

Comments on Behalf of the Natural Resources Defense Council  
Opposing the U.S. Environmental Protection Agency's Proposal  
to Withdraw Proposed Determination to Restrict the Use of an  
Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska

Docket No. EPA-R10-OW- 2017-0369

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From the moment in May of 2010 that the U.S. Environmental Protection Agency (“EPA”) received a letter from six federally-recognized Bristol Bay tribes requesting protection from the environmental devastation of a Pebble Mine, EPA has engaged in a process unsurpassed in transparency, comprehensiveness, and scientific rigor—until now. This multi-year administrative process has formed the foundation for a substantive proposal that was well-founded in federal law, based on peer-review, and shaped by overwhelming public input and support—until now.

For the first time in this more than ten-year effort to uphold the directives of the Clean Water Act and protect the world’s most productive natural salmon fishery from the potentially catastrophic consequences of the Pebble Mine, EPA proposes to ignore years of careful science, public input, and formal process and to do so in haste—without reviewing the record or even consulting agency staff—based on an arbitrary and capricious, *post hoc* rationale unmoored from applicable law or fact. By this action, taken at the summary direction of the agency’s Administrator Scott Pruitt after a closed-door meeting with the CEO of the sole owner of the Pebble Mine project, makes a mockery of EPA’s mission of environmental protection—turning on its head the letter and spirit of the federal Clean Water Act, misstating the underlying facts, and reversing a carefully crafted proposal informed by science and endorsed virtually unanimously by hundreds of thousands of Americans who have put their faith in the integrity of legal process.

The Natural Resources Defense Council (“NRDC”), on behalf of its more than 3 million members and activists, submits these comments to oppose in the strongest terms EPA’s Proposal to Withdraw the Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska (“Proposed Withdrawal”).<sup>1</sup> We urge EPA instead to finalize its Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska (“Proposed Determination”).<sup>2</sup> Such action would be responsive to science, justified by law, and clearly permissible under EPA’s congressionally-instilled authority to act. It is also overwhelmingly supported by the Bristol Bay residents, subsistence families, commercial fishermen, business owners, and countless individuals who—for over a decade—have sought EPA protection of the area’s pristine environment and productive fishery.

If the Agency does not finalize the Proposed Determination, the only defensible alternative is to maintain the Proposed Determination in place during whatever permitting process may follow. EPA has followed this course of action in the past, and the Proposed Determination can serve as a valuable guide to mining companies, stakeholders, and reviewing agencies throughout the 404 process.

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<sup>1</sup> Proposal To Withdraw Proposed Determination To Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska, 82 Fed. Reg. 33123 (July 19, 2017) [hereinafter Proposed Withdrawal].

<sup>2</sup> Notice of Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska, 79 Fed. Reg. 42314, (July 21, 2014); *see also* Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act Pebble Deposit Area, Southwest Alaska (July 2014) [hereinafter Proposed Determination].

## **I. FACTUAL BACKGROUND**

In July of 2014, EPA issued a Proposed Determination pursuant to Section 404(c) of the Clean Water Act that, if finalized, would place science-based restrictions on the Pebble Mine. This Proposed Determination was the result of a comprehensive multi-year, multi-staged process that incorporated public input and scientific review well beyond what is required. Never before did EPA go to such lengths to ensure that all voices were heard, and all thresholds were met before proceeding with 404(c) action.

In May 2010, six federally-recognized tribes from the Bristol Bay region sent a letter to EPA requesting that it proactively initiate section 404(c) action to prohibit, deny, restrict, or withdraw specification of the Pebble Mine site in Bristol Bay as a disposal area for the discharge of dredged or fill material.<sup>3</sup> These requests came after years of pronouncements by the mining entity Pebble Limited Partnership (“PLP”) that permit applications were forthcoming. Alaska Senator Lisa Murkowski highlighted the mining interests’ “collective responsib[ility]” for years of uncertainty and delays in a July 1, 2013 letter, emphasizing that “[a]t least as far back as . . . 2004, Northern Dynasty Minerals asserted that the submission of permit applications was imminent.”<sup>4</sup> Yet after over a decade of waiting, “it is anxiety, frustration, and confusion that have become the norm in many communities,” Murkowski wrote.<sup>5</sup>

