEC withdrew approval of the wastewater discharge system set out in Constantine’s original application “until further site investigation and study of the affected hydrology was conducted,” after which “Constantine would need to resubmit new design document(s) and any related or supporting document(s).¹³ The cover letter further explained that the company had since completed further investigation and “incorporated that additional information into an updated design for the wastewater discharge system as well as some less significant design and operational changes.”¹⁴

The updated design described in the revised permit application includes substantial changes to the land application disposal system (LAD) relative to Constantine’s March 2019 permit application.¹⁵ Constantine explains that it has updated “the *entire* LAD system comprising the water treatment plant, settling ponds, diffuser and the piping that connects them.”¹⁶ Among other things, the new LAD design eliminates the upper diffuser; relocates and expands the lower diffuser; makes changes to the pumping system and pumphouse, including additional pipeline to allow pump-back capacity from sediment ponds to the adit portal; and adds active water treatment, requiring transport and storage of toxic chemicals.¹⁷ Indeed, the only element of the LAD design that appears unchanged is the diffuser trench depth, width, and materials, and the size of the sediment ponds.¹⁸ Additionally, the revised permit application includes a new description of the proposed wastewater discharge as well as updates to construction timeline and who will own and operate the LAD system. Constantine is effectively requesting approval of an entirely different wastewater discharge system.

II. ADEC must provide public notice and comment on Constantine’s revised permit application.

We request that ADEC provide public notice and a 30-day comment period on Constantine’s revised permit application, in compliance with AS 46.03.110. ADEC must publish notice of “an application for an individual or general permit” and allow interested persons to provide written comments on the application within 30 days of that notice. AS 46.03.110(b); *see also* 18 AAC 15.050. Constantine has submitted a revised “Application for Waste Management Permit”; the requirement for public notice and comment plainly applies. Moreover, Constantine’s revised

¹² Constantine, Application for Waste Management Permit for the Palmer Phase II Exploration Project (Apr. 14, 2022) (Revised Permit Application).

¹³ Constantine, Cover Letter to Revised Application for Waste Management Permit for the Palmer Phase II Exploration Project at 1 (Apr. 14, 2022).

¹⁴ *Id.*

¹⁵ *See* Revised Permit Application at 1-2.

¹⁶ *Id.* at 2 (emphasis added).

¹⁷ *Id.* at App. A.

¹⁸ *See id.*

permit application includes a substantial redesign of the primary system for wastewater discharge. It is not merely a request for design review of a system that was described in the original permit or of minor modifications to the previously described system. Such substantial changes are necessarily a new request for approval under AS 46.03.100, for which public notice and opportunity for comment are required.

III. ADEC should promptly issue a final decision on remand.

We also request that ADEC make a final decision on the September 9, 2019, remand of the permit. This decision is long overdue. The Supreme Court issued its decision in *County of Maui v. Hawai'i Wildlife Fund* approximately two years ago.¹⁹ Constantine has now submitted its revised plan and groundwater studies. ADEC has had ample time to review its policies in response to the *County of Maui* case and now has all of the information necessary to make a final decision whether this WMP would allow a discharge into surface waters without an APDES permit, in violation of the CWA. Indeed Director Bates' October 2021 letter, addressing both the remand and ADEC's upcoming review of Constantine's revised wastewater management system, suggests that ADEC was waiting on Constantine's updated wastewater treatment plans in order to make its final decision on the remand.²⁰ Please confirm if ADEC intends to issue a final decision on the remand when it decides whether to approve Constantine's revised permit application, and, if not, please indicate the date by which that decision will be made.

Thank you for your attention to these requests. If you have any questions, please contact Jeremy Lieb at (907) 792-7104 or jl Lieb@earthjustice.org.

Sincerely,

David Krause
Director of Conservation
AUDUBON ALASKA

Shannon Donahue
Executive Director
GREAT BEAR FOUNDATION

Jeremy Lieb
Senior Attorney
EARTHJUSTICE

Jessica Plachta
Executive Director
LYNN CANAL CONSERVATION

Chris Zimmer
Alaska Campaign Director
RIVERS WITHOUT BORDERS

Aaron Brakel
Inside Passage Waters Program Manager
SOUTHEAST ALASKA CONSERVATION
COUNCIL

¹⁹ 140 S. Ct. at 1462 (decision released April 23, 2020).

²⁰ ADEC Director Bates, Re: Public Hearing Request for WMP 2019DB0001 (Oct. 12, 2021).

Cc:

Gene McCabe

Program Manager, Division of Water, Wastewater Discharge Authorization Program, ADEC

E: gene.mccabe@alaska.gov

Allan Nakanishi

Technical Engineer / Architect, Division of Water, Wastewater Discharge Authorization Program, ADEC

E: allan.nakanishi@alaska.gov