

Report of 2013 Fortymile Mining District Investigation

Introduction

This report has been prepared to review and summarize the facts involving a federal criminal compliance investigation of placer mining operations in the Fortymile mining district (“Fortymile area”) which occurred between August 19 and August 22, 2013 (“Criminal Compliance Investigation”). It has been prepared pursuant to a contract issued by the Office of the Governor which specifies the scope of services to be provided and the issues to be addressed.

The Fortymile area has been the focus of interest for gold miners for more than one hundred years. Presently, there are less than 80 miners in the region roughing out a living during the summer months by moving dirt and materials in search of gold and other precious metals. As a group, they are generally rugged individualists who need to be self-reliant due to their isolation. Their mining claims are run by one or two person owner/operators under less than perfect conditions. They face challenges from the environment, weather, wildlife, and even neighbors throughout the short mining season. From the appearance of their equipment and facilities, they are hardly getting rich. In spite of their conditions, they appear committed to hard work and eternal optimism that just around the corner, a vein of gold is waiting for them to discover.

In August 2013, nine of these miners received visits from criminal law enforcement officials representing the Bureau of Land Management (“BLM”), the Environmental Protection Agency (“EPA”), and the Department of Environmental Conservation (“DEC”). These investigations are the subject of this Report. Evidence was gathered but no criminal charges have been filed. The Criminal Compliance Investigation marked a change in the manner of enforcement of environmental laws against small mine operators in this area and around the state. We were asked to look into the facts of this investigation and opine about the nature and scope of the Criminal Compliance Investigation.

Our efforts to gather evidence and reconstruct the events leading up to this criminal investigation were generally successful. This was primarily due to several factors: the cooperation of state employees in making themselves available for interviews, data and records kept by state agencies which we were given access to review, and the preservation of field recordings made during the investigation. On the other hand, our efforts were hampered by federal agency demands for the return of all documentation associated with the Criminal Compliance Investigation and the federal government’s minimal cooperation extended

throughout the process. The federal responses, as well as failures to respond, occurred despite repeated assurances any information received would be treated with the same confidentiality accorded designated records by state agencies.

Regulation and enforcement of federal and state environmental laws is an important state function and fulfills vital duties the State of Alaska (“Alaska”) owes under the Alaska Constitution, its statutes and regulations, and agreements it has with the federal government. In the regulation of placer mining, compliance enforcement can take many forms including administrative, civil, or criminal sanctions. Traditionally, both before and after Alaska assumed permitting authority from EPA, enforcement was conducted by the administrative and civil arms of the regulatory agencies designated to oversee this activity. The Criminal Compliance Investigation marked a significant change in the manner of investigating placer mines around Alaska. We found scant historical evidence to support this major change in the manner of compliance enforcement.

The Criminal Compliance Investigation was originated, organized, and primarily executed by personnel from the criminal enforcement arms of the EPA and BLM. According to the limited information available to us, these personnel acted within legal and procedural authority. Given that federal agencies have wide discretion to act in enforcing federal laws without interference from state authorities, little is gained by second guessing their actions. This inquiry is more appropriate for Congress and its legislative hearing process. More productive would be to ensure that state employees do not participate in or facilitate such activities in the future.

This Report will identify issues and endeavor to create a framework in which a constructive dialogue can be undertaken to improve enforcement of federal and state environmental laws. State and federal officials have a vested interest in promoting compliance by users of our resources. Criminal enforcement and sanctions for violations, while an important part of the regulatory fabric, should be reserved for the worst offenders who endanger human life or health. This is how enforcement activities have been conducted in the past and nothing discovered in this probe requires a different approach.

Summary of Conclusions:

- We found no evidence that task force members broke state or federal laws during the Criminal Compliance Investigation.
- We found that task force members acted appropriately while conducting the Criminal Compliance Investigation.

- We found no evidence that any federal or state agency failed to follow regulations, policy, or practice in developing and implementing the Criminal Compliance Investigation.
- We found that state employees had little involvement in the origination, organization, or execution of the Criminal Compliance Investigation. The Criminal Compliance Investigation was organized and conducted mostly through the efforts of EPA and BLM criminal investigators.
- While enforcement of the Clean Water Act and associated environmental laws are compelling governmental interests for both state and federal authorities, we found scant evidence to support the need for a criminal investigation in the Fortymile area.
- We found that while it is in the best interest of Alaska to actively participate with federal agencies in criminal investigations, procedures should be put in place to ensure the safety of those involved in the investigation, the efficient use of resources, and the proper administration of justice.
- We found poor levels of communication between federal and state agencies.
- We found the decision to conduct a criminal investigation rather than a civil compliance check introduced an unnecessary element of risk into this regulatory process.
- We found the importance of “confidentiality” can be a barrier to effective communication and can result in a failure to use “the best information” available.
- We found poor lines of communication and lack of oversight within DEC and its Environmental Crimes Unit (“ECU”).
- We found a need for clearer direction and better oversight of Alaska employees involved in the prosecution of environmental crimes.
- We found the need for better cooperation between the DEC Water Division and the ECU, including the need for overhauling the procedures by which cases are referred to the ECU.
- We found some information distributed to the public by federal authorities after the Criminal Compliance Investigation to be inaccurate and misleading.

- We found claims of “drug and human trafficking” in the region to have been discredited in June 2013 by an investigation conducted by the Alaska State Troopers (“AST”). Unfortunately, a lack of communication kept the federal criminal investigators from learning of this information.
- We learned of military helicopters being used to assist in environmental crimes investigations. We recommend that Alaska adopt procedures for the use of military resources in state criminal investigations before state employees participate in such activity.

Background of Placer Mining in The Fortymile area

The Fortymile area is located in the eastern central part of Alaska between Tok and Eagle off the Taylor Highway. This mining district is considered one of the original beginnings of the development of the Alaska mining industry. The first Alaska gold rush took place in the 1880s when prospectors explored the creeks surrounding the Fortymile area and its adjacent drainages with intense interest. Gold was discovered in the area in 1886 and led to a mining bonanza until the mid-1890s when interests shifted to the Klondike River in Canada. Gold was discovered in the Chicken area in 1896.¹

Land ownership in the lands within this district is complex and varied.² Federal control through BLM is based on ANILCA, which designates approximately 392 miles of the Fortymile River as a National Wild, Scenic and Recreational River. The BLM manages federal uplands and nonnavigable river segments as well as federal mining claims. State control is based upon its own ownership interests as well as claims to navigable river segments, riverbeds, and lands below the ordinary high water mark on navigable segments. State agencies, including DEC, DNR, and the Alaska Department of Fish & Game (“ADF&G”) oversee activities located within state lands including state mining claims. Private land claims include transferred federal patented claims and Native land claims to the region.

Mining for the past forty years has been conducted primarily by small family operations engaging in suction dredging and placer mining practices. Because of the location, mining activities are limited in duration to mid-May through mid-October. In order to conduct mining operations in the area, operators are required to comply with permitting requirements through DEC, the US Army Corps of Engineers (“Corps”), the Department of Natural Resources (“DNR”), and possibly BLM.³ The Fortymile Mining District had 79 active Annual Placer Mining Applications (“APMA”) in 2013 including 58 placer operations, 19 suction dredgers, and 2 hard rock exploration operations.⁴

The Walker Fork, which was repeatedly referred to during the course of our probe, has been intensely mined for more than one hundred years by everything from underground hard drift mining to bucket dredges to draglines to early and modern bulldozers. Canadian tributaries of the Walker Fork have been and are still being heavily mined under turbidity standards

¹ *Early Miners of the Fortymile* (A BLM Alaska “Adventures in the Past” Series), Gagner, K (2007).

² “The Fortymile Mining District is unique in its level of complexity.” Witness statement provided during interview process.

³ Prospective miners can pick up a 2013 Hardrock, Placer Mining or Suction Dredge Application which is quite instructive about the regulatory requirements to mine in Alaska.

⁴ Letter dated November 4, 2013 from Steve Mulder on behalf of the Department of Natural Resources Division of Mining Land and Water.

different from those on the U.S. side of the border. Other rivers in the area also receive high concentrations of pollutants from Canadian mining operations.

Background of the Clean Water Act

The Clean Water Act establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. The basis of the Clean Water Act was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganized and expanded in 1972, when it became more commonly known as the “Clean Water Act.”⁵ The Clean Water Act made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained.

There are two major components of the Clean Water Act that apply to placer mining. Section 402 of the Clean Water Act establishes the National Pollutant Discharge Elimination System (“NPDES”) to regulate point source discharges of pollutants into waters of the United States. An NPDES permit sets specific discharge limits for point sources and establishes monitoring and reporting requirements. While EPA is charged with administering the NPDES permit program, it can authorize states to assume many of the permitting, administrative, and enforcement responsibilities. Authorized states are prohibited from adopting standards that are less stringent than those established under the federal NPDES permit program. Forty-six states, including Alaska, have assumed NPDES authority from EPA.

The second major component of the Clean Water Act applicable to placer mining is Section 404. Section 404 regulates the discharge of dredged and fill material into waters of the United States, including wetlands. Responsibility for administering and enforcing Section 404 is shared by the Corps and EPA. While there is authority for states to assume administration of the Section 404 permitting program in certain nonnavigable waters within their jurisdiction, only two states have accomplished this to date. Alaska is presently seeking such authority.

Under Section 309, EPA can issue administrative orders against violators and seek civil or criminal penalties when necessary for violations of Sections 402 and 404.⁶ It is a misdemeanor offense to commit a violation of the Clean Water Act with criminal negligence subjecting a violator to a minimum fine of \$2,500 and a maximum fine of \$25,000 per day of violation. The violator may also receive up to one year in jail. On a second offense, a maximum fine of \$50,000 per day may be issued. It is a felony offense to knowingly commit a violation of the Clean Water Act while placing another person in imminent danger of death or serious bodily injury. This crime subjects a violator to a fine of up to \$250,000 per day and higher under special circumstances. Additionally, a violator may be imprisoned for up to 15 years as part of the sentence.

⁵ 33 U.S.C. § 1251 *et seq.*

⁶ 33 U.S.C. § 1323.

EPA has printed the following guidelines for obtaining compliance with Section 404 permits:

EPA's Section 404 enforcement program has three goals: protect the environment and human health and safety, deter violations, and treat the regulated community fairly and equitably. EPA's enforcement program achieves these goals through voluntary compliance and by using the enforcement tools provided under Sections 309 and 404 of the Clean Water Act.

In administrative enforcement, under Section 309(a), EPA can issue administrative compliance orders requiring a violator to stop any ongoing illegal discharge activity and, where appropriate, to remove the illegal discharge and otherwise restore the site. Under Section 309(g), EPA can assess administrative civil penalties of up to \$16,000 per day of violation, with a maximum cap of \$177,500 in any single enforcement action.

In judicial enforcement, Sections 309(b) and (d) and 404(s) give EPA and the Corps the authority to take civil judicial enforcement actions, seeking restoration and other types of injunctive relief, as well as civil penalties. The agencies also have authority under Section 309(c) to bring criminal judicial enforcement actions for knowingly or negligently violating Section 404.

EPA and the Corps consider a wide variety of factors when deciding whether to initiate an enforcement action and, if so, what type of action to pursue. These factors include the amount of fill, the size of the water body (acres of wetlands filled and the environmental significance), the discharger's previous experience with Section 404 requirements, and the discharger's compliance history.

In most instances, EPA and the Corps prefer to resolve Section 404 violations through voluntary compliance or administrative enforcement.⁷

Similar language was not found on EPA's website regarding enforcement of Section 402 matters. However, in 2009 EPA issued the Clean Water Act Action Plan, which is designed to target the most important water pollution problems, strengthen oversight of the states, and improve its own transparency and accountability.⁸ After reading this plan, it is hard to imagine the authors envisioned small placer mining operations in rural Alaska being the focus of criminal enforcement actions for violating the Clean Water Act.

During the course of our investigation, we questioned a number of people with knowledge of the Fortymile area including attorneys, prosecutors, miners, state and federal

⁷ This quote is taken from the EPA's website at <http://water.epa.gov/type/wetlands/outreach/fact15.cfm>.

⁸ Clean Water Act Action Plan, issued October 15, 2009, <http://www2.epa.gov/enforcement/clean-water-act-cwa-action-plan>.

regulators, and law enforcement personnel about EPA's practices and enforcement of the Clean Water Act prior to October 31, 2010. We were unable to document the EPA's criminal enforcement of the Clean Water Act in the Fortymile area. Long time miners in the area recall little if any contact by EPA personnel: criminal or civil. To the extent miners remember having contact with EPA officials, most remembered only dealing with civil enforcement officers. We spoke to prosecutors, both state and federal, who have not been able to identify one instance where a small placer mine operation was charged by EPA with violations of the Clean Water Act. While enforcement actions may have taken place, it is clear they were few and far between. The absence of federal criminal prosecutions leads to one of two conclusions: 1) violations of the Clean Water Act have been handled administratively or civilly or 2) EPA conducted few compliance investigations of placer mining operations. Under either conclusion, criminal enforcement of Clean Water Act violations involving placer mines in Alaska has never been a priority for EPA.

Alaska Administration of the NPDES Program.

On October 31, 2010, Alaska assumed administration of the NPDES program. This culminated from a significant effort between EPA and DEC officials to reach the NPDES Memorandum of Agreement between the State of Alaska and the Environmental Protection Agency, Region 10.⁹ This agreement placed Alaska in charge of permitting and enforcement activities under the Alaska Pollution Discharge Elimination System (“APDES”) subject to EPA’s oversight and its own enforcement authority. EPA has reserved its right to bring federal enforcement actions under the Clean Water Act in response to any violation of the Clean Water Act.¹⁰ If EPA determines that the DEC has not taken timely enforcement action against a violator and/or that enforcement action has not been appropriate, EPA may proceed on its own to bring any action it sees fit.¹¹ We are unaware of EPA proceeding on its own under this provision.