Since the initial 2010 request for 404(c) action to EPA’s issuance of the Proposed Determination, EPA received over 850,000 requests from citizens, tribes, Alaska Native corporations, commercial and sport fishers, jewelry companies, seafood processors, restaurant owners, chefs, conservation organizations, members of the faith community, sport recreation business owners, elected officials and others asking EPA to take action to protect Bristol Bay.<sup>6</sup>

### **1. EPA’S MULTI-STAGED AND INCLUSIVE PROCESS**

Consistently throughout the process that culminated in the Proposed Determination, EPA elicited extensive input, reviewed and responded to that input, provided open access and communication, and sought independent review. The result is a Proposed Determination founded on comprehensive scientific study and rigorous analysis – a determination that incorporates input from two rounds of public comment and peer review. EPA more than sufficiently established that mining in Bristol Bay would result in “unacceptable adverse effects” to fishery areas (including spawning and breeding areas), recreational areas, and wildlife, satisfying the statutory trigger to invoke section 404(c).

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<sup>3</sup> A Joint Letter from Six Fed.-Recognized Tribes in the Kvichak & Nushagak River Drainages of Sw. Alaska, to Lisa P. Jackson, Adm’r, EPA (May 2, 2010). Ultimately, EPA received petitions from nine federally recognized tribes, the Bristol Bay Native Corporation, commercial fishermen, sportsmen, conservationists, and others to initiate action under section 404(c).

<sup>4</sup> Letter from Lisa Murkowski, U.S. Sen., to John Shively, Chief Exec. Officer, PLP, Mark Cutifani, Chief Exec. Officer, Anglo American, and Ron Thiessen, Chief Exec. Officer, N. Dynasty Minerals (July 1, 2013), *available at* [https://www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=3b2efb37-cdd2-4203-8568-72c405e2a4e4](https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=3b2efb37-cdd2-4203-8568-72c405e2a4e4).

<sup>5</sup> *Id.*

<sup>6</sup> Press Release, U.S. Env’tl. Prot. Agency, EPA Moves to Protect Bristol Bay Fishery from Pebble Mine (Feb. 28, 2014), [https://yosemite.epa.gov/opa/admpress.nsf/names/r10\\_2014-2-28\\_bristol\\_bay](https://yosemite.epa.gov/opa/admpress.nsf/names/r10_2014-2-28_bristol_bay).

**a. Process: EPA’s Proposed Determination was the Result of Extensive Public and Stakeholder Participation and Peer Review**

In order to take 404(c) action, EPA has a duty only to provide “notice and opportunity for public hearings,” to “consult with the [Corps] Secretary,” and to “set forth in writing and make public his findings and his reasons for making any determination under this subsection.”<sup>7</sup> EPA did all of this—and much more—in response to the Tribes’ petition for 404(c) review:

- EPA held meetings and telephone calls in 2010 with stakeholders who both supported and opposed the Pebble Mine, and engaged in tribal consultation and public meetings.<sup>8</sup> The EPA Administrator and Regional Administrator visited Alaska, met with PLP, and hosted listening sessions with tribal leaders and local and regional entities.<sup>9</sup>
- EPA next decided to conduct an ecological risk assessment before considering any additional steps.<sup>10</sup>
- In February 2011, EPA invited all 31 federally recognized tribal governments of the Bristol Bay region – 20 of which elected to participate – to enter “formal consultation” on the Watershed Assessment.<sup>11</sup>
- In May 2012, EPA released a Draft Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska.<sup>12</sup>
- EPA held eight noticed public hearings and a public comment period, during which it received over 233,000 public comment letters.<sup>13</sup> Of these, over 90% expressed support for the Draft Assessment and/or EPA action.
- The agency submitted the Draft Assessment to peer review by twelve independent scientific experts, assembled through an independent contractor. Peer reviewers included specialists in the fields of mine engineering, salmon fisheries biology, aquatic ecology, aquatic toxicology, hydrology, wildlife ecology and Alaska Native cultures.<sup>14</sup>
- Public involvement in the peer review process was extensive. The public was invited to nominate peer reviewers, the peer review panel charge questions were subject to public comment and revised accordingly, and the first two days of the peer review meeting were

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<sup>7</sup> Permits for Dredged or Fill Material, 33 U.S.C. § 1344(c) (2006).

