



Section 404(c) of the Clean Water Act authorizes the EPA to prohibit, restrict, or withdraw the use of an area to dispose of dredged or fill material when the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

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FACT SHEET

The EPA Should Stop the Pebble Mine By Prohibiting or Restricting Discharges Associated with Large-Scale Mining in the Bristol Bay Watershed

THE BRISTOL BAY WATERSHED AND PEBBLE MINE

The cool, shallow waters of Bristol Bay in southwestern Alaska are surrounded by tundra, crisscrossed by rivers, and dotted with lakes large and small. The Bristol Bay watershed is home to the world's greatest wild salmon fishery, with record runs exceeding 50 million fish annually. Salmon are the lifeblood of the region, supporting valuable fish-related economic activity (\$1.5 billion annually and 14,000 jobs), Alaska Native subsistence culture, and a vast array of wildlife. In December 2014, President Obama barred offshore oil and gas exploration and development activities in Bristol Bay, calling it "one of Alaska's most powerful economic engines and one of America's greatest national treasures" that is "too special and too valuable to auction off to the highest bidder."¹

But large-scale mining continues to threaten the Bristol Bay watershed. Canadian-based Northern Dynasty Minerals (NDM) plans to develop and operate a gold, copper, and molybdenum mine—Pebble Mine—at the headwaters of the Bristol Bay watershed. Given the size of the deposit and its remote location, any mining operation will leave an immitigable footprint. Based on applications submitted to the Alaska Department of Natural Resources in 2006 (later

suspended upon NDM's request), a 2011 report filed with the U.S. Securities and Exchange Commission (SEC), and a 2013 economic study commissioned by NDM, initial plans include at minimum:

- An open pit two miles wide and 2,000 feet deep and an underground mine 5,000 feet deep.
- Colossal earthen dams up to 740 feet high—larger than the Three Gorges Dam in China—built to perpetually store more than 10 billion tons of mine tailings, contaminated with leach-prone toxic materials.
- Mine-related infrastructure, including major power plants, 86 miles of new road, and hundreds of miles of slurry pipelines through untouched wilderness to a new deep water port constructed in Cook Inlet, home to the critically endangered Cook Inlet beluga whales.
- The annual removal of more than 35 billion gallons of surface water from salmon habitat.

In January 2014, the U.S. Environmental Protection Agency (EPA) released its Watershed Assessment, a final scientific assessment of the Bristol Bay watershed that examined the potential impacts of large-scale mining on fish populations, wildlife, development, and Alaska Native

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communities. The Watershed Assessment concluded that Pebble Mine would have potentially devastating impacts on wild salmon—and the economies that depend on them. Even in a best case scenario—without any leaks or failures—Pebble Mine would destroy up to 94 miles of stream and eliminate up to 5,350 acres of wetlands. Worse, a tailings dam failure would be “catastrophically damaging” to the ecosystem and fisheries.²

THE EPA MUST FOLLOW THROUGH AND ISSUE A FINAL 404(C) DETERMINATION

Alaska Native tribes, commercial and sport fishing operations, environmental groups and others have all called on the EPA to protect Bristol Bay by issuing a final determination under Section 404(c) of the Clean Water Act. Responding to overwhelming public demand and scientific justification, the EPA initiated the 404(c) process in February 2014. Before beginning this process, the EPA conducted a three-year scientific study accompanied by two rounds of scientific peer review, engaged the local and broader public, and reviewed more than 1.1 million public comments.

The EPA’s mandate under Section 404(c) is broadly defined to prohibit, deny, restrict, or withdraw dredge and fill projects “whenever” the agency determines a reasonable likelihood of “unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”³ The EPA has the unequivocal right to act pursuant to Section 404(c) “whenever” failure to do so would result in unacceptable adverse environmental effects. As the

D.C. Court of Appeals held in April 2013, “whenever” truly means “whenever.” The EPA may “prohibit/deny/restrict/withdraw a specification *at any time*.”⁴ Regulations specify that the EPA may act even “*before a permit application* has been submitted to or approved by the Corps or a state.”⁵

Taking action to protect Bristol Bay now is both environmentally and economically responsible. Economically, it ensures that mining interests do not continue to invest additional resources in projects that may be deemed unacceptable. As the EPA noted in 1979, the use of pre-application 404(c) protection “may well have some economic benefits that outweigh some of the costs,” because it takes place “before industry has made financial and other commitments.”⁶ Three large mining companies—Anglo American, Rio Tinto and Mitsubishi—have all divested from the project after investing hundreds of millions of dollars. Environmentally, a proactive approach reflects good governance by restricting a gargantuan mine that would create:

- A mine pit nearly as deep as the Grand Canyon.
- Enough mine waste to fill a major football stadium up to 3,900 times.
- Massive mine tailings impoundments that would cover approximately 19 square miles and waste rock piles that would cover nearly nine square miles in an area with streams, wetlands, lakes, and ponds important for salmon.
- A mining operation area larger than Manhattan.⁷

Now is the right time for final 404(c) action. Out of the hundreds of thousands of 404(c) permits issued by the Army Corps of Engineers in the history of the Clean Water Act, the EPA has used Section 404(c) only 13 times. Of those instances, 11 were under Republican administrations. The EPA’s Watershed Assessment paints a stark picture for Bristol Bay, including certain dewatering, destruction, and pollution from large-scale mining. Mining would not only threaten the salmon—and the commercial and sports fishing industries they support—but also the wildlife and people who depend on salmon to survive. The threat of “imminent” mining applications from foreign mining companies for more than a decade has placed great stress on the people and economies of Bristol Bay. Final EPA action would free Bristol Bay from this looming menace.

Although NDM has filed a series of lawsuits to prevent the EPA from doing its job, we urge the EPA to issue a final determination under Section 404(c) to protect Bristol Bay as soon as possible.

ENDNOTES

- 1 Somander, T., “5 Things You Need to Know About Alaska’s Bristol Bay,” Dec. 16, 2014, www.whitehouse.gov/blog/2014/12/16/5-things-you-need-know-about-alaskas-bristol-bay.
- 2 U.S. EPA, An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, Region 10, Seattle, WA, January 2014.
- 3 Clean Water Act, U.S. Code 33, § 1344(c).
- 4 Mingo Logan Coal Co. v. U.S. EPA, 714 F.3d 608, 613-14 (D.C. Cir. 2013), WestLaw (italics added).
- 5 Purpose and Scope, Section 404(c) Procedures, *Code of Federal Regulations*, title 40, sec. 231.1 (italics added).
- 6 U.S. EPA, “Denial or Restriction of Disposal Sites; Section 404(c) Procedures,” Federal Register 44, no. 194 (October 9, 1979): 58076-58077 (to be codified at 40 C.F.R. § 231).
- 7 U.S. EPA, “EPA releases proposal to protect Bristol Bay, Alaska fisheries from potential impacts posed by Pebble Mine,” July 18, 2014, <http://yosemite.epa.gov/opa/advpress.nsf/0/B52A95F5B3ADEFC185257D1900056758>.