On the other hand, EPA and the Corps still retain jurisdiction over wetland permitting issues under Section 404 of the Clean Water Act. Alaska continues to negotiate with these agencies to assume primary authority over this permitting process.

⁹ The Agreement notes at the beginning: “The COMMISSIONER [of DEC] and the REGIONAL ADMINISTRATOR [Region 10] hereby agree to maintain a high level of cooperation and coordination between the [DEC] and EPA in a partnership to assure successful and effective administration of the APDES Program.” Interviews made it clear little to no cooperation or coordination occurred between agency heads leading up to the Criminal Compliance Investigation.

¹⁰ NPDES Memorandum of Agreement between the State of Alaska and the Environmental Protection Agency, Region 10, at Section 7.02(1.).

¹¹ NPDES Memorandum of Agreement between the State of Alaska and the Environmental Protection Agency, Region 10, at Section 7.02(2.).

The Alaska Environmental Crimes Task Force.

EPA officials originally reported that this environmental compliance investigation was conducted by the Alaska Environmental Crimes Task Force (“AECTF”). While references to this organization can be found on the EPA website,¹² historical background is lacking. No other instances of the AECTF pursuing criminal investigations could be identified. In this respect, it is not like traditional federal and state task forces that actively work together in drug, gang, or organized crime investigations. Its origins appear to be in the late 1990s but all the witnesses we interviewed indicated its most immediate impact has been over the past four to five years. It has been headed by attorneys with the U.S. Attorney’s Office and is comprised of federal and state law enforcement officials. The EPA website cites as AECTF members, employees with EPA, FBI, U.S. Coast Guard, U.S. Department of Defense, U.S. Fish and Wildlife, DEC, AST, Alaska Wildlife Troopers (“AWT”), and Department of Law.

In response to “what is the Alaska Environmental Crimes Task Force,” several consistent themes were enunciated by most witnesses. This collective group of law enforcement officials uses meetings to network and become familiar with other individuals whose common interests include criminal enforcement of laws related to treatment of the environment, whether land, water, air, animal, or fish. All interviewed spoke highly of the annual seminars that are put on to educate both law enforcement and regulatory employees on topics of common interest. In spite of the problems of limited resources faced by all agencies, most spoke of the opportunities to network and be able to place a name with a face or know whom to call when faced with matters that were outside their areas of expertise or experience. Nothing negative was voiced about the AECTF in our interviews, and we found the purpose of building professional relations to be laudable. With the limited funds available to both federal and state prosecutors in wildlife and environmental areas, the more communication that exists between federal and state agencies, the better.

But prior to the Criminal Compliance Investigation, the focus of the AECTF has never been to actively pursue criminal investigations. It is common for members of the group like the U.S. Fish and Wildlife (federal) and AWT (state) to partner together to conduct investigations as a team. Similar activities were noted to have occurred between EPA and DEC. But as noted below, the Criminal Compliance Investigation was less of a partnership between state and federal agencies and more of an investigation pursued by EPA and BLM.

¹² <http://www2.epa.gov/enforcement/criminal-environmental-crime-task-force-partners>.

The Criminal Compliance Investigation:

A. AST Intelligence Investigation.

On September 12, 2012, the AST Intelligence Division had a visit from a BLM Ranger stationed in Fairbanks. This BLM Ranger indicated that he was traveling along the Taylor Highway to the Canadian border and believed that there were suspicious activities occurring in the area. The BLM Ranger described seeing a group of individuals with prison tattoos who were heavily armed and who were not working. He identified some as having criminal histories, including bank robbery. He also described a veiled threat made to him. AST determined that none of the people identified had recent criminal histories. The BLM Ranger also identified other people he believed were conducting illegal activities across the border, including possible drug smuggling or human trafficking. During the course of this meeting, no information regarding criminal activity in the Fortymile area was conveyed from the Trooper to the BLM Ranger.

During this same time period, AST was engaged in another investigation in this area. In the course of their investigation, they arranged to meet with EPA criminal investigators to discuss possible federal criminal crimes and penalties. On February 12, 2013, two Troopers (including the Trooper who had previously met with the BLM Ranger) met with two EPA criminal investigators (involved in the Criminal Compliance Investigation). During the meeting, the Troopers learned EPA intended to conduct a criminal investigation in the Fortymile area, and both parties agreed to keep the other advised of the status of their respective operations. AST Intelligence Troopers came away with a clear understanding that before any operation occurred, EPA criminal investigators would provide advance notice to protect any ongoing investigations. This is standard operating procedure among law enforcement officials. Providing notice of a criminal search, arrest, or other similar action ahead of time ensures other investigations are not compromised as a result of another agency's operations.

Thereafter, the AST Intelligence Trooper arranged to meet with the BLM Ranger in Tok and traveled to the identified areas to assess the ranger's information. This meeting occurred on June 18, 2013, when the Trooper travelled with the BLM Ranger between Tok and Eagle. The Trooper was not able to substantiate the intelligence provided by the BLM Ranger. The Trooper noted that the mine reported to have armed, idle workers with criminal histories was not operational and was smaller than represented. At the end of their meeting, the Trooper advised the BLM Ranger he was disappointed the Rangers concerns of criminal conduct were not borne out by their investigation. When he returned to Anchorage, the Trooper also communicated with his superiors that he was unable to corroborate the Ranger's allegations.

B. Pre February 6, 2013.

As noted above, Alaska assumed administration of the NPDES program on October 31, 2010. As a result, the summer of 2011 was the first year Alaska monitored and enforced environmental compliance of placer mining claims. We found scant evidence that EPA conducted criminal investigations or filed criminal charges against placer miners over compliance with water discharge permits prior to 2011. In the summer of 2011, DEC inspectors led a joint DEC/EPA compliance investigation into the Circle Mining District. This investigation resulted in DEC sending out one Compliance letter and one Notice of Violation. Also in August of 2011, two BLM inspectors and one Fish and Game biologist reported compliance violations at the Minekime mine on Walker Fork near the Canadian border. Four subsequent visits by state and federal officials confirm compliance violations later in August, September, and October. That same year, the owner of the mine visited by DNR filed the necessary paperwork for proper reclamation and bonding.¹³

In early 2012, BLM and DEC officials met to discuss complaints from a neighbor about environmental issues involving the Lost Chicken Hill Mine. In May, DEC, DNR, and BLM traveled to the Lost Chicken Hill Mine to conduct a compliance investigation. Thereafter, a compliance letter was issued to Mr. Bud Hill. In June another anonymous caller complained about the Lost Chicken Hill Mine.¹⁴ DNR happened to have an employee in the area, and the next day he sent back pictures of Chicken Creek and a note indicating that he could not find any dirty water in the area from mining.

On July 18, 2012, a BLM fisheries biologist documented turbid water on the Walker Fork at the Minekime mine. These reports were forwarded to the DEC civil enforcement officer on July 27, 2012. The civil enforcement officer was initially too busy to follow up but later requested further information on August 21 and 22, 2012. Documents regarding the Minekime mine were forwarded from federal and state inspectors to the DEC civil enforcement officer during August 2012. After consultation, a notice of violation was issued to the owners of this mine.¹⁵ Additionally, ECU officers reported receiving three other discharge cases and one

¹³ DNR requires reclamation plans be filed and reclamation occur at properties that are mined. AS 27.19 *et seq.* As part of this process, prospective miners are required to post a monetary bond. If a miner fails or refuses to conduct the necessary reclamation at a mining claim, funds from this bond fund can be used to complete the necessary reclamation. AS 27.19.040.

¹⁴ In speaking with witnesses, we were told that anonymous tips of noncompliance were often submitted by nearby miners or competing mining operations and in some cases for the purpose of seeking a competitive advantage over their neighbors.

¹⁵ It is worth noting that on each occasion after this mine was visited and determined to have compliance issues, the owners of the mine promptly communicated with state officials and cooperated to the extent required. Ms. Minekime wrote a letter of apology which was received within days of the notice of violation. Her letter noted that her husband was engaged in reclamation and would be sending photographs of his work. Additionally Mr. Minekime cooperated in an interview on October 25, 2012 with the ECU investigator and informed him that they

trespass case from BLM in 2012. DOL and DEC Water Division were consulted regarding the proper handling of these matters. Minekime was considered for prosecution but was ultimately declined. The other cases were either closed due to non-collectability or handled civilly.

C. February 1 through July 15, 2013.

The first time a state employee heard of the possibility of the Criminal Compliance Investigation was February 1, 2013. On that date, an ECU officer received a call from an EPA criminal investigator about a “crackdown” on the Fortymile area placer mines where they planned to proceed into the area as a group. EPA wanted to start planning in February and hoped to fly in and use three or four teams to help identify operations producing dirty water. The EPA criminal investigator noted that BLM had a ranger to help coordinate the operation who was very familiar with the area.¹⁶ Six days later at a scheduling meeting of the AECTF, a local Assistant US attorney brought up the possibility of a joint investigation of mining operations in the Fortymile area. AWT officials were asked to participate but declined, citing a lack of nexus between the stated intentions of federal investigators and AWT’s mission statement. A followup meeting of prospective participants was then set for February 19, 2013. The only representatives from Alaska present at the meeting were officials with the ECU.

This meeting was designed to introduce the attendees to the general issues associated with mining and to introduce several BLM officers who were to play a role in the Criminal Compliance Investigation. In addition to possible environmental crimes, participants were briefed that the task force could encounter drug trafficking and illegal firearms violations. Officer safety was emphasized. There was discussion about narrowing the list of sites to be visited to the worst violators which could be reached either by ATV or road. Confidentiality of the nature of this investigation was stressed during the meeting.

The next meeting occurred on April 24, 2013. This meeting was attended by three federal criminal investigators and one ECU officer. The federal investigator leading the meeting indicated that they had spoken with a new BLM compliance inspector and identified the five worst miners in the area. Comments made at the meeting suggest that these investigators knew that the BLM had not actively enforced water discharge violations in the past. At least seven different miners were identified based on comments by the BLM compliance inspector. After the meeting, either at the direction of his supervisor or on his own initiative, the ECU officer encouraged the BLM criminal investigator to conduct a joint interview with the BLM compliance inspector. On May 1, 2013, the BLM compliance inspector was interviewed. This

would not be mining in 2013. Ultimately in September 2013, a decision was made not to move forward on criminal prosecution by state officials.

¹⁶ This source was later determined to be the same BLM Ranger whose information could not be corroborated by the AST Intelligence Trooper in June 2013.

interview was not recorded but notes exist of the conversation. Our interview with the ECU officer revealed that at the conclusion of the meeting he expressed significant concerns to the BLM criminal investigator about the need for any criminal investigation in the Fortymile area. He believed the information provided by the BLM compliance inspector did not support criminal prosecution and he conveyed his thoughts to the BLM criminal investigator. Comments from the BLM criminal investigator in response led the ECU officer to believe his concerns were shared.

The ECU officer's concerns were then passed on to his supervisor. At that time it was still very unclear whether federal funding would be available for the criminal compliance investigation due to the "sequestration" in Washington, D.C. Therefore, the two agreed that rather than simply withdraw from the investigation, it was better to monitor the situation, see if it actually moved forward, and then make a determination on whether or not to remain involved. It does not appear that this decision was discussed with other DEC officials at the time. Alaska's environmental prosecutor with the Office of Special Prosecutions and Appeals ("OSPA") was kept apprised of the situation. When she left for vacation in June, she briefed her supervisor of the possibility of the Criminal Compliance Investigation.

D. July 15, 2013 through August 22, 2013.

The next time state officials heard the Criminal Compliance Investigation was going forward was six weeks later on July 15, 2013. That day, a BLM criminal investigator contacted the ECU officer and said they were planning a reconnaissance flight to the Fortymile area on July 26, 2013. This flight was later changed to August 1, 2013. EPA criminal investigators and the ECU officer also talked that day and identified the dates the compliance inspection was expected to occur. The DEC officer was asked to identify who was actively mining in the area.¹⁷ It also became known they were going to need additional four wheelers for the investigation. On July 18, 2013, EPA criminal investigators began inquiries to acquire additional four wheelers for the investigation. On July 22, 2013, EPA criminal investigators learned that BLM regulations prohibited the use of side-by-side four wheelers on the Fortymile trails because of weight restrictions. Although AWT officers declined to participate, they were willing to provide one four wheeler for use by the task force. When they inquired about why it was necessary to borrow an agency four wheeler, it was explained this was necessary because BLM officials in Fairbanks refused to commit four wheelers to the Criminal Compliance Investigation. Additionally, the task force was unable to obtain an instrument to measure turbidity from federal sources and instead borrowed one from the DEC water division.

On July 30, 2013, the offer to borrow the AWT four wheeler was accepted with a caveat that it might not be necessary as things were "starting to unravel" along with hints that there may

¹⁷ This information was gathered from DEC records and provided to an EPA criminal investigator on July 31, 2013.

be discord among BLM employees. On August 1, 2013, a federal aerial reconnaissance flight was conducted over the Fortymile area. Prior to leaving on this flight, 24 mining claims were input into an aviation GPS instrument, presumably because these sites represented the most egregious polluters. The ECU officer on board was responsible for writing down his observations of the 24 sites as the aircraft flew overhead. We reviewed these notes. These notes and the officer's statement make it clear that at least as to the preprogrammed sites, there was only one apparent ongoing discharge. In our limited discussions with federal employees, we were informed other sites besides those programmed into the GPS were observed to have discharge issues, but we were unable to confirm these statements.