<sup>8</sup> Proposed Determination, *supra* note 2, at 2-5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ES-3.

<sup>11</sup> *Id.* at 2-8, 2-9.

<sup>12</sup> *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, U.S. Environmental Protection Agency, Washington, DC, EPA-HQ-ORD-2012-0276 (2012).

<sup>13</sup> Proposed Determination, *supra* note 2, at 2-9.

<sup>14</sup> Press Release, U.S. Env'tl. Prot. Agency, EPA Releases Bristol Bay Assessment Describing Potential Impacts to Salmon and Water from Copper, Gold Mining (Jan. 15, 2014), <https://yosemite.epa.gov/opa/advpress.nsf/d96f984dfb3ff7718525735900400c29/e66260c6668ccdf185257c610061ba99!opendocument> (last visited Oct. 11, 2017).

open to public participation.<sup>15</sup>

- EPA incorporated the public and peer input into a revised Draft Assessment, released in April 2013.<sup>16</sup> This second Draft was *also* subject to public comment and a follow-on peer review to evaluate whether it was responsive to the 2012 peer review comments.<sup>17</sup> This time EPA received over 890,000 public comments, with over 650,000 of them supporting EPA protection of Bristol Bay.<sup>18</sup>
- Incorporating the peer review and public comments to the Second Draft Assessment,<sup>19</sup> EPA issued its final Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska (“Watershed Assessment”) in January 2014, determining that large-scale mining would result in unacceptable adverse effects to streams, wetlands, lakes, and ponds, and unacceptable alterations of streamflow.<sup>20</sup>
- In July of 2014, EPA issued its Proposed Determination based on a finding that mining the Pebble deposit “could result in significant and unacceptable adverse effects on ecologically important streams, wetlands, lakes, and ponds and the fishery areas they support.”<sup>21</sup> In response to its request for public comment on the Proposed Determination, the Agency received more than 670,000 written comments,<sup>22</sup> over 99% in support of finalizing EPA’s Proposed Determination to protect Bristol Bay from the Pebble Mine.<sup>23</sup>

In taking these comprehensive steps, EPA far surpassed both its 404(c) requirements and the EPA peer review guideline requirements (which for example contain no obligation—or mention—of a second review or comment period<sup>24</sup>). This unprecedented level of public and peer engagement and input combined to ensure a thorough and reliable analysis of potential environmental impacts from large-scale mining in Bristol Bay.

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<sup>15</sup> Proposed Determination, *supra* note 2, at 2-9.

<sup>16</sup> *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, (Second External Review Draft)*, U.S. Environmental Protection Agency, Washington, DC, EPA-HQ-ORD-2013-0189 (2013).

<sup>17</sup> Proposed Determination, *supra* note 2, at 2-10.

<sup>18</sup> *Id.* at 2-9. See also Press Release, Commercial Fishermen for Bristol Bay, Staggering National Support to Save Bristol Bay (Sept. 16, 2013), <http://fishermenforbristolbay.org/2013/09/staggering-national-support-to-save-bristol-bay/> (last visited Oct. 11, 2017.)

<sup>19</sup> Proposed Determination, *supra* note 2, at 2-10.

<sup>20</sup> *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska (Final Report)*. U.S. Environmental Protection Agency, Washington, DC, EPA 910-R-14-001A-C, ES, 2014.

<sup>21</sup> Proposed Determination, 79 Fed. Reg. 42314, 42317.

<sup>22</sup> Proposed Withdrawal, 82 Fed. Reg. 33123.

<sup>23</sup> *Examining EPA’s Predetermined Efforts to Block the Pebble Mine: Hearing Before the H. Comm. on Science, Space, and Tech.*, 114<sup>th</sup> Cong. (2015)(written testimony of Rick Halford, Former Alaska Senate President), <http://docs.house.gov/meetings/SY/SY00/20151105/104078/HHRG-114-SY00-Wstate-HalfordR-20151105.pdf>.

