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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

SOUTHEAST ALASKA CONSERVATION)
COUNCIL, et al.,)

Plaintiffs,)

v.)

UNITED STATES ARMY CORPS)
OF ENGINEERS, et al.,)

Defendants.)

Case No. J05-0012 CV (JKS)

UNITED STATES' MOTION FOR
VOLUNTARY REMAND

Defendants, the United States Army Corps of Engineers, et al. (collectively, "Corps"),
hereby move the Court for a voluntary remand of the permit decision being challenged in this
action. The Corps makes this request so that it can suspend the challenged permit and conduct

further review of information related to it pursuant to 33 C.F.R. § 325.7. Based on that review, the Corps may reinstate, modify, or revoke the permit. See 33 C.F.R. § 325.7. Accordingly, we request that the Court stay this case to allow the Corps to conduct its review and take appropriate agency action. In support of this motion, the Corps states as follows:

1. On June 17, 2005, the Corps issued a permit under Clean Water Act ("CWA") section 404 (Permit No. POA-1990-592-M, Lynn Canal 31) to Coeur Alaska, Incorporated ("Coeur Alaska"). On the same date, the Corps issued a Record of Decision and Permit Evaluation ("ROD") for that permit. The Corps' issuance of that permit is the agency action challenged in this case. Shortly thereafter, on July 5, 2005, the Corps issued a CWA section 404 permit (Permit No. POA-1997-245-N) to Goldbelt, Incorporated for a marine terminal at Cascade Point, and also issued a ROD for that permit.¹

2. On September 12, 2005, Plaintiffs filed the Complaint for Declaratory and Injunctive Relief ("Complaint") in this matter, seeking judicial review under the Administrative Procedure Act. Complaint ¶ 7. The Complaint contains two counts, both set forth as CWA counts. Complaint at 11, 15. In Count I, plaintiffs challenge the Corps' determination to regulate the discharge of tailings under CWA section 404, 33 U.S.C. § 1344, rather than under CWA section 402, 33 U.S.C. § 1342. Complaint ¶¶ 48-72. In Count II, plaintiffs allege that the Corps' issuance of the section 404 permit to Coeur Alaska did not comply with guidelines promulgated under CWA section 404(b), 33 U.S.C. § 1344(b), for issuance of such permits. Id.

¹ As discussed below, one of plaintiffs' challenges in this case relates to the issuance of the section 404 permit for the Cascade Point marine terminal. If this motion for voluntary remand is granted, the Corps also will suspend the permit for the Cascade Point marine terminal.

¶¶ 73-99. Among other things, plaintiffs allege that the Corps improperly compared the impacts under various alternatives for Coeur Alaska's Kensington Mine project and failed to consider impacts associated with the construction of the proposed marine terminal at Cascade Point. Complaint ¶¶ 76-96.

3. To date, neither the agency record nor any merits briefs have been filed. The only briefing submitted to the Court in this matter concerns the motions to intervene filed by Coeur Alaska, the State of Alaska, and Goldbelt, Incorporated.

4. On November 3, 2005, the Court entered the Order Expediting Briefing (Docket No. 15). Under the Order Expediting Briefing, Plaintiffs' Opening Brief on Count I of the Complaint is due November 10, 2005. Order Expediting Briefing at 1. Briefing on Count II of the Complaint would proceed according to the timelines set forth in Local Rule 16.3, with an allowance for additional briefing by Intervenor-Defendants. *Id.* at 2. Pursuant to Local Rule 16.3(b), the agency record is due on November 14, 2005. Under Local Rule 16.3(c), Plaintiffs' merits brief on Count II would be due on or around December 14, 2005.

5. Even though neither the record nor any merits briefs have been filed, the Corps has undertaken its own review of the challenged permit decision and the accompanying ROD. Based on that review, the Corps has determined that the permit application merits further review and that the Corps should revisit the ROD and the Corps' underlying analysis instead of asking the Court to decide this case based on the existing record.

6. The Court possesses ample discretion to grant a voluntary remand, and voluntary remands to allow for reconsideration or revision of challenged agency action are commonplace. See, e.g., Nat'l Ass'n of Home Builders v. Norton, 340 F.2d 835, 840 (9th Cir. 2003) (discussing

district court's granting of motion for voluntary remand); Chang v. United States, 327 F.3d 911, 918 n.4 (9th Cir. 2003) (discussing proposal for INS to take a voluntary remand); Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1431 (9th Cir. 1991) (Ninth Circuit granted EPA's motion for a voluntary remand); Covelo Indian Community v. FERC, 895 F.2d 581, 584 (9th Cir. 1990) (FERC sought and obtained a voluntary remand from the Ninth Circuit).²

7. For these reasons, the Corps requests that the Court remand the matter to the Corps, whereupon the Corps will suspend the permit pursuant to 33 C.F.R. § 325.7 and conduct further review.³

8. Granting the relief requested by this motion may conserve judicial resources and save the parties from additional burdens of litigation. For example, it is possible that some or all of the allegations of the Complaint may be rendered moot or otherwise resolved by the Corps' further consideration on remand. See, e.g., Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) (stating preference for granting motions for voluntary remand because, among other reasons, doing so avoids "wasting the courts' and the parties' resources").

9. As discussed above, Plaintiffs have not yet filed a brief on the merits of the case and the Corps has yet to file the administrative record. Moreover, Plaintiffs would retain their

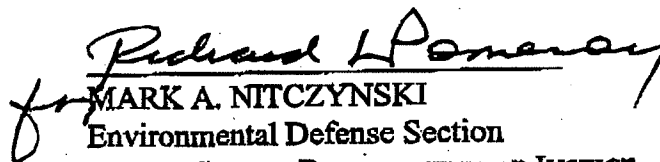
² Rather than taking unilateral action on the challenged permit, in an abundance of caution the Corps is requesting that this Court remand the matter to the agency because a challenge to the Corps' permit decision is pending before the Court.

³ Under the Corps' regulations, "[t]he district engineer may reevaluate the circumstances and conditions of any permit . . . and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest." 33 C.F.R. § 325.7(a). After suspension of a section 404 permit, the permittee may request a meeting with the district engineer or a hearing to present further information. 33 C.F.R. § 325.7(c). After any such proceedings, or within a reasonable time if no such proceedings are requested, the district engineer "will take action to reinstate, modify, or revoke the permit." Id.

opportunity to seek judicial review in this case should they be dissatisfied with the outcome of the proceedings on remand.⁴ Thus, granting this Motion would not prejudice Plaintiffs.

Respectfully submitted,

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⁴ Similarly, Coeur Alaska would retain its rights to seek judicial review if it is dissatisfied with a final agency action taken by the Corps on remand.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2005, I served a true copy of the foregoing UNITED STATES' MOTION FOR VOLUNTARY REMAND and the proposed ORDER GRANTING UNITED STATES' MOTION FOR VOLUNTARY REMAND by the methods indicated below, postage prepaid for U.S. mail, addressed to the following persons:

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