Afterwards, the ECU officer again noted his concern that the aerial inspection did not reveal the level of conduct that would give rise to a criminal investigation of the nature being planned. He reported his concerns to his supervisor who confirmed this conversation in his interview. These concerns were also reported to the OSPA environmental crimes prosecutor. The consensus of their discussions was that despite the noted concerns, there were reasons why it would be best for ECU to remain involved in the investigation. First, all expressed a concern that it was important for Alaska to have a presence on the ground and be in a position to prosecute cases referred from DOJ or EPA. There were concerns expressed that it would reflect poorly on Alaska if the ECU withdrew as a participant at that point and might impact the perception of Alaska's ability to enforce the Clean Water Act. Second, while this would occupy one of the officer's time for several days, participation came with minimal costs to Alaska. Third, joint federal and state participation in environmental investigations was seen as a positive step in the enforcement of state environmental laws, and they did not want to hamper future cooperative efforts. While there may have been some concerns expressed at this meeting, the feeling was it was better to remain involved in the investigation to maintain established relationships and further joint efforts in the future.

The task force participants held a logistics meeting on August 7, 2013. A draft of the Operations Plan was sent out on August 12, 2013.¹⁸ Inquiries were made on or about August 13 by both state and federal officers seeking advice from the state environmental crimes prosecutor about issues related to serving warrants in the field. The ECU supervisor directed his officer not to be involved in the arrest of any individuals on state warrants during this investigation. This direction was given even though the state environmental crimes prosecutor advised this was legally permissible. It was reported that on August 13 and 14, there were heavy rains in the Fortymile area. This fact is significant because rains can impact settling ponds and other structures designed to prevent sediment from getting into river systems. These structures can then erode or be overrun, causing turbidity problems.

¹⁸ This document was part of the materials kept from our review, presumably at the demand of letters from EPA and BLM officials. Exhibit A, November 6, 2013, letter, and Exhibit B, November 20, 2013, letter.

On August 14, 2013, an approved Operations Plan was emailed to the various parties.¹⁹ A number of notices were sent out that day or shortly thereafter informing various supervisors and directors of the impending operation. It does not appear that the heads of the DPS, DNR, ADF&G, or DEC were aware of this operation prior to its commencement. It does appear that some supervising attorneys with the Department of Law and some officials with the DEC were made aware of the investigation by email or phone call on August 14, 2013. Around August 18, 2013, the AST sergeant in Tok was contacted by the federal criminal investigators and notified that they would be conducting a criminal compliance inspection in the Fortymile area. He was asked about communication problems in the area, and he told them radio and cell phones did not work but satellite phones did.

Approximately ten individuals were involved in the Criminal Compliance Investigation. One ECU officer, three Alaska EPA criminal investigators, three Alaska BLM agents, and three out of state federal agents made up the task force. The Criminal Compliance Investigation began at 7:30 am on August 19 and ended on August 22, 2013. Initially, the task force members all went to the first mine together for a test run. Later, they divided into two teams of four with two individuals flying air support. The general plan was for two of the task force members to engage the miners and the other two members to attend to collecting evidence. This consisted of taking pictures, taking water samples, and checking paperwork.

After the first or second day, the same AST Intelligence Trooper who met with the BLM Ranger in June 2013 received a call from the task force member whom he spoke with in February 2013. The AST Intelligence Trooper was asked if he was aware of anything going on in the area. The AST Intelligence Trooper discussed in detail that he had been up in the area in June and had been unable to corroborate any of the BLM Ranger's suspicions regarding illegal activity in the area. The EPA criminal agent noted that they were reaching the same conclusion.

During the course of the Criminal Compliance Investigation, the ECU officer met with, and spoke to, the miners encountered by the task force. He recorded conversations with five separate miners and we have reviewed the contents of these interactions. It does not appear from listening to these recordings that task force members engaged in any overbearing or improper investigation tactics. They might not have been as candid about the nature of the investigation as they could have been, but they clearly noted it was different from civil investigations. Concerns were noted by miners but the conversations that ensued seemed cordial and informative. Given the history of enforcement in the area, however, it would be quite reasonable for miners to be surprised by the presence of the task force members, their attire, and how they conducted the investigation.²⁰ Nine mining operations were investigated over the four days the task force

¹⁹ Again, presumably this document was kept from our review at the demand of EPA and BLM officials.

²⁰ Certainly, this heightened level of enforcement might confuse or concern anyone subject to it who was not used to seeing any law enforcement personnel during the summer season. Thus, we understand why some miners and their family members expressed concern in the statements before Congress and at the meeting in Chicken on September 14, 2013. Additionally, we were only able to review the ECU officer's taped conversations. We now understand

members were in the field. We understand all miners contacted had obtained the required DEC permits,²¹ although several did not have them on their possession. The ECU officer revealed to us that during the Criminal Compliance Investigation, he expressed strong reservations about the nature of the criminal investigation. These concerns were conveyed to the lead EPA investigator on more than one occasion, but again were ultimately ignored.

E. Post-August 22, 2013.

Word of the Criminal Compliance Investigation circulated within days of its completion. News articles were written about the investigation starting on August 28, 2013. Included in these reports were press releases from both state and federal agencies. In addition, EPA officials briefed Alaska's congressional delegation on the issue. At a conference call held to address stated congressional concerns, EPA officials said the decision to send in task force members armed and wearing body armor was the result of information received from AST about "rampant drug and human trafficking going on in the area." The EPA also stated it used BLM compliance records on all of the area's mines in order to choose which would be visited by the task force, and it was only targeting mines with a past history of violations, as well as those found to be major violators, based on aerial observation.

Interviews were conducted with miners who claimed they were intimidated and concerned with the tactics used during the investigation. Later a meeting was called by the Fortymile Mining Association to be held in Chicken, Alaska, to address the tactics used by the task force members during the Criminal Compliance Investigation. The meeting, held on September 14, 2013, was attended by a number of miners in the area, miners who were contacted by the officers, state officials including the Governor, and a lone representative of the EPA. Unfortunately, the EPA representative had no involvement in the planning or execution of the Criminal Compliance Investigation and appeared to know little about the reasons for this level of investigation. His unfamiliarity with the facts and circumstances leading up to the Criminal Compliance Investigation only stoked the fire of discontent.

At the same time, EPA investigators were requesting compliance histories from DEC regarding individuals who were contacted during the Criminal Compliance Investigation. We could find no evidence they requested compliance histories from state officials prior to that date. These compliance histories were delivered to federal authorities on October 4, 2013. On September 13, 2013, DEC suspended its criminal investigation associated with the Criminal

that federal officials in both groups recorded their conversations with miners during the Criminal Compliance Investigation. We were not allowed to review any of the federal audio recordings. We are still unaware of which miners were contacted by the second group of investigators, with the exceptions of C. R. Hammond, Bronc Jorgenson, and Kim Ferguson whom we did interview. We cannot comment on any conversations which occurred with other unidentified miners.

²¹ General Permit Number AKG370000.

to investigate the facts of this case. On October 9, 2013, we were appointed and later signed confidentiality agreements with the various state agencies to guard against the unnecessary disclosure of confidential information.

Since that time, state agencies have turned over approximately 10,000 pages of discovery, much of which has been labeled confidential or was redacted. In addition, we have interviewed more than 50 witnesses. We have also listened to tape recordings made during the Criminal Compliance Investigation. Our efforts have been hampered by two letters from BLM and EPA officials demanding the return of all operations documents related to the Criminal Compliance Investigation.²² While we are aware of efforts by state officials to convince federal officials to allow our review demanded documents, we were kept from reviewing approximately 400 pages of material. This was done despite the fact that we had agreed to enter confidentiality agreements precluding the disclosure of any identified documents.

Later in interviews with federal officials, requests were again made to review the documents that were returned to the respective federal agencies. Again, our requests were rebuffed despite our repeated assurances that any disclosures could be covered by a confidentiality agreement. We met with representatives of the U.S. Attorney's office and discussed the nature of the Criminal Compliance Investigation and the possibility of interviewing involved individuals. This request was again documented by letter dated December 24, 2013.²³ We were directed on January 7, 2014, to submit written questions to the witness and they would be responded to as appropriate.²⁴ No other witness interviewed in the course of our review demanded the right to receive written questions as part of our preparation of this report. Because of these concerns and pending deadlines, this offer was initially rejected.²⁵ Later, after deadlines were extended, and at the specific request of the Assistant U.S. Attorney, questions were prepared and submitted for her written answers. In this letter, concerns with this method of response were specifically identified:

My reluctance to grant you the opportunity to provide written answers stems from several concerns. First, no other witness interviewed for this report was granted the opportunity to provide written answers to questions. I am not sure why your position as an attorney in the U.S. Attorney's Office requires a different approach. Second, allowing you the opportunity to provide written answers allows for the possibility of collaboration with others in answering the questions. Oral questions given at in-person interviews do not allow for the collaboration of many. We have already received several written documents from federal authorities that are indicative of collaborative efforts. Please do not try to simply duplicate their efforts. If your answers are not based on your knowledge,

²² See attached Exhibits A and B.

²³ See Exhibit C attached.

²⁴ See Exhibit D attached.

²⁵ See January 21, 2014 letter, Exhibit E.

but rather the collective knowledge of a group of people, they will be given minimal weight.²⁶

We did receive a written response, but because it did not address the questions we asked, we gave it little weight.²⁷

The BLM and the EPA did make available two supervisors for questioning regarding the Criminal Compliance Investigation. We were allowed to question these representatives about an internal memorandum outlining events leading up to the Criminal Compliance Investigation.²⁸ This EPA Internal Memorandum speaks in vague terms with few specific and identifiable events. Some of the information provided was outdated and not related to the Fortymile area. Most of the examples cited in this report were provided in the materials we received from state agencies in response to our discovery requests. During our interview, neither the supervisors nor their attorneys could provide answers to fundamental questions regarding the need for this elevated level of enforcement. Later, we received an email from EPA officials further attempting to explain the need for the Criminal Compliance Investigation.²⁹ Federal officials did not respond to requests to interview the lead EPA criminal investigator and the BLM Ranger.

²⁶ See February 5, 2014 letter, Exhibit F.

²⁷ See February 11, 2014 letter, Exhibit G.

²⁸ See EPA Internal Memorandum on Fortymile Enforcement Initiative, dated December 6, 2013 (“EPA Internal Memorandum”), Exhibit H.

²⁹ January 9, 2014 e-mail from M. Fisher, Director, Legal Counsel Division, Office of Criminal Enforcement, Forensics, and Training, EPA, Exhibit I.

Summary:

1. We found no evidence that federal or state employees broke any laws during the Criminal Compliance Investigation.

We were asked to investigate if any laws were broken during the course of the Criminal Compliance Investigation. We found no evidence to support the conclusion that members of the compliance team violated any state or federal laws. All placer mining operations are required to obtain a permit from DEC, identified as General Permit Number AKG370000. After being issued, this permit must be kept at the site where the discharge activity occurs. This permit requires DEC or its authorized representatives be allowed to enter the premises, review records, inspect facilities, and sample or monitor any substances to ensure compliance.³⁰ Federal claims can be accessed by federal government agents under the Multiple Surface Use Act (30 U.S.C. § 611-615). One federal patented land claim was accessed by the compliance team by consent. There are no restrictions on carrying firearms in the Fortymile area and law enforcement officers have procedures which allow for the possession and use of firearms in their jobs. Finally, we found no evidence that task force members acted improperly. In fact, our review of the tape recordings disclosed the conversations between task force members and miners were cordial and friendly.

2. We found no evidence that federal or state law enforcement agents acted inappropriately while conducting the Criminal Compliance Investigation but question the need for a criminal investigation.

As noted above, the ECU officer carried a tape recorder during the Criminal Compliance Investigation and used it when he spoke with the miners. All taped conversations we reviewed were cordial and friendly. While some individuals indicated surprise at the way this compliance investigation was handled, none of them appear to have been intimidated or scared. We reviewed photographs of the law enforcement officers and their attire. Nothing about their dress was out of the ordinary for law enforcement officials.

This is not an appropriate forum for commenting on how federal law enforcement officers should conduct their criminal investigations into federal environmental matters. Nor is it an appropriate forum for discussing how federal agencies make determinations on how and when to spend federal tax dollars on enforcing compliance with federal environmental laws. As noted above, this is best left to Congress and its congressional hearing process.

The decision by federal authorities to conduct a criminal compliance investigation rather than a civil or administrative compliance inquiry merits comment. A criminal investigation can

³⁰ General Permit Number AKG370000, Appendix A, 1.10 Inspection and Entry.

involve surreptitious surveillance, special needs for the collection of evidence, and the possibility of placing someone under arrest. All these actions can place officers in danger and require specific procedures to ensure officer safety. Civil or administrative compliance investigations, on the other hand, have been and are routinely conducted by federal and state employees without guns, protective vests, or back up resources to ensure their safety. They ride and walk up to mines, take pictures, operate turbidity meters, and discuss compliance issues with miners, their families, and their employees without a problem. Whether mining operations were being visited by EPA, DEC, BLM, or DNR compliance investigators in years past, our interviews demonstrated that none felt the need to carry firearms on them except for bear protection, and with little concern that they were at risk or harm. As will be set forth below, there are a number of additional reasons why the Criminal Compliance Investigation was ill-conceived.

3. We found that Alaska employees and officials had very little involvement in the origination, organization, or execution of the Criminal Compliance Investigation.

The decision to conduct a criminal investigation of mining operations in the Fortymile area originated with federal officials. As best can be determined, this occurred sometime during late fall 2012. Federal officials point to a presentation by a prior state environmental prosecutor at a 2010 environmental task force seminar which focused on criminal prosecution of placer mines in Alaska as a basis for the origins of the Criminal Compliance Investigation.

We interviewed the past state environmental crimes prosecutor about his knowledge and experience in enforcing water discharge cases against small mining operations under the Clean Water Act. He had none. He also stated that criminal prosecutions of placer mining discharges were not a priority of his office at the time of the seminar. At the time of the presentation, Alaska had not even taken over primacy of enforcing clean water permitting issues. The presentation was merely a short 1-2 hour talk by several moderators regarding possible environmental crimes issues relating to placer mining operations anywhere in the state. Based on our discussions, it hardly constituted a foundation for the 2013 Criminal Compliance Investigation in the Fortymile area.