<sup>24</sup> EPA, PEER REVIEW HANDBOOK EPA/100/B-06/002, at 59 (3rd ed. 2006), [https://www.epa.gov/sites/production/files/2015-09/documents/peer\\_review\\_handbook\\_2006\\_3rd\\_edition.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/peer_review_handbook_2006_3rd_edition.pdf) (last visited Oct. 11 2017).

**b. Substance: EPA’s Finding of Unacceptable Adverse Effects is Based on Sound Science**

EPA’s final Watershed Assessment thoroughly documents that large-scale mining in Bristol Bay would irrevocably devastate one of the most highly-functioning and productive salmon ecosystems remaining anywhere in the world, as well as the sustainable communities, wildlife, and local economy that it supports. As EPA has correctly explained, “any mining of this deposit would, by necessity, require similar mine components, support facilities, and operational features.”<sup>25</sup>

EPA’s Watershed Assessment analyzed the environmental impacts that mines of three sizes—6.5 billion tons of ore, 2 billion tons, and 0.25 billion tons—would have in Bristol Bay. EPA reviewed the 6.5 and 2 billion ton mine sizes because public statements by the Pebble mining interests indicated that they were actively considering mines of at least this size. EPA also considered a smaller 0.25 mine size—the worldwide median size of porphyry copper deposits<sup>26</sup>—specifically in response to the draft Watershed Assessment peer review recommendation to “[a]dopt a broader range of mine scenarios ... especially at smaller mine sizes.”<sup>27</sup>

Even under the smallest contemplated mine size, the nature and magnitude of environmental losses from mining would be unprecedented for the Clean Water Act Section 404 permitting program in all of Alaska<sup>28</sup>—and perhaps the nation.<sup>29</sup> “In simple terms, the infrastructure necessary to mine the Pebble deposit jeopardizes the long-term health and sustainability of the Bristol Bay ecosystem.”<sup>30</sup>

EPA’s findings were substantiated by in-depth scientific review and analysis. EPA followed its guidelines for ecological risk assessments in creating the Watershed Assessment, which require data of “sufficient quantity and quality, from a variety of sources.”<sup>31</sup> EPA prioritized peer-reviewed, publicly accessible sources to ensure that incorporated information

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<sup>25</sup> Proposed Determination, 79 Fed. Reg. 42314, 42316.

<sup>26</sup> *Id.*

<sup>27</sup> *EPA Response to Peer Review Comments on the May 2012 and April 2013 Drafts of An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, at 12-13, [https://cfpub.epa.gov/si/si\\_public\\_file\\_download.cfm?p\\_download\\_id=522994](https://cfpub.epa.gov/si/si_public_file_download.cfm?p_download_id=522994).

<sup>28</sup> The unacceptable adverse impacts associated with a 0.25 billion ton mine would include: (a) nearly 24 miles of streams (representing approximately 5 miles of streams with documented anadromous fish occurrence and 19 miles of tributaries of those stream); (b) total habitat losses of more than 1,200 acres of wetlands, lakes, and ponds, of which approximately 1,100 acres are contiguous with either streams with documented anadromous fish occurrence or tributaries of those streams; (c) streamflow alterations in excess of 20% (which result in major changes in ecosystem structure and function and significant reductions in the extent and quality of fish habitat downstream of the mine) in more than 9 miles of streams with documented anadromous fish occurrence. Proposed Determination, *supra* note 2, at ES-4. In addition, losses of streams, wetlands, lakes, and ponds and alterations of streamflow each provide a basis to issue the Section 404(c) proposed determination. *Id.* at ES-5.

<sup>29</sup> News Release, U.S. EPA, EPA Releases Proposal to Protect Bristol Bay, Alaska Fisheries from Potential Impacts Posed by Pebble Mine (July 18, 2014), <https://yosemite.epa.gov/opa/admpress.nsf/6427a6b7538955c585257359003f0230/b52a95f5b3adefc185257d1900056758!OpenDocument> (last visited Oct. 11, 2017).

<sup>30</sup> Proposed Determination, 79 Fed. Reg. 42314, 42316.

<sup>31</sup> Proposed Determination, *supra* note 2, at 2-7.

and data were of sufficient quality. The agency also reviewed information and data from other credible, non-peer-reviewed sources, including reports from the mining entities, the State of Alaska, the U.S. government and other governments; datasets from the State of Alaska, the U.S. government, and other sources; mine industry publications; reports from non-governmental organizations; and personal communications with qualified experts.<sup>32</sup> In addition, the peer review process described above was charged with evaluating the quality of the science upon which the Watershed Assessment was based.<sup>33</sup>

## **2. THE HALTED PROPOSED DETERMINATION PUBLIC COMMENT PROCESS**

Upon issuing the Proposed Determination in 2014, EPA held a public comment and public hearing process, which ended on September 19, 2014, and yielded over 670,000 written comments overwhelmingly in favor of finalizing the Proposed Determination.<sup>34</sup> Concurrently, PLP filed three lawsuits against EPA, and on November 25, 2014, obtained a preliminary injunction directing EPA to halt its review process until the case was resolved.<sup>35</sup> This resolution did not occur until May of 2017 when EPA entered into settlement with PLP.<sup>36</sup> There is no evidence to suggest that EPA began or completed its review of the 670,000 public comments within the only two months it would have been permitted to do so in 2014, or since May of 2017 when the final pending lawsuit was dismissed.

## **II. LEGAL FRAMEWORK**

### **a. EPA's Section 404(c) Mandate**

Section 404(c) of the Clean Water Act gives EPA the explicit authority to prohibit, deny, restrict or withdraw permitting by the U.S. Army Corps of Engineers' ("Army Corps") of dredge and fill projects when EPA finds that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."<sup>37</sup> EPA's mandate pursuant to 404(c) to consider specific impacts on the environment are evident in this text; supported by this language and the case law applying it, EPA has correctly interpreted 404(c) to limit its discretion to consideration of specifically-enumerated environmental factors. EPA may act pursuant to section 404(c) if a future discharge is reasonably *likely* to cause unacceptable adverse effects. The agency has explained that "absolute certainty is not required. Because 404(c) determinations are by their nature based on predictions of future impacts, what is required is a reasonable likelihood that unacceptable adverse effects will occur — not absolute certainty but more than mere guesswork."<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2-10.

<sup>34</sup> Proposed Withdrawal, 82 Fed. Reg. at 33123.

<sup>35</sup> Prelim. Inj., *Pebble Ltd P'ship v. EPA*, No. 3:14-cv-00171-HRH (D. Alaska Nov. 25, 2014), ECF No. 90.

<sup>36</sup> Proposed Withdrawal, 82 Fed. Reg. at 33123.

<sup>37</sup> 33 U.S.C. § 1344.

<sup>38</sup> Denial or Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. 58076, 58078 (Oct. 9, 1979).

## b. EPA Authority Under Section 404(c) is Limited to Environmental Factors

EPA's rules governing section 404(c) provide that "[i]n evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40 CFR part 230)."<sup>39</sup> Although the Army Corps is responsible for implementing those guidelines during the permitting process, as EPA explained when it published its 404(c) regulations, "[w]hile Congress had faith in the Corps' administrative experience, it recognized EPA as the 'environmental conscience' of the Clean Water Act."<sup>40</sup>

Therefore, in considering whether to issue a permit, the Army Corps is permitted to consider the wide array of factors found in those guidelines, both environmental and non-environmental.<sup>41</sup> By contrast, in deciding whether to exercise its authority under section 404(c), EPA's power is narrowly focused on the environmental priorities of the Clean Water Act, and the Agency may consider *only* the portions of those rules relevant to evaluating adverse effects on the section 404(c) resources.<sup>42</sup>

The Court of Appeals for the Fourth Circuit has considered the relationship between the Army Corps' role in the section 404 permitting process and EPA's 404(c) authority. Significantly, it concluded that section 404(c) allows EPA to consider the environment at the exclusion of other values.<sup>43</sup> Because EPA's 404(c) authority is based only on its obligation to protect the environment,<sup>44</sup> the Court of Appeals held that the agency may rest its decision to intervene under section 404(c) *solely* on a finding of unacceptable adverse effects to the environment.<sup>45</sup> The court in *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers* further clarified this finding, holding that an Administrator cannot base his decision to forego 404(c) action where the decision "was not based on his determination that the permit would not likely have unacceptable adverse effects, but on a whole range of other reasons completely divorced from the statutory text."<sup>46</sup>

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<sup>39</sup> 40 C.F.R. § 231.2(e).