Because we were not able to interview the BLM Ranger who met with the AST Intelligence Trooper, despite our request, we were not able to confirm our assumption that he was a major impetus for the Criminal Compliance Investigation. We base our assumption on facts known to us. In September 2012, he met with the AST Intelligence Trooper and complained of a number of criminal activities he thought were ongoing in the Fortymile area including human trafficking and drug trafficking. In the reports we received and during our interviews of federal officials, references to criminal conduct in the area were based on

information they received from the same BLM Ranger. Similar allegations appear to have been made to federal officials during the planning phase of the Criminal Compliance Investigation.

What is troubling was that the BLM Ranger's claims were investigated by AST Intelligence in June 2013 and found to be without merit. This information was never passed on to EPA or BLM criminal investigators or ECU officers because AST Intelligence was never advised (as they thought they would be) that the Criminal Compliance Investigation was moving forward on August 19, 2013. If they had been notified, as previously agreed, then AST Intelligence might have passed along the results of their investigation and eliminated the need for a criminal investigation. We learned from our interviews that federal officials were not aware the BLM Ranger had met with an AST Intelligence Trooper at the Fortymile area in June 2013. Additionally, it is noteworthy that the AST Intelligence Trooper received a call from a task force member in the field in August 2013 who confirmed that during the investigation the task force was having a difficult time corroborating the claims of the BLM Ranger.

Federal officials also determined the scope of the investigation and decided which miners would be visited during the Criminal Compliance Investigation. Although we were not given access to the Operations Plan, we learned it was prepared by EPA criminal investigators. Both ECU officers told us the Criminal Compliance Investigation was spearheaded by an EPA criminal investigator. He was identified as the individual who led most discussions during the planning phase and who pushed for a criminal investigation. He made representations of reports received from BLM and convinced the task force that serious (intentional or knowing) violations were ongoing in mining operations in the Fortymile area. As noted, we have been unable to substantiate the nature and extent of most of these contentions.

From the beginning, federal officials identified the miners who needed to be investigated without information from state officials. Even after the source who identified the "worst miners" was questioned, federal criminal investigators continued to plan and organize the Criminal Compliance Investigation. AST was never asked for their views on who should be investigated nor were they advised of this operation until shortly before it began. The AST supervisor stationed in Tok was told a group of eight to ten people would be in the area and might need support. He said he would be unable to make a Trooper available because they had other duties to attend to and did not want to be left short-staffed. He did indicate that in an emergency AST would obviously respond. No state employees who regularly or routinely visited the Fortymile mining claims were contacted to determine who might be the worst offenders in the area and whether they thought there was a need for a criminal investigation versus a civil enforcement proceedings.

The Fortymile Operations Plan, which we were unable to review, was prepared by EPA and BLM criminal investigators. This plan contained the plan of attack and identified whom

the task force intended to visit. It appears it was not known what miners would be visited until a week or so before the investigation began. In late July, federal authorities did not even know which miners were actively mining on state claims in the area in 2013. This information was not provided until the end of July 2013. The aerial flight notes reveal little evidence of discharges. While other discharges may have been noted, these mines were not originally identified as the “worst offenders.”

The State of Alaska’s involvement in the Criminal Compliance Investigation was limited. It can be summarized as follows:

A. One ECU officer sat in on part of one meeting. Another ECU officer sat in on meetings and was briefed on matters. He attended one interview, participated in the aerial reconnaissance flight, met at the planning meeting and participated in the Criminal Compliance Investigation as one of the eight people who visited the mining claims and spoke with miners and collected evidence.

B. The Alaska environmental crimes attorney was asked to do research on issues relating to federal and state officials entering onto state mining claims, including the legality of federal officers arresting a person on a state warrant. She did this and passed this information along to state and federal participants in the investigation.

C. AWT loaned a four wheeler for use during the Criminal Compliance Investigation.

D. The DEC water division loaned a turbidity meter to the ECU officer who in turn loaned it to the task force for use on the Criminal Compliance Investigation.

E. A DEC enforcement inspector provided the ECU officer a database list of the people with active mining claims in the Fortymile area in 2013, and he in turn provided that list to an EPA criminal investigator on or about July 30, 2013.

In short, this was not a joint investigation between state and federal law enforcement agencies but rather was a joint investigation of BLM and EPA, with minimal state assistance.

4. While enforcement of the Clean Water Act and associated environmental laws and statutes is a compelling governmental interest for both Alaska and the United States, we found little evidence to support the means and procedures used in the Criminal Compliance Investigation.

Enforcement of environmental laws generally focuses on compliance. Prior to Alaska assuming administration of the NPDES program, EPA primarily used civil and administrative measures to encourage small mining operations to comply with the Clean Water Act. We spoke with prosecutors, miners, and past federal employees and were not able to find evidence of federal criminal prosecutions of small mining operations across Alaska in years past. No one told us criminal prosecution of mining operations was a focus of law enforcement, was necessary to compel compliance, or otherwise was an active enforcement tool except in extraordinary circumstances. Miners with a history in the Fortymile area spoke of seeing BLM and EPA compliance inspectors on an annual or biennial basis, but never recalled seeing criminal investigators. In summary, our review showed federal enforcement of permitting and discharge violations against small mining operations under the Clean Water Act and the NPDES program had been accomplished primarily by administrative and civil enforcement actions. Criminal investigations played a very limited role, if at all.

The summer of 2011 was the first time Alaska oversaw and assumed primacy for discharges under the Clean Water Act by enforcing permitting requirements under the NPDES program. The Criminal Compliance Investigation occurred in August 2013 and by all accounts was planned and researched for months.³¹ We, therefore, expected to find a significant increase in the number of reported violations of the Clean Water Act in the Fortymile area in 2011 and 2012—the years leading up to the Criminal Compliance Investigation—after Alaska took over primacy of enforcement actions. This evidence would support a need to change the nature of investigations and penalties necessary to compel compliance with state and federal environmental laws. We did not uncover such increase in the number or the nature of such violations in the Fortymile area.

In summary, the following are the reported violations we learned about in our probe. In the summer of 2011, investigators from various Alaska agencies were sent out into the field to conduct inspections, fish counting surveys, aerial overflights, and enforcement of fish and game laws. In 2011, DEC, DNR, and ADF&G identified the following compliance issues in the Fortymile Mining District:

³¹ As noted above, this criminal investigation was first announced to investigators in February 2013, six months before the beginning of the Criminal Compliance Investigation. Our research does not bear out this contention but certainly it has been repeated both in public statements by the EPA and in confidential documents submitted by the offices of EPA, BLM, and the U.S. Attorney.

1. August and September 2011 investigations of mining operations of Jason Minekime based on observations by state and federal compliance inspectors.

2. 2011 investigation of the Lost Chicken Mine investigated by both state and federal officials. This resulted in the issuance of a Compliance Letter in 2012.

In 2012, reports relating to Mr. Minekime's mining operation were again forwarded by federal and state officials. Based on this investigation and the reports from the prior year, Minekime was issued a Notice of Violation by the DEC for unlawful discharges for 2011 and 2012.

In the course of interviews, we were told that BLM officials forwarded four cases to the ECU for possible criminal prosecution in 2012. Initially we were informed that each of these cases originated from the Fortymile area, but learned only two were from the Fortymile area.

1. 2011 and 2012 Minekime Investigation.
2. 2011 Olton Riddles Investigation. (Criminal Trespass).
3. 2012 Porcupine Mine Investigation. (Central mining district—not the Fortymile area).
4. 2011-12 Lapp & Tillian NF Investigation. (Central mining district—not the Fortymile area).

These cases were evaluated for criminal prosecution by DEC Division of Water, ECU officers, and the state environmental crimes prosecutor. None of these cases were accepted for criminal prosecution and were either resolved at the civil or administrative level or dismissed. We were not made aware of any federal complaints expressed over Alaska's handling of these cases. No documents we reviewed, nor any interviews we conducted, led us to discover a dramatic upswing in the levels of criminal discharges from small mining operations in the Fortymile area in 2011 or 2012.³²

During our investigation, we received only three documents from federal authorities which were written for the purpose of explaining the basis for the Criminal Compliance Investigation. We received the first document from EPA and BLM officials.³³ Its purpose was to "provide background and context to the Fortymile River Enforcement Initiative conducted

³² It did appear that there were several referrals to the ECU unit from other agencies, including BLM officials regarding possible unlawful discharges from mining operations in other areas of Alaska. EPA officials were very clear in their press releases, their disclosures and their interviews that the Criminal Compliance Investigation was based on "repeated and historic" violations in Fortymile. As directed by the Office of the Governor, we did not investigate other areas besides Fortymile. These few referrals were quite small in number compared to the placer mining claims being actively mined around Alaska. We also understand all except one case were handled through noncriminal arenas.

³³ EPA Internal Memorandum, Exhibit H.

under the auspices of the Alaska Environmental Crimes Task Force.” In interviews with federal officials, they contended this document contained information showing “serious violations that had been repeatedly observed in the Fortymile Mining District, and the agencies involved believed it was likely that these violations were ongoing.” Serious violations were defined as “knowing or intentional” violations as opposed to simply “negligent” violations. This document cited the presentation made by the past state environmental crimes prosecutor at the AECTF seminar in 2010. As noted earlier, the one to two hour seminar in 2010 by the past state environmental crimes prosecutor who had no experience in prosecuting these types of cases hardly seems a basis for the Criminal Compliance Investigation.

The EPA internal memorandum cites a number of state and/or federal investigations involving criminal violations in the Alaska mining sector (both placer and other that were undertaken in 2011 and 2012), some of which it claims were ultimately charged criminally. None of these cases involved the Fortymile area. We found little evidence of state or federal criminal prosecution of small placer mining operation for water discharge violations anywhere in the state.³⁴ The EPA internal memorandum cites exchanges of information between agencies that caused the Fortymile area to emerge as a particular area of concern for placer mining. Other than the two mining operations noted earlier, we were unable to corroborate this claim, nor were federal officials able to provide other evidence to support this contention. Much of the “evidence” cited in the report was provided by the BLM Ranger and the BLM compliance investigator whose claims had been investigated by AST and ECU officers and found not to be sufficient for further criminal investigation.

Later, after identifying particular concerns with the EPA internal memorandum, we received a followup email from EPA. There were no documents, backup or support provided with this email. Some of the events cited in the email were previously referred to in the EPA Internal Memorandum. Several referred to the same two mining operations complained about and noted above. Some of the events cited were new. To the extent new information was provided, it was unusual that it was not included in the original EPA Internal Memorandum. Finally, references in the email involved BLM complaints about federal mining claims. There is scant evidence in this document showing noncompliance on state mining claims in the Fortymile area.

Finally, in response to written questions posed to federal authorities, we received a letter from federal officials. We gave it little weight for the reasons stated in our earlier letter; it did not respond to our questions, and it was another collective response trying to justify federal actions.

³⁴ Our review of the records in both state and federal courts only found one state criminal prosecution of a placer mine for discharge violations in 2011-2012.

Nothing presented in these materials approaches the nature or scope of cases cited by the EPA's own publications for requiring criminal prosecution or sanctions. Little if any civil enforcement by DEC or EPA had occurred in the Fortymile area in years past. There was no evidence that civil enforcement measures would not have brought about compliance. Nor was there evidence of "serious and knowing" violations ongoing in the Fortymile area. Under the facts provided to us, we were unable to conclude that a criminal compliance inspection was necessary here.

5. **We found that while it is in the best interest of Alaska to actively participate with federal agencies in investigations of environmental crimes, other factors including ensuring public safety, evaluating long term consequences, efficient and effective use of resources, and the administration of justice must be considered before Alaska agrees to participate in such activities.**

There is a compelling need to protect the Alaskan environment from abuse. Alaska is unique in the depth and vastness of its land size, its differing ecosystems, and its environmental resources. As a state, Alaska is constantly balancing the needs to protect its environment while at the same time making its lands available for recreational use and providing business opportunities for all, big and small. State and federal agencies have been granted significant powers to protect the environment and compel compliance with environmental laws and regulations.

While Alaska could enforce its environmental laws by itself, the preferable option is to also participate with federal agencies to ensure compliance with state and federal environmental laws. This sentiment was expressed in numerous interviews by both state and federal officials. Joint participation also makes sense, given Alaska's size and the limited resources allocated to ensure compliance with environmental laws. The efforts of a few can be multiplied if they work as a team.

Therefore, state and federal cooperation in criminal investigations should be encouraged where appropriate. Here, however, we failed to discover facts that merited a criminal investigation in the Fortymile area. When balanced against the reasons for not conducting a criminal investigation, it is not clear it was in the best interest of Alaska to participate in this investigation. In the future, Alaska should consider whether to participate in such activities and, if necessary, leave federal investigators to conduct investigations themselves.

In this case, the concerns against participating in this investigation include the following:

- a. **Little factual support of ongoing serious environmental crimes being committed in the Fortymile area.** This concern has been previously addressed. Certainly if

“serious” environmental crimes had been discovered, the task force members would likely have taken violators into custody.³⁵

b. Failure to demonstrate the need to change from administrative and civil enforcement to compel compliance with environmental laws in the Fortymile area. Alaska began overseeing unlawful discharges under the Clean Water Act program in the summer of 2011. For the thirty years prior, federal oversight deemed administrative and civil remedies sufficient to promote compliance with environmental laws at placer mines around Alaska. None of the evidence we reviewed presented compelling reasons for changing past practices.

Some BLM officials clearly disagreed with the criminal nature of this investigation. We learned AWT officers were advised BLM officials refused to make a four wheeler available for use by the task force. When asked about the BLM’s involvement in the Criminal Compliance Investigation, one BLM official stated, “We waffled back and forth, honestly about how involved we wanted to be. It was a gut-wrenching exercise, and wasn’t taken lightly.”

The ECU officer noted his concerns on several occasions about whether there really was a need for a criminal investigation in light of civil and administrative options. While federal officials indicated agreement, the ECU officer’s concerns were rejected. Many of the state officials we spoke with were very opposed to the escalated level of enforcement.

Environmental cases involving placer mines around Alaska have been handled by state officials at the civil and administrative level since 2011. We did not learn of any dissatisfaction expressed by federal officials of Alaska’s efforts to enforce compliance under the Clean Water Act by enforcing permitting requirements under the NPDES program. In short, nothing we reviewed led us to the conclusion that the prior level of enforcement needed to change.

c. Negative short and long term consequences that may result from the Criminal Compliance Investigation. In many respects, compliance with environmental laws requires the cooperation of the users of the resource. The willingness of these users to comply and cooperate with governmental officials is as important as any factor in keeping the environment clean. Miners and state officials both spoke to the positive level of cooperation that existed between them prior to the Criminal Compliance Investigation. Beforehand, DNR, DEC, ADF&G, EPA and BLM employees often met with miners, had coffee, discussed any issues, took pictures, conducted tests, and left. If something appeared to be improper, these same state and federal employees referred cases to their respective investigative units for possible criminal prosecution.

³⁵ 18 U.S.C. § 3063.

After the Criminal Compliance Investigation, many people we spoke with expressed a concern that this cordial relationship may no longer exist. Concerns exist now that miners may be less inclined to cooperate with visiting state and federal compliance officers. They may not report violations or ask questions about best management practices or permitting issues. Simply put, there is a concern the trust and cooperation established between miners and regulators and established over many years has been damaged by this criminal investigation.

Maybe the Criminal Compliance Investigation will place Alaska placer miners on notice that failure to comply with environmental laws will result in serious consequences, compelling greater compliance. But the task force members who participated in the Criminal Compliance Investigation will not be travelling to the Fortymile area or other areas to conduct civil or administrative compliance checks in the future. Therefore, they will not be affected by any changes in the relationship between the regulators and the regulated. Also, the decision to conduct a criminal investigation was made without input from the agencies who will be most affected by the decision: civil enforcement officials with DEC, DNR, and ADF&G. As noted above, some BLM officials certainly expressed their concerns with this action both before and after the Criminal Compliance Investigation. Because more state employees have contact with placer mining operations, they will be more adversely affected by any short or long term consequences of this criminal investigation than federal employees. In summary, there are many factors that were not considered or were simply ignored by federal authorities when they made the decision to disregard civil and administrative enforcement options and proceed with a criminal investigation.

d. This criminal investigation unnecessarily placed people in harm's way. When federal authorities decided to conduct this criminal investigation in a rural area, they introduced an unnecessary level of risk to the participants and the public. While the method of conducting this environmental criminal investigation may meet proper legal protocol, the novelty of it in the region introduced a potential for confrontation and harm that was unnecessary. In the past, if federal or state compliance officers visited the mines, they did so as singles or pairs and made sure they contacted the miners before carrying out any investigation on the properties. If they carried any firearms, it was usually a long rifle or shotgun for bear protection. Here, the task force members risked escalating a confrontation potentially causing harm or injury into an otherwise normal compliance check.

None of the task force members were knowledgeable about the Fortymile area. The task force members failed to use local resources to assess who might be contacted and what they should expect to find. The AST Intelligence Troopers were not contacted, and the local AST office in Tok was only contacted shortly before the investigation began. No contact was made with any of the DEC, DNR, or ADF&G employees who had regular contact with the people in this region. While task force members relied on the BLM Ranger and the BLM compliance

officer, this reliance was questionable as a minimal investigation revealed. Had they contacted any of these state employees, the task force members would have learned that their safety concerns were exaggerated.

We also heard and read this level of investigation was necessary because the task force members felt they might need to arrest people for “serious” violations. There was also discussion of encountering people with criminal records and people for whom there were outstanding warrants. As stated earlier, there was little evidence to support the existence of “serious” violations necessitating the arrest of anyone. No one was arrested for committing “serious” violations. Accounts of the possibility of encountering people with criminal records were overblown because the individuals’ criminal histories were old and stale. Also, simply having a criminal record does not make a person a danger. None of the compliance inspectors noted concerns of this nature.

Finally, federal authorities noted the possibility of encountering two individuals with outstanding warrants, one federal and one state, during the Criminal Compliance Investigation. It is not clear what the source of this information was or how reliable it was. As it turned out, these individuals were not present and no arrests were necessary. This seems more like the responsibility of the U.S. Marshall’s Office or AST, and at most, an ancillary responsibility of task force members. It is hardly the basis for conducting a criminal investigation. Apparently state and federal civil compliance officials had been going into the Fortymile area and meeting these same individuals without incident.

Fortunately, there were no serious incidents or injuries. Maybe this can be attributed to the professionalism of the task force members. It also could be attributed to the hospitality of the miners. In either case, the Criminal Compliance Investigation unnecessarily increased the risk of injury to others by using the methods it did.

6. We found a lack of timely communication between federal and state agencies and between state agencies leading up to and during the Criminal Compliance Investigation.

We found avenues of communication between involved parties were lacking on several accounts.

First, federal officials failed to contact AST Intelligence as agreed. If they had, they might have learned the BLM Ranger’s representation of ongoing criminal activity in the area was at best exaggerated, cancelling the need for a criminal investigation. By not contacting AST

Intelligence, federal officials could have placed AST's ongoing investigations at risk.³⁶ The only contact we are aware of was one telephone call to the AST Sergeant at Tok just before the beginning of the Criminal Compliance Investigation. Clearly federal authorities have no duty to contact AST when they are conducting a criminal investigation. But when they did not include AST in the planning of this rural investigation, federal authorities lost the opportunity to use AST's local knowledge of the area and people.

Second, ECU officers were told that federal criminal investigators were coordinating the Criminal Compliance Investigation with AST. Consequently, they did not separately contact AST to advise them of the Criminal Compliance Investigation. In retrospect, the better decision would have been for DEC officers to contact AST separately instead of relying on federal authorities.

Additionally, with one minor exception, federal and state criminal investigators did not speak with any state employees who regularly did compliance checks in the area. DEC, ADF&G, and DNR employees regularly visited these very areas, were familiar with the people in the area, and knew who was easy to talk with and who might be more difficult to deal with. These people regularly contact the miners in rural areas without incident or the need for criminal enforcement attire. During the entire time leading up to the Criminal Compliance Investigation, we could only find evidence of one DEC inspector being questioned by task force members about the miners in the Fortymile area and this was a relatively brief interview. Whether this information would have changed the complexion of the Criminal Compliance Investigation is subject to debate.³⁷ Assuming though that other similar activities are contemplated in the future, a better line of communication should exist to ensure that the best source of information is used to ensure officer safety and the minimal level of enforcement necessary.

One factor that may have inhibited lines of communication was the expressed need for "confidentiality" reiterated throughout the preparation phase of the Criminal Compliance Investigation. This is a common theme with criminal law enforcement officials who focus on the importance of "surprise" to catch law breakers in the act of their wrongdoing and to prevent wrongdoers from covering up their wrongdoing before the inspection. Additionally, maintaining secrecy can avoid confrontations by a prepared perpetrator. In traditional cases, the importance of maintaining confidentiality can be, and is, an important facet of criminal investigations.

³⁶ We discounted the argument that contacting AWT officials about the need to borrow a four wheeler constituted sufficient communication with AST. AWT officials made it clear from the beginning that their department would not be involved in this criminal investigation.

³⁷ Several witnesses we spoke with indicated that the federal official heading up this Criminal Compliance Investigation rarely accepted input from state officials on when or how to conduct investigations. People opined that regardless of what was learned from other witnesses or the aerial flights, it was unlikely he was inclined to change the nature of this criminal investigation.

While these points are laudable, it is not readily apparent they are as important in an environmental compliance investigation like the present one. Miners expect to be visited by and are used to state and federal civil inspectors arriving unannounced and on a regular basis. Miners either have the necessary permits or they do not. They are either in compliance with the terms of the permit or they are not. Under these circumstances, the need for “confidentiality” is not nearly as important as gathering as much information as possible from people most familiar with the area. This did not happen here.

7. We found poor lines of communication and oversight between administrators within DEC and ECU leading up to the Criminal Compliance Investigation.

The DEC Commissioner’s office did not learn about the impending Criminal Compliance Investigation until after final approval of the Operations Plan had been given by federal authorities. Thus, it had no ability to weigh in on the issue of whether ECU should participate in this investigation.

The ECU supervisor received notice on the afternoon of August 14, 2013, that the Operations Plan for Criminal Compliance Investigation was approved and the investigation was going forward. Within about one hour of receiving this information, he sent an email to his boss, the DEC Director of Administrative Services, giving notice of the upcoming Criminal Compliance Investigation. The director in turn emailed the Deputy Commissioner of DEC on August 15, 2013 with the news. The Deputy Commissioner of DEC also received a call on August 15, 2013, from the Alaska EPA representative advising of the operation. In this conversation, the EPA official appeared to be surprised at the immediacy of the operation but emphasized the need for confidentiality. Prior to August 15, 2013, the Deputy Commissioner had no knowledge of ECU’s involvement in the Criminal Compliance Investigation. The Deputy Commissioner then contacted the Deputy Attorney General, Civil Division, and advised him of the operation. He was also not aware of the pendency of the Criminal Compliance Investigation.

The DEC Commissioner was out of the country during the Criminal Compliance Investigation. He had no knowledge of the operation prior to leaving on his trip. He only found out about it after his return. Since the ECU did not report to the Deputy Commissioner or the Commissioner, updates on ongoing ECU investigations were supposed to be included in a periodic written update. The topic of the Criminal Compliance Investigation was never brought up in any of the monthly letter updates prior to the commencement of operations. As a result, the DEC Commissioner’s office had little or no knowledge of ECU’s involvement in the Criminal Compliance Investigation.

This failure of ECU to communicate to DEC Commissioner's staff can be attributed to several factors:

- The uncertainty of whether the Criminal Compliance Investigation would in fact be authorized by federal authorities in Washington, D.C. Because of sequestration, there was concern expressed to the ECU officers that approval might not be granted for budgetary reasons. This indecision appears to have factored into the decision not to notify the DEC Commissioner's staff earlier.
- The uncertainty of whether a criminal investigation was really necessary. Because of their involvement in interviews and the aerial flights, ECU officers were not convinced that a criminal investigation was necessary in the Fortymile area. This uncertainty appears to be another factor why this criminal investigation was not communicated to DEC staff.
- The need for "confidentiality" stressed by federal officials. This also appears to have acted as an impediment to communicating this information to DEC staff.
- The fact that ECU officers were communicating with the environmental crimes prosecutor led them to assume that it was not necessary to communicate their intentions to DEC staff.

From the ECU officers' perspective, they notified their superiors within hours of receiving official notice that federal authorities were moving forward with the Criminal Compliance Investigation. While we acknowledge this fact, the structure in place to notify the DEC Commissioner's office was inadequate. The present reporting system requiring the ECU to report to the Division of Administrative Services, and not to the Commissioner's office seems inappropriate and ineffective. We never received adequate responses for why this organizational reporting system is in place.³⁸

8. We found a need for better direction and oversight of DEC's criminal investigation and prosecuting units.

Our interviews disclosed that ECU employees and the prosecuting attorney are passionate about their jobs, protecting the environment, and improving the system. Generally, they are

³⁸ People interviewed told us the reason for the separation was to allow the ECU to maintain independence from the DEC Commissioner's office. We did not understand the reasoning behind this explanation. First, the Commissioner should know of criminal investigations being conducted by employees within his agency. Second, if the Commissioner cannot be trusted with confidential information, he should not be in the position and employees within his agency should not be part of the investigation. Finally, trusting a division director with confidential information rather than the Commissioner makes little sense.

devoted to the successful pursuit of criminal violators, but both understand the role of civil and administrative remedies to bring about compliance. However, both the ECU supervisor and the prosecutor have limited backgrounds in criminal enforcement of environmental laws.³⁹ OSPA provides some oversight for the environmental crimes prosecutor, but little guidance is available to ECU. Of the state employees involved,⁴⁰ only the ECU officer recognized and voiced potential problems with this criminal investigation. Others were more willing to defer to federal authorities because of the benefits from joint participation in these investigations. Some were told it was not their responsibility to question the direction of this federal investigation. All focused on their roles as criminal investigators or prosecutors in the environmental area without concern of other public policy concerns.

The benefits of joint participation with federal authorities in criminal investigations have been noted and acknowledged. Unquestioning participation, however, can lead to problems. Here, there were short and long term consequences associated with the decision to participate in this federal investigation that might not be readily apparent to line investigators or prosecutors. The decision to participate should have been considered and discussed by elected or appointed officials whose job it is to understand the larger public policy issues associated with these matters. If state resources are to be involved in criminal investigations or prosecutions, elected or appointed officials should receive timely notice of and approve such actions. We do not believe this occurred here and steps should be taken to avoid this happening in the future.

9. Concern was expressed with the state of criminal prosecutions of environmental crimes in Alaska.

We interviewed state employees who expressed concerns about the effectiveness of state prosecutions of environmental crimes in Alaska. These concerns focused on the funding and manpower available to effectively investigate and prosecute cases, as well as decisions made on whether or not to prosecute cases criminally or civilly. Funding is not within the scope of this assignment,⁴¹ but concerns raised with how decisions were made and whether to prosecute cases criminally or civilly may have contributed to how the events unfolded here. Lack of analysis or poorly delineated guidelines present when making determinations of how a case will be handled by the department can inhibit the lines of communication among staff and management. A review of prior cases referred for criminal prosecution and decisions related to commencement of criminal prosecutions is also outside the scope of this assignment. We only suggest this situation be examined to determine whether it is necessary to improve the reasoning process behind how cases are handled by DEC.