<sup>40</sup> Denial or Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. at 58081.

<sup>41</sup> *James City Cty., Va. v. EPA*, 12 F.3d 1330, 1335 (4th Cir. 1993) ("Congress obviously intended the Corps of Engineers in the initial permitting process to consider the total range of factors bearing on the necessity or desirability of building a dam in the Nation's waters, including whether the project was in the public interest.").

<sup>42</sup> 40 C.F.R. § 231.2(e). EPA has found the following 404(b)(1) guidelines relevant to its 404(c) analysis: Significant degradation of waters of the United States, 40 C.F.R. § 230.10(c), *Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No 1 Mine, Logan County, West Virginia* (Jan. 13, 2011) ("Spruce No. 1") at 74, [https://www.epa.gov/sites/production/files/2015-12/documents/1\\_spruce\\_no\\_1\\_mine\\_final\\_determination\\_011311.pdf](https://www.epa.gov/sites/production/files/2015-12/documents/1_spruce_no_1_mine_final_determination_011311.pdf) (last visited Oct. 11, 2017), *rev'd on other grounds, Mingo Logan Coal Co. v. U.S. Env'tl. Protection Agency*, CA No. 10-0541 (ABJ) (D.D.C. Mar. 23, 2012), *appeal docketed*, No. 12-5150 (D.C. Cir. July 18, 2012); Secondary effects, 40 C.F.R. § 230.11(h), Spruce No. 1 at 74; Cumulative effects, 40 C.F.R. § 230.11(g), Spruce No. 1 at 74, Everglades (Rem, Becker & Senior Corp.) Veto, 53 Fed. Reg. 30,093-094 (Aug. 10, 1988) (veto based in part on cumulative impacts as described at 52 Fed. Reg. 38,519 (Oct. 16, 1987)); *see also* Jack Maybank Veto, 50 Fed. Reg. 20,291 (May 15, 1985) (veto based in part on cumulative impacts to the area, including functional losses in the St. Helena Sound ecosystem, as described at 49 Fed. Reg. 30,112, 30,114 (July 26, 1984)); Sweden Swamp Veto, 51 Fed. Reg. 22,977, 22,978 (June 24, 1986).

<sup>43</sup> *James City Cnty.*, 12 F.3d at 1336.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *All. to Save the Mattaponi v. United States Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 140 (D.D.C. 2009).

The provision's legislative history further confirms that Congress intended section 404(c) to serve purely as an environmental check on the Army Corps' permitting authority under section 404. An early House amendment to the bill would have given the Army Corps the power to administer the permitting of dredged or fill material without EPA oversight. Instead, the Army Corp would have been, by itself, "required to determine that the discharge would not unreasonably degrade or endanger human health, welfare, or amenities or the marine environment, ecological systems, or economic potentialities."<sup>47</sup> That scheme for the section 404 permit program did not survive the House and Senate conference committee. According to the conference committee report:

The conferees agree that the Administrator of the Environmental Protection Agency shall have authority to prohibit specification of a site and deny or restrict the use of any site for the disposal of any dredge or fill material which he determines will adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.<sup>48</sup>

It was this formulation of section 404(c) that made its way into the final version of the bill. The decision to abandon the language of economics and rest the oversight authority with EPA suggests what courts and EPA have always understood: that section 404(c) was intended to fulfill the environmental and ecological priorities of the Clean Water Act.

Finally, and significantly, in EPA's statement of purpose that accompanied the rulemaking, the Agency explained that "section 404(c) does not require a balancing of environmental benefits against non-environmental costs such as the benefits of the foregone project. This view is based on the language of 404(c) which refers only to environmental factors."<sup>49</sup> EPA emphasized that "there is no requirement in 404(c) that a cost/benefit analysis be performed, and there is no suggestion in the legislative history that the word 'unacceptable' implies such a balancing."<sup>50</sup>

### **III. WITHDRAWING THE PROPOSED DETERMINATION WOULD BE UNREASONABLE, ARBITRARY AND CAPRICIOUS**

On May 1, 2017, Pebble Limited Partnership CEO met with EPA Administrator Scott Pruitt. Shortly thereafter that same day—without consulting with or being briefed by agency scientists or career staff—the EPA's acting general counsel sent an email to agency staff saying the Administrator had "directed" the agency to withdraw the Proposed Determination.<sup>51</sup> That

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<sup>47</sup> Joint Explanatory Statement of the Committee of Conference, Pub. L. No. 92-500 (*reprinted in* 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972, at 325 (1973)).

<sup>48</sup> *Id.*

<sup>49</sup> Denial or Restriction of Disposal Sites; Section 404(c) procedures, 44 Fed. Reg. at 58078 ("When Congress intended EPA to consider costs under the Clean Water Act, it said so.").

<sup>50</sup> *Id.*

<sup>51</sup> Drew Griffin, Scott Bronstein & John D. Sutter, *EPA Head Met with a Mining CEO--and Then Pushed Forward a Controversial Mining Project*, CNN, Sept. 22, 2017, <http://www.cnn.com/2017/09/22/politics/pebble-epa-bristol-bay-invs/>.

email specifically noted that the agency would need to develop a judicially-defensible *post hoc* rationale for its about-face: “As far as the basis, we will need to develop the most defensible basis we can...”<sup>52</sup> Administrator Pruitt’s rush to withdraw the Proposed Determination without taking the time to review the existing record—or make a new record—reveals the arbitrary and capricious nature of this decision.

On July 17, 2017, EPA issued a Proposed Withdrawal and request for public comment,<sup>53</sup> providing what appear to be four stated reasons for foregoing 404(c) action. The proposal also limits public comments regarding withdrawal and subsequent Administrator review/approval to those stated reasons, and explicitly directs commenters that EPA “is not soliciting comment on the proposed restrictions or on science or technical information underlying the Proposed Determination.”<sup>54</sup> By failing to consider the science—and worse, limiting the public from commenting on the science—EPA reveals its reversal as a purely political decision, divorced from science, facts, law or even public engagement. In short, EPA’s rapid reversal is not only unjustified by the record, but is also the very definition of arbitrary and capricious.

Courts may review agency action—even discretionary action—for arbitrariness and capriciousness when an agency abandons or reverses a course of action without explanation.<sup>55</sup> Agency action is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.”<sup>56</sup> In *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, the court held that the EPA Administrator’s decision to forego a 404(c) veto was arbitrary and capricious where the decision “was not based on his determination that the permit would not likely have unacceptable adverse effects, but on a whole range of other reasons completely divorced from the statutory text.”<sup>57</sup> The court further explained that while the statute grants EPA discretion, it “is not a roving license to ignore the statutory text,” and this exercise of discretion “must relate to whether the permit will ‘have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ..., wildlife, or recreational areas.’”<sup>58</sup> This means that EPA action—or inaction—under 404(c) must be rooted in an unacceptable adverse impacts analysis.

Each of the four reasons provided by EPA for altering course on 404(c), however, suffers the same flaw as *Mattaponi*; none addresses the factor that EPA is statutorily required to consider—the risk of unacceptable adverse effects. And each one reveals and substantiates the arbitrary and capricious nature of the Proposed Withdrawal.

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<sup>52</sup> *Id.*

<sup>53</sup> Proposed Withdrawal, 82 Fed. Reg. at 33123.

<sup>54</sup> *Id.* at 33124.

<sup>55</sup> *Int’l Union, United Mine Workers of Am. v. United States DOL*, 358 F.3d 40, 43-44 (reviewing the withdrawal of a proposed Air Quality rule by the Mine Safety and Health Administration (“MSHA”) after public hearing and comment; explaining that while the MSHA was under no obligation to adopt the proposed rule, “or, for that matter, any rule,” it was not “free to terminate the rulemaking for no reason whatsoever”; withdrawal was arbitrary and capricious because MSHA’s explanations—that “there was a ‘change in agency priorities,’ ” the record was stale, and a recent Eleventh Circuit opinion cast doubt on the proposed rule—were inadequate).