³⁹ At the time of this criminal compliance investigation, both had approximately two years on the job working experience.

⁴⁰ There were at least six or seven state employees who had knowledge of the nature and timing of the investigation.

⁴¹ We were surprised to learn the travel budget for ECU investigations was only \$7,500. On the other hand, the criminal case loads carried were also surprisingly low.

10. Alaska should adopt procedures for the use of military resources in state criminal investigations before state employees participate in such activity.

During the course of our investigation, we learned of Alaska National Guard flying Corps officials to check mines at various locations around Alaska. This is not what happened during the Criminal Compliance Investigation. We understand pilots of the Alaska National Guard are considered dual status employees, meaning they are under federal control and considered employees of the federal government when flying to assist another federal agency in an investigation. We also learned of EPA criminal enforcement officers being ferried by military helicopters to serve search warrants within Alaska. While this conduct does not appear to violate federal laws, this type of activity could create legal and political issues if other state employees are involved.⁴²

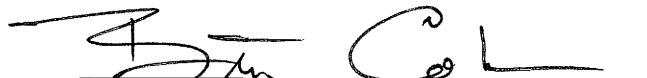
Alaska should adopt procedures for the use of military resources in state criminal investigations before state employees, other than Alaska National Guard employees, participate in such activity. While there are circumstances where such actions would be proper, there should be clear guidelines setting forth the circumstances under which state employees are allowed to participate in the use of military forces or equipment to assist in criminal investigations.

⁴² The Posse Comitatus Act was designed to limit direct active use of federal troops by civil law enforcement officers to enforce laws of the nation. *U.S. v. Hartley*, C.A.5 (La.) 1986, 796 F.2d 112. The clause “to execute the laws” in this section, was intended to make unlawful the direct active participation of federal military troops in law enforcement activities. *U. S. v. Red Feather*, D.C.S.D.1975, 392 F. Supp. 916. However, this section refers to direct active use of Army or Air Force personnel and does not preclude the use of Army or Air Force equipment or material. *U. S. v. Red Feather*, D.C. S.D.1975, 392 F. Supp. 916.

Recommendations

- We recommend all criminal investigations conducted by agencies other than the Department of Public Safety (“DPS”) notify DPS prior to commencement.
- We recommend Governor’s staff receive notice of all joint federal and state criminal investigations at least seven (7) days prior to commencement except in emergency situations.
- We recommend reassessing the role of ECU within DEC to determine whether criminal investigations of environmental crimes should be handled through the Department of Public Safety.
- We recommend rearranging the organization chart of DEC to require ECU to report directly to the Commissioner’s office.
- We recommend completion of the rewrite of the criminal enforcement manual for DEC. This will provide further guidance for the decisions of whether to go forward with future criminal prosecutions.
- We recommend Alaska adopting an administrative penalty order and ticketing authority for NPDES related programs similar to Wisconsin and Minnesota.
- We recommend re-evaluating the manner in which cases are referred to the ECU, particularly referrals from outside DEC.
- We recommend considering enacting a statute to allow Alaska to recover the costs of its criminal investigations upon conviction of serious environmental crimes.
- We recommend adoption of procedures for the use of military resources in state criminal investigations before state employees, other than Alaska National Guard employees participate in such activities.

DATED this 20th day of February, 2014, at Anchorage, Alaska.


Brent R. Cole



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Mr. Douglas H. Parker
Director, Criminal Investigation Division
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Mail Code 2233A
Washington, DC 20004

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

November 6, 2013

Mr. Larry Hartig
Commissioner, Alaska
Department of Environmental Conservation
P.O. Box 111800
Juneau, AK 99811

Mr. Michael C. Geraghty
Attorney General
Alaska Dept. of Law
P.O. Box 110300
Juneau, AK 99811

Dear Sirs:

This pertains to investigative records of the U.S. EPA Criminal Investigation Division (CID) in the matter of mining operations in the Fortymile District.

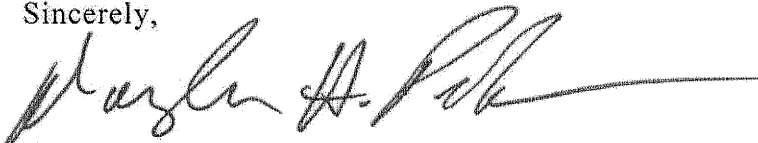
As a result of a joint investigation of this matter with the Alaska Department of Environmental Conservation and another federal agency, copies of certain law enforcement sensitive and privileged records generated by CID were shared with DEC as a party with a common interest.

I hereby request that all such CID-generated records pertaining to this matter, and all duplicate copies of such records, which are currently in possession of any agency within the State of Alaska, be promptly returned to CID. I request that all such CID documents be returned to CID care of Tyler Amon, Special Agent in Charge, CID Seattle Area Office, 1200 Sixth Ave., Suite 900, Seattle, Washington, 98101.

I further request that such CID documents, and any information in them, not be further disclosed, whether within the State government or to any other person.

Any person who wishes to have access to CID investigative records may file a Freedom of Information Act request at the following address: Records, FOIA, and Privacy Branch, Office of Environmental Information, Environmental Protection Agency, 1200 Pennsylvania Ave. (2822T), N.W., Washington, DC 20460, or via email at hq.foia@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas H. Parker", with a long horizontal flourish extending to the right.

Douglas H. Parker

cc: Karen Loeffler, U.S. Attorney
Tyler Amon, SAC



United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240
<http://www.blm.gov>



November 20, 2013

In Response Refer to
9260 (WO120)

Mr. Larry Hartig
Commissioner, Alaska Department
of Environmental Conservation
P.O. Box 111800
Juneau, Alaska 99811

Mr. Michael C. Geraghty
Attorney General
Alaska Department of Law
P.O. Box 110300
Juneau, Alaska 99811



Dear Sirs:

This pertains to investigative and administrative records of the Bureau of Land Management's (BLM) Office of Law Enforcement and Security (OLES) in the matter of the investigation of certain mining operations in the Fortymile Mining District in August of 2013.

As a result of a joint investigation of this matter with the Alaska Department of Environmental Conservation (DEC) and the Environmental Protection Agency, copies of law enforcement sensitive and privileged records generated by OLES were shared with DEC as a participating agency with a common interest. These records included, but were not limited to: Accurint reports, BLM administrative mining compliance reports and BLM law enforcement reports.

I am officially requesting that all such OLES-generated records pertaining to this matter, and all duplicate copies of such records, which are currently in possession of any agency within the State of Alaska, be promptly returned to OLES. I request that all such OLES documents be returned to Loren Good, Acting Special Agent in Charge, OLES, 1387 South Vinnell Way, Boise, Idaho 83709.

I further request that such OLES documents, and any information in them, not be further disclosed, whether within the State government or to any other person.

Any person who wishes to have access to OLES investigative records once a case has been closed or adjudicated in a court of law may file a Freedom of Information Act request at the following

address: Washington Office Bureau of Land Management, WO-560 FOIA Specialists, 3rd Floor,
20 M Street, SE, Washington, D.C. 20003, or via email at BLM_WO_FOIA@blm.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S. Lauro', written in a cursive style.

Salvatore Lauro
Director, Office of Law Enforcement & Security

cc: Karen Loeffler, U.S. Attorney
Loren Good, BLM

LAW OFFICE OF
BRENT R. COLE, P.C.

BRENT R. COLE
PATRICK N. BERGT

821 N STREET, SUITE 208
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December 24, 2013

Karen Loeffler, Esq.
U.S. Attorney
Office of the U.S. Attorney
222 West 7th Avenue, #9, Room 253
Anchorage, AK 99513

Kevin Feldis, Esq.
Criminal Division Chief
Office of the U.S. Attorney
222 West 7th Avenue, #9, Room 253
Anchorage, AK 99513

Re: Chicken/Fortymile Investigation
Our File No. 1226.001

Dear Karen and Kevin:


Thank you for meeting with me regarding my assignment to report to the Office of the Governor regarding the compliance investigation of the Fortymile placer mines by the Alaska Environmental Crimes Task Force. As requested, I am enclosing for Kevin's review the Scope of Work provisions of my contract. As I noted at our meeting, I have not been made privy to any law violations during my investigation. While I noted a slight reluctance to participate in this review process, please note again that I have signed confidentiality statements with the State of Alaska and am willing to do so with your office in an effort to obtain the Government's cooperation.

As part of my investigation, I would like to speak with Ms. Aunnie Stewart about her role in the events leading up to this enforcement action. I have time available next week to accomplish this interview. My report will be written with or without her participation.

Thank you again for your time and consideration in this matter. If you have any questions or concerns, please feel free to contact me.

Very truly yours,

LAW OFFICE OF BRENT R. COLE, P.C.


Brent R. Cole

BRC/ksg
Enclosure

APPENDIX C SCOPE OF SERVICES

The Contractor, Brent L. Cole, shall act as Special Investigator and Independent Counsel for the Office of the Governor and shall obtain, review, and summarize all facts relevant to the EPA and the DEC field investigation of mining claims in the Fortymile District that culminated in field and aerial investigations in 2013. Services shall include but shall not be limited to the following:

Focusing on the workings of the Interagency Task Force on Environmental Crimes (ITFEC), the individual agencies (federal and state), and actions taken by individuals.

Identifying primary areas of concern to the public and to agency management related to how the Fortymile investigation developed and was implemented. We certainly want to enforce the law but we do not support overly aggressive or heavy-handed enforcement.

Identify whether the investigators could have taken different actions, including better communication with management or other agencies, or leaving certain parts of the investigation to inspectors who handle only civil compliance matters, which could have avoided or mitigated instances where a citizen was intimidated or threatened by the presence of the investigators.

Identify any other measures that could be taken to assure members of the public are not subject to intimidation or threatening conduct in the future as a result of a field investigation by the Criminal Investigation Program of the Environmental Protection Agency (EPA) or the Criminal Enforcement Unit of the Alaska Department of Environmental Conservation (DEC).

Identify whether any laws have been violated in the development or execution of the Fortymile investigation.

Reviewing the processes and requirements currently in place for federal and state agencies conducting joint investigations of suspected criminal violations of sections 402 and 404 of the Clean Water Act, including violations of wastewater discharge permits issued by EPA or DEC or of state water quality standards.

Evaluating whether these processes and requirements adequately assure that authorization to use state-owned assets or state employees in an investigation are made by the appropriate state officials.

Identifying any measures that could be taken to assure this, including measures relating to the "Alaska Environmental Crimes Task Force".

Providing a written report summarizing the facts and recommendations from the review, with a copy to the Alaska Attorney General within 90 days. The report will include conclusions as to whether any laws were violated; whether any agency failed to follow regulation, policy, or practice in developing and implementing the Fortymile investigation; and whether any regulation, agreement, or practice of the ITFEC, EPA, or DEC should be altered to better assure law-abiding citizens are not subject to overly aggressive or heavy-handed enforcement practices in the pursuit of Clean Water Act violations.

Traveling to Chicken, Tok, Fairbanks, or other locations as determined by the Project Director to conduct research and record all interviews.

Performing these and any additional services within the scope of this project as determined by the Project Director.



U.S. Department of Justice

*United States Attorney
District of Alaska*

*Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 253
Anchorage, Alaska 99513-7567*

*Commercial: (907) 271-5071
Fax Number: (907) 271-3224*

January 7, 2014

RECEIVED

JAN - 9 2014

LAW OFFICE OF
BRENT R. COLE, P.C.

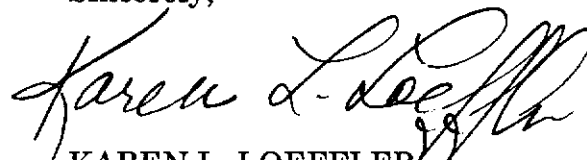
Brent R. Cole
Law Office of Brent R. Cole, P.C.
821 N Street, Suite 208
Anchorage, AK 99501

Re: Chicken/Fortymile Investigation
Your Letter of December 24, 2013

Dear Brent:

Thank you for your letter of December 24, 2013, containing your request to interview AUSA Steward. Please submit whatever questions you wish answered in writing and we will respond as appropriate.

Sincerely,


KAREN L. LOEFFLER
United States Attorney

LAW OFFICE OF
BRENT R. COLE, P.C.

BRENT R. COLE
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January 21, 2014

Karen Loeffler
United States Attorney
222 West 7th Avenue, #9, Room 253
Anchorage, AK 99513


Re: Chicken/Fortymile Investigation
Our File No. 1226.001

Dear Karen:

Thank you again for your offer dated January 7, 2014, to submit written question to Ms. Steward regarding the Fortymile investigation. Unfortunately, your invitation comes too late in the process. The report was in the final stages of being completed when we received your offer and the contract requirements to complete this report did not afford us the time to follow up on your offer.

Very truly yours,

LAW OFFICE OF BRENT R. COLE, P.C.


Brent R. Cole

BRC/ksg

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February 5, 2014

VIA E-MAIL – aunnie.steward@usdoj.gov

Aunnie Steward, Esq.
Assistant U.S. Attorney
Office of the U.S. Attorney
222 West 7th Avenue, #9, Room 253
Anchorage, AK 99513

Re: Chicken/Fortymile Investigation
Our File No. 1226.001

Dear Aunnie:

I have given more thought to your request to answer written questions. While reluctant to do so for a number of reasons, my mandate from the Office of the Governor has always been to collect as much information as possible in order to prepare a complete factual report of events. Therefore, I am enclosing with this letter written questions regarding your role in the criminal compliance investigation in August 2013. I have delayed producing my Report to allow you the opportunity to provide written responses. I expect to make final corrections and submit my Report on Tuesday, February 11, 2013. Therefore, if you want your answers to be part of the record, you should provide them to me by the close of business on Monday, February 10, 2014.

My reluctance to grant you the opportunity to provide written answers stems from several concerns. First, no other witness interviewed for this report was granted the opportunity to provide written answers to questions. I am not sure why your position as an attorney in the U.S. Attorney's Office requires a different approach. Second, allowing you the opportunity to provide written answers allows for the possibility of collaboration with others in answering the questions. Oral questions given at in-person interviews do not allow for the collaboration of many. We have already received several written documents from federal authorities that are indicative of collaborative efforts. Please do not try to simply duplicate their efforts. If your answers are not based on your knowledge, but the rather the collective knowledge of a group of people, they will be given minimal weight.

Thank you again for your time and consideration in this matter. If you have any questions or concerns, please feel free to contact me.

Very truly yours,

LAW OFFICE OF BRENT R. COLE, P.C.



Brent R. Cole

BRC/ksg
cc: Karen Loeffler, Esq.
Enclosure

Questions for Aunnie Steward:

Please answer based on your knowledge as specifically as possible.

- 1) What is the Alaska Environmental Crimes Task Force?
- 2) Can you cite any other criminal investigations undertaken by the Alaska Environmental Crimes Task Force? If so, please list.
- 3) Who brought to your attention the need to conduct a criminal investigation of the mining operations in the Fortymile mining district?
- 4) When did that occur?
- 5) What facts were you made aware of at that time that required this compliance check to be conducted as a criminal investigation rather than as a civil investigation?
- 6) Were any of these facts based upon information provided by BLM Ranger Friday? If so, please list these facts.
- 7) Were any of these facts based upon information provided by BLM Compliance Inspector Cole? If so, please list these facts.
- 8) Please identify the role of the Department of Environmental Conservation's ECU in the task force from February 19, 2013 through this criminal compliance investigation in August 2013?
- 9) Please identify the role of any other Alaska agency in the task force from February 19, 2013 through this criminal compliance investigation in August 2013?
- 10) What investigation did you undertake to determine whether there was a basis for a criminal compliance investigation before your announcement at the AECTF meeting on February 6, 2014?
- 11) Were you aware that an Alaska State Trooper spent a day with BLM Ranger Friday in June 2013 looking into his claims of illegal activity in the Fortymile mining district? If so, how did that factor into your decision that a criminal compliance investigation was necessary in the Fortymile mining district?
- 12) Were you involved in picking the mining operations to ultimately be visited by the task force? If so, when did this occur?

- 13) Please identify all facts known to you which would support the contention that prior to the criminal compliance investigation, federal authorities received information from the Alaska State Troopers about “rampant drug and human trafficking going on in the [Fortymile] area.”
- 14) Please identify who told you that the deadline to file the Report had been extended?

**U.S. Department of Justice***United States Attorney
District of Alaska**Federal Building & U.S. Courthouse
222 West 7th Avenue, #9, Room 255
Anchorage, Alaska 99513-7667**Commercial: (907) 271-5071
Fax Number: (907) 271-3224*

February 11, 2014

Brent R. Cole, Esq.
Law Office of Brent R. Cole
821 N Street, Suite 208
Anchorage, AK 99501

Re: Fortymile Review

Dear Brent:

I am writing on behalf of the United States Attorney's Office in response to the letter and written questions you sent to AUSA Aunnie Steward about the Clean Water Act mining investigation conducted along the Fortymile River. To the extent that your questions are directed toward understanding the context in which EPA, BLM and ADEC worked together to conduct the inspection, whether law enforcement acted appropriately during their interactions with miners, and the legality of the investigation, I have provided information below.

To the extent, however, that your requests are directed at the overall decision by federal law enforcement to investigate potential Clean Water Act violations in the Fortymile River area, or towards our review and analysis of discharges reported or observed at specific mining claims at various times, we do not believe that they are appropriate questions. Nor do we believe that such questions were what the Governor's Office intended when it announced the appointment of a special counsel to ascertain the facts regarding mine inspections in the Fortymile area and whether any laws were violated by EPA, BLM and ADEC during the course of their investigation. The Governor understandably expressed interest in the initial reports that law enforcement agents acted in an intimidating or threatening fashion in performing their jobs, and although we have not seen evidence of any improper conduct in this case, our office would likewise be concerned about that type of approach.

After you met with U.S. Attorney Loeffler and me in December, you wrote us a letter stating that you "had not been made privy to any law violations" during your investigation. As we expressed during our meeting, we would have thought that

such a finding on your part would have ended your inquiry. Our office is not aware of any facts that would suggest that law enforcement engaged in illegal or improper conduct during their investigation, or intentionally threatened or intimidated members of the public. Absent such a finding of some wrongdoing, we are concerned that your inquiry has gone beyond its prescribed scope and appears to be taking on a subjective focus.

As I am sure you are aware from your many years as a criminal defense attorney, federal, state and local law enforcement have a long history of working cooperatively together in Alaska. This is equally true when it comes to working together to protect Alaska's environment, fisheries and wildlife. Through cooperation, limited investigative resources are leveraged to better protect the people, land and resources of this great state in a way that would not be possible working independently. Not only has this cooperation made the State a better and safer place to live, but it has also resulted in many millions of dollars in criminal restitution, fines and forfeited assets being obtained for the benefit of Alaskans.

One example of this cooperation in the environmental crimes arena was the federal criminal conviction of BPXA for the 2006 spill of over 200,000 gallons of oil. The federal Clean Water Act conviction in that case resulted in \$20 million in criminal penalties, of which \$8 million in restitution and community service was targeted for the direct benefit of Alaska. This federal criminal conviction also laid the groundwork for the State of Alaska to obtain an award of \$220 million in lost revenues from the spill.

The Environmental Crimes Task Force that you have asked about came into existence, at least in part, as a result of the successful and close coordination of state and federal agencies in the BPXA case. Sometime after that case was completed, multiple state and federal agencies decided to meet to share information, discuss coordination and to plan a joint training seminar. This gathering of law enforcement became known as the Alaska Environmental Crimes Task Force and continues meets periodically in an effort to leverage resources and to share information about both legal and case specific developments.

In March 2010, participants in the Environmental Crimes Task Force held a training seminar that included a panel discussion of the enforcement of mining pollution laws in Alaska. The panel presenters for this session included an Assistant Attorney General for the State of Alaska, a representative from the Alaska Department of Natural Resources, a representative from the Alaska Department of Environmental Conservation, a BLM mining law staff member, and an EPA mining permit writer. The moderator of the panel was a second Assistant Attorney General for the State of Alaska. Both the Commission of the Alaska Department of Environmental Conservation and the United States Attorney supported this seminar and provided key note remarks.

Moving forward to approximately February 2013, our office learned from law enforcement that there were concerns about mining permit compliance in the Fortymile area. This included learning that a representative from both DEC and the State Department of Law had attended a meeting discussing placer mining in December 2012 during which the Fortymile area was identified as an area of concern when it came to compliance with applicable regulations. It also included learning that biologists from BLM had indicated that turbidity from placer mining was a potential problem in anadromous streams in the Fortymile area. Sometime thereafter, investigators from EPA, BLM and DEC began to develop a plan to further investigate. As you are likely now aware, there are a large number of placer mining operations conducted each summer on federal and state lands within the expansive Fortymile area. These mining operations are remote and hard to reach, and there are a very limited number of state and federal inspectors employed to inspect them. As a result, it can be difficult to identify and enforce environmental violations, including illegal discharges that might occur.

In the summer of 2014, prior to beginning their field operations in the Fortymile River area, EPA and BLM investigators consulted with our office and we provided them our opinion that they had the legal authority to inspect these mining activities to insure that they were complying with federal law. As mentioned above, our office was by this time aware that environmental violations had been reported in the Fortymile area and that there was a need to conduct a more targeted investigation to both gather evidence and to stop potentially harmful discharges into this designated National Wild and Scenic River system.

We were not present when federal and state investigators visited mining sites, took water samples of discharges, and spoke to miners along the Fortymile this summer. It is our understanding, however, that these visits and the investigation as a whole were done in a professional, courteous and safe manner. As a result of that investigation, discharges were documented and it is our hope that corrective actions will be taken and future pollution will be prevented.

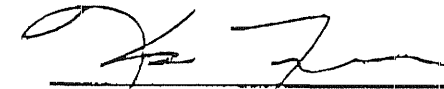
Finally, I must also express our concern with the suggestion in your February 5th letter to Ms. Steward that it would be improper for our office to consult among ourselves or with others involved in order to gather and provide you with the most accurate information for your report, as well as with the implication that you would call the accuracy of a response into question as a result. It is our understanding that you were asked to provide a factual report of the Fortymile investigation, and to that end, I hope that the information provided by our office serves to provide facts and context to your report.

I am optimistic that you will report to the Governor's office that the EPA, BLM and DEC acted appropriately and consistently with their respective missions to determine whether any placer mining operations were violating permits and illegally discharging along the Fortymile River system contrary to state and federal law. Our office looks forward to continued close coordination with our state partners in our joint efforts to protect the air, water, land, wildlife and people of Alaska.

Please do not hesitate to contact us if you have any further questions.

Sincerely,

KAREN L. LOEFFLER
United States Attorney



KEVIN R. FELDIS
First Assistant U.S. Attorney
and Criminal Division Chief



FAX TRANSMISSION

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Date: 2/11/14

Fax #:

Pages: 5 (incl. cover sheet)

From:

Subject:

COMMENTS:

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REPORT ON FORTY MILE RIVER ENFORCEMENT INITIATIVE

DECEMBER 6, 2013

The purpose of this report is to provide background and context to the Fortymile River Enforcement Initiative (Initiative) conducted under the auspices of the Alaska Environmental Crimes Task Force (Task Force).¹

Serious violations had been repeatedly observed in the Fortymile Mining District and the agencies involved believed it was likely that these violations were ongoing. The Alaska Department of Environmental Conservation (ADEC) the Environmental Protection Agency (EPA), and the Bureau of Land Management (BLM), with support from the Alaska Department of Law and the United States Department of Justice (DOJ), developed the Initiative to further investigate potential criminal violations of the federal Clean Water Act (CWA) in the Fortymile river area.

The field investigations conducted during August 19-23, 2013 involved the collection of water samples, discussions with miners, and use of photographs and video recording to document potential CWA criminal violations at a limited number of mining sites. The investigation was conducted in accordance with standard law enforcement operation procedures and protocols.

I. BACKGROUND

The mining industry in Alaska, including gold placer mining, is regulated by federal and state agencies responsible for protecting the environment and public health. ADEC issues the Alaska Pollution Discharge Elimination System (APDES)/National Pollution Discharge Elimination System (NPDES) general discharge permit for placer mines in Alaska. The EPA shares CWA enforcement authority with ADEC. The BLM administers mining claims on subsurface minerals on all federal land within the Fortymile Mining District. The U.S. Army Corps of Engineers (Corps of Engineers) is responsible for protecting and maintaining the physical, chemical, and biological integrity of waters of the United States under the federal CWA, while allowing reasonable development.

A. Placer Mining Regulation in Alaska

Mining in Alaska is supported by the State and the federal government with permit requirements in place to protect the rivers and streams potentially impacted by mining operations. Under the General Mining Law of 1872, individuals can prospect, explore, claim, access, develop, and extract minerals from all federal lands, except for those lands designated for other uses such as parks or wilderness areas. The Alaska Placer Mining Claim Operations Guide, produced by the State of Alaska and federal

¹ The Task Force is comprised of a number of state and federal agencies including the Alaska Department of Environmental Conservation (ADEC), the U.S. Environmental Protection Agency (EPA), and the Bureau of Land Management, (BLM), among others. It is common practice to establish state/federal law enforcement task forces to address criminal violations, and EPA participates in dozens of them across the nation.

partners, notes that placer mining is “highly regulated by federal and state governments and sometimes requires multiple permits,” and warns that “failure to comply with regulations may result in the loss of mining claims and other significant penalties.”

Most mechanical placer miners in the Fortymile District operate under General Permit AKG370000, and cannot legally discharge wastewater into receiving waters (apart from stormwater) unless the permittee meets specified conditions, including the Best Management Practices (BMPs) prescribed in the permit. General Permit AKG370000 is administered by the ADEC under authority from the EPA. Congress provided criminal penalties for negligent and/or knowing violations of CWA permits (as well as for negligent and/or knowing discharges without a permit). State and federal enforcement of pollution laws protects both an important environmental and economic resource and provides a level playing field for the majority of placer miners who comply with these laws.

B. The Fortymile Mining District

The Fortymile Mining District exists within the Fortymile River drainage in remote eastern Alaska. Dozens of federal and state placer mine claims operate within the area, and portions of the Fortymile River are congressionally designated a “National Wild & Scenic River” managed by the BLM. Mining claims on federal lands in this area are administered by the BLM, while mining claims on state lands are administered by several State of Alaska departments. Most often, these claims are on federal or state public land, to which the claimant must continue to allow access to the public. On certain claims on federal lands established prior to 1955, the claimant may restrict access to the public, but may not prevent regulators from performing their regulatory function. Some federal claims have been patented, meaning that title to the land has passed to the miner and the claim is private property.

C. Alaska Environmental Crimes Task Force

The Task Force was organized in 2008 to coordinate enforcement efforts, leverage limited resources and to address criminal violations of state and federal environmental and wildlife laws enacted for the benefit of the people of Alaska. Each agency or department makes its own decisions about whether to participate in task force activities pursuant to its own enforcement authority

The following agencies or departments have participated in the Task Force: DOJ’s Environmental Crimes Section; U.S. Attorney’s Office, District of Alaska; EPA; U.S. Fish & Wildlife Service; BLM; U.S. Forest Service; U.S. Coast Guard; Federal Bureau of Investigation; National Oceanic and Atmospheric Administration; U.S. National Park Service; Alaska Department of Law; ADEC, Alaska Department of Environmental Conservation’s Environmental Crimes Unit (ADEC-ECU); and the Alaska State Troopers.

Task Force participants meet as needed to discuss environmental and wildlife enforcement matters impacting Alaska. During a 2010 Task Force presentation and discussion, the Alaska Department of Law organized for all task force participants a session entitled “*Enforcement of Mining Pollution Laws and Mining in Alaska.*” The information presented by panel members, who represented both federal and State of Alaska regulatory and law enforcement units, helped prioritize mining pollution as an area of potential criminal violations in Alaska needing more investigation.

Following the 2010 Task Force discussion, at least ten (10) State and/or federal investigations involving criminal violations in the Alaska mining sector (both placer mining and other) were undertaken, including cases that were ultimately criminally charged. As the Task Force members exchanged information during these investigations, potential water quality violations in 2011 and 2012 were identified in the Fortymile Mining District. By late 2012, the Fortymile Mining District emerged as a particular area of concern for placer mining, which led to discussions among the Corps of Engineers, EPA's Criminal Investigation Division, the ADEC-ECU and the BLM-Office of Law Enforcement and Security (BLM-OLES). An enforcement Initiative began in early 2013.

D. Fortymile River Enforcement Initiative

At the beginning of 2013, BLM-OLES, EPA-CID and the ADEC-ECU began to develop the Fortymile River Enforcement Initiative. The initial phase involved cooperative information gathering and analysis during the first half of 2013. Phase two, which occurred during August 19 – 23, 2013, involved field investigation by the Task Force members. Phase three involved the opening of criminal cases for further investigation and referral to prosecutors, if warranted.

As noted, the information-gathering phase involved the collection of pertinent records held by federal and state agencies and discussions with state and federal regulatory personnel. Ultimately, information gathered by Task Force agencies and departments indicated a likelihood of knowing and/or negligent CWA violations within the Fortymile Mining District, including violations of the AKG370000 General Permit for Mechanical Placer Mines. Examples of specific information on violations gathered during this period include:

- The Corps of Engineers reported that claimants were exceeding their authorized acreage disturbance limits and conducting unauthorized stream bank diversions.
- BLM reported discharge violations involving material pushed into the Fortymile River during mining operations and identified 10 significant Fortymile mining offenders on both federal and state claims.
- BLM reported that Walker Fork River “runs turbid on a consistent basis through mining season,” and “sedimentation is easily noticeable from the air.” BLM fisheries staff also consistently observed and recorded sedimentation levels that were very high and “in violation of CWA standards.”
- BLM reported observing, with respect to a particular mine along Jack Wade Creek, “some of the highest sediment loads ever witnessed (by the reporting official) in the Fortymile (that) have emanated from this operation.” Other BLM staff observed water quality violations in the area from 2011 to 2013.
- The Alaska Department of Fish and Game reported, with respect to a particular mine along Walker Fork, observing a mine discharging “thick dirty water at a fast rate” and noted that “pumping while discharging was against state’s rules for operating a placer mine.”
- BLM reported that they were unable to conduct fish surveys and count fish in normally clear running streams along Walker Fork because of turbid waters. The BLM fish inventory personnel reported “extreme turbidity” was coming from mining operations “many miles”

upstream that pushed overburden next to Walker Fork and the “elevated turbidity in Walker Fork was not from recent rain events, but rather from mining disturbances.”

Environmental concerns associated with placer mining activity include increased turbidity of river water, adverse impacts of the overall chemical quality of river water, and potential additions of specific toxic metals, such as copper, lead, zinc, nickel and arsenic, to the river during mining operations. Excess turbidity can be harmful in rivers and creeks for a number of reasons, such as the loss of available food supply for fish and short-term exposure to large concentrations of suspended sediment can cause fish mortality. For example, BLM fisheries staff observed that Arctic Grayling are less abundant and generally of smaller size in areas of the Fortymile with active mining.

With respect to the general permit, the ADEC concluded that turbidity and arsenic must be limited in order to meet the state’s water quality standards that protect all waters for all users. Previous EPA Alaska Placer Mining Metals Studies found turbidity can be used as an effective indicator for metal levels in the effluent of placer mines. In reissuing the general permit in 2000, EPA noted that turbidity acts as a surrogate for metals; consequently rather than impose metals limitations in the permit, EPA increased the monitoring frequency for turbidity. The turbidity limits provide immediate control of the discharge of metals in the effluent of placer mines.

Responses to some actual violations the Task force members were briefed on included a Notice of Violation for turbidity issued by ADEC and Letters of Non-compliance from BLM, including those for turbidity.

During the information gathering phase, participating Task Force members also received information regarding activities that may be a concern for law enforcement safety, e.g., several mine operators had criminal records, including convictions for felony bank robbery, felony escape, burglary, reckless endangerment, felony assault, weapons violations, DUIs, attempted murder and drug charges. A specific example that involved potential for conflict concerned two individuals believed to be operating mining claims in the area who were fugitives with outstanding warrants, as well as having significant criminal histories. In addition, two BLM personnel had been threatened by miners in the past. It is not the Task Force’s job to address other law enforcement problems; this information was relevant so that the necessary precautions to ensure officer safety while investigating potential environmental crimes were taken.

The Initiative called for participating Task Force members to conduct field observations and investigate potential negligent and/or knowing CWA violations during the 2013 mining season. Because of the Fortymile Mining District’s remoteness, lack of infrastructure, wilderness conditions, and size (roughly the size of Connecticut), a focused approach was selected to identify possible locations where violations might be observed.

Extensive coordination, such as direct discussions and reviews of records with the Corps of Engineers and the review of records from the Alaska Department of Natural Resources (ADNR) and the BLM, helped narrow the focus from the approximately one hundred (100) placer mining sites in the Fortymile National Wild and Scenic River area to about twenty-nine (29) sites where the agencies

suspected potential criminal conduct. The US Attorney's Office and Alaska Department of Law were briefed throughout the investigation.

II. FORTY MILE FIELD INVESTIGATIONS AUGUST 2013

A. Field Operation Objectives

The field operation had two objectives:

- *Identify the scope of the problem.* The turbidity sampling that had been done in the area indicated violations, but the full extent of the violations was not fully understood. By sampling and monitoring active turbidity discharges at multiple placer mine sites, the agencies would have a more complete picture of the extent of the pollution problem.
- *Investigate active discharges.* Where exceedances were measured, investigators would document the processes contributing to such discharges, talk to miners, photograph, sample, and potentially refer criminal case(s) for prosecution.

In early August 2013 and during the week of the operation, an aerial team overflew approximately thirty-eight (38) mine sites, comprised of the original twenty-nine (29) sites identified, as well as others. Active discharges from mining sites were confirmed. Photographs and recorded videos were taken.

For example, the following photograph was taken during the Fortymile River Enforcement Initiative's field investigative phase. It is an example of the types of illegal discharges observed:



Turbid point source discharge from (upstream) mine impacts the receiving stream and a downstream creek. This aerial photo depicts the confluence of the receiving stream and the downstream creek.

B. The Field Investigative Teams

Ten (10) law enforcement officers participated in the operation:

- Five Special Agents from EPA CID;
- Three Special Agents and one Ranger from BLM's Office of Law Enforcement and Security;
- One Criminal Investigator from ADEC's Environmental Crimes Unit.

Based on information received and consistent with standard operating procedures for law enforcement officers, team members were armed and employed other law enforcement safety equipment for conducting field work. Eight team members traveled to the BLM Chicken Field Station on Sunday August 18, organized into two ground teams of four-persons. Each morning, the ground teams would depart from Chicken pulling trailers loaded with ATVs which were used to access the mine sites along a network of established state roads and trails. All placer mining sites visited were on federal or state owned land, although one site, which was a patented claim, was posted as private property; verbal consent was provided to access this property.

With respect to all mine sites visited by ground teams, each team had at least two members pre-assigned to contact the operator. The remaining ground team members, assigned with forensic responsibilities, determined whether a discharge was active. If ground teams encountered a potential violation, they summoned the plane by radio to take aerial photographs of the mine site. The aerial team would overfly the area and photograph and videotape ongoing violations.²

At sites where a mine operator or laborers were present, ground team members endeavored to contact the operators, identify themselves and explain their purpose. These conversations with operators were intended to: (1) confirm whether the mine was or was not the mine being sought, (2) confirm whether the mine was or was not operating, and (3) confirm whether the mine was or was not discharging. If no discharge(s) were observed, the ground team departed the site.

C. Mine Discharge Investigations

As noted earlier, of the roughly 100 mines in the area, thirty eight (38) sites were identified in coordination with state and federal regulators and/or by the aerial team. Nine (9) mines ultimately became subject to a "Mine Discharge Investigation" due to their active discharges. During these nine Mine Discharge Investigations, team members went directly to the location of the discharge to collect water samples consistent with a pre-approved Quality Assurance Project Plan. Other team members contacted the operator, explained their objective, identified themselves, and talked with the miner to better understand the miner's operation and his understanding of the mine's wastewater discharge permit.

² Federal mine claims may be lawfully accessed by government agents under authority of the federal Multiple Surface Use Act (30 USC 611-615). Moreover, pursuant to the "open fields doctrine" established by U.S. Supreme Court precedent, outdoor areas (apart from the area immediately surrounding a home) may be lawfully accessed by governmental personnel, e.g., federal agents. Sampling and monitoring of U.S. waters by law enforcement requires no warrant.

For eight (8) mechanical placer mining sites where potentially illegal discharges were found, investigations continue. One (1) Mine Discharge Investigation emanating from a suction dredge was found to be in compliance and this matter has been closed.

It should be noted that the remaining twenty-nine (29) mines were not subject to a Mine Discharge Investigation, e.g., an active discharge was not found by a ground team or aerial pictures were taken but no ground follow up was performed because the site was not reached. It was not unusual during this Initiative that some of the sites, even those that had violated in the past, were not observed to be discharging on the day of the site visit or aerial overflight. These sites do not operate every day, and even those that routinely violate do not violate 24 hours of every day.

III. MISINFORMATION REGARDING THE FIELD INVESTIGATIONS

Following the investigation, there was unfounded criticism by some media and public officials that it was a “raid” conducted by a “swat team.” Such characterizations of the field investigations are completely inaccurate. The task force teams made no effort to conceal their identities or “sneak up” on a site. The officers were identified with clothing and gear marked with “Federal Agent, Police and/or US Ranger.” They arrived at mining claims on ATVs via established roads and trails, in many cases passing through multiple mine sites. All of the on-site mine discharge investigations that were conducted involved consensual interviews, and taking forensic readings and pictures. Ground team members introduced themselves to the claim operators whenever they were present and explained the reason they were there. If miners were working or observable, they were contacted immediately. All interviews were conducted professionally and there were no hostilities. If miners were inside dwellings or residences, they were not contacted as the operational plan specifically sought to avoid any potential confrontations that might arise from approaching or entering a residence. No arrests were made, no search warrants were carried out, nor were any private residences or dwellings searched.

Much of the criticism was fueled by internet photos of military-style assault squads purporting to show the team members conducting the investigation in Chicken, Alaska. The photos were not of Task Force members and they bear no resemblance whatsoever to the actual field work on the Fortymile River. In fact, members of the Task Force wore civilian rough-duty field clothing (blue jeans, hip waders or leather boots) and ballistic vests that identified them as law enforcement either by the words FEDERAL AGENT, POLICE, US RANGER, or by prominently displayed badges.

As noted earlier, team members were armed, consistent with standard criminal law enforcement operating procedures. All team members carried side arms. Each ground team was also assigned either a shotgun (carried by a qualified EPA Special Agent) or a semi-automatic rifle (carried by a qualified BLM Special Agent). Throughout the operation, the rifle was “broken down” and carried in a backpack until the final day when it was carried on a sling. Such long guns are commonly used for bear protection in remote portions of Alaska by law enforcement officers and citizens alike, including non-law enforcement officers employed by various state, federal and private employers. No weapons were drawn during the investigation. It was observed during the Task Force’s field investigations that many of the placer miners carried weapons.

Following media and congressional interest in the field investigations -- much of it fueled by the mischaracterizations described above -- EPA and BLM have briefed in general terms state and federal elected officials and the Alaska Miners Association.

Summary of Report

The issue of potential criminal violations of state and federal pollution laws in Alaska's mining sector was presented in 2010 when the Alaska Department of Law coordinated a presentation concerning "*Enforcement of Mining and Pollution Laws in Alaska*" for the Task Force.

The Fortymile River Enforcement Initiative, implemented by participating members of the Task Force, was not the first regulatory or enforcement step in Alaska's mining sector, but a response to prior violations that continued in spite of regulatory inspection and oversight. The Initiative's primary focus was on a limited number of drainages, mining sites, and operators who might be committing criminal violations of federal and state water pollution laws. The Initiative did not focus on all miners.

The field investigative phase of the Initiative was a standard law enforcement operation. EPA's special agents were armed and wore appropriate law enforcement equipment, in accordance with standard protocol. Because team members were also advised by law enforcement and regulators of criminal elements in the Fortymile River area, including some who were associated with specific mining sites that were part of the investigation, the field investigations teams were additionally careful to take safety precautions.

Field activities were conducted professionally. Ground team members identified themselves to mine operators when operators were present and explained their purpose. No property was seized, no dwellings were searched, no miner was prevented from operating, no one was detained and there were no hostilities. No weapons were drawn. A number of point source discharge and other significant permit violations were identified by law enforcement and remain under investigation and violators were left to correct the problem(s) at the mine.

EPA has ongoing investigations that will be brought to the attention of prosecutors should the evidence merit referral.

**EXHIBIT I
WITHHELD BY
ENVIRONMENTAL PROTECTION AGENCY**