<sup>56</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>57</sup> *All. to Save the Mattaponi v. United States Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 140 (D.D.C. 2009).

<sup>58</sup> *Id.* at 140.

**Reason No. 1:** *Proposal reflects “the Administrator’s decision to provide PLP with additional time to submit a permit application to the Army Corps and potentially allow the Army Corps permitting process to initiate without having an open and unresolved section 404(c) review.”*<sup>59</sup>

No perceivable basis exists to support the assumption that EPA must withdraw the Proposed Determination in order for PLP to have additional time to submit a permit application—or even the underlying assumption that PLP needs any additional time. It is well within EPA’s authority to extend 404(c) time requirements without pursuing a withdrawal.<sup>60</sup> Further, as EPA acknowledges in the Proposed Withdrawal, “EPA Region 10’s initiation of the Section 404(c) process did not prohibit PLP from filing a permit application and the Army Corps could have processed such a permit application while Section 404(c) review was ongoing.”<sup>61</sup> Nothing is currently stopping PLP from advancing a permit application with the Proposed Determination in place. Indeed, PLP has been promising for over a decade to submit such permit applications.

Furthermore, even if this were a valid rationale for withdrawal, by doing so now, EPA is *ensuring* an “unresolved section 404(c) review” rather than preventing it. EPA’s Proposed Determination was based on scientific findings that mining the Pebble Deposit risks unacceptable adverse effects to fishery areas. It solicited “public comment on all issues discussed in th[e] proposed determination, including likely adverse impacts to fishery resources, mitigation measures to potentially address these impacts, and other options to restrict or prohibit potentially harmful discharges of dredged or fill material associated with mining the Pebble deposit.”<sup>62</sup> It noted—*twice*—that “[a]ll comments will be fully considered as EPA Region 10 decides whether to withdraw the proposed determination or forward to EPA Headquarters a recommended determination to restrict the use of certain waters ... as disposal sites for the discharge of dredged or fill material associated with mining the Pebble deposit.”<sup>63</sup> As such, within the language of the Proposed Determination, EPA *both* gave assurances that all comments would be considered, *and* explicitly contemplated the possibility of a withdrawal within the same administrative process.

But now, without reference to its earlier basis for inviting public comment, nor to the comments themselves—and seemingly without even reviewing those prior comments—EPA seeks to withdraw the Proposed Determination on completely different grounds. That the Proposed Withdrawal not only ignores, but explicitly excludes consideration of the “science or technical information underlying the Proposed Determination” about which 670,000 public comments were submitted is an arbitrary and capricious “fail[ure] to consider an important aspect of the problem” with “an explanation for its decision that runs counter to the evidence before the agency.”<sup>64</sup> If EPA is to withdraw a prior proposal, it cannot simply feign a new and separate process to avoid the existing factual record.

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<sup>59</sup> Proposed Withdrawal, 82 Fed. Reg. at 33124.

<sup>60</sup> 40 C.F.R. § 231.8 (“The Administrator or the Regional Administrator may, upon a showing of good cause, extend the time requirements in these regulations”).

<sup>61</sup> Proposed Withdrawal, 82 Fed. Reg. at 33124.

<sup>62</sup> Proposed Determination, 79 Fed. Reg. at 42318

<sup>63</sup> *Id.*

<sup>64</sup> *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

Moreover, under the Administrative Procedure Act (“APA”), agencies are required to respond to “significant” comments because “a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”<sup>65</sup> Courts cannot uphold an agency decision that “does not consider all relevant factors or fails to establish a reasonable connection to the facts in the record.”<sup>66</sup> EPA action has been deemed arbitrary and capricious where it failed to directly consider and respond to comments introducing alternative evidence,<sup>67</sup> failed to respond to comments raising efficiency and reliability concerns about a proposal,<sup>68</sup> and failed to consider new studies submitted in comments.<sup>69</sup> Ignoring hundreds of thousands of comments takes “arbitrary and capricious” to an entirely different level, and leaves a gaping portion of the record “open and unresolved.”

**Reason No. 2:** *Withdrawal allows “the factual record regarding any forthcoming permit application to develop.”*<sup>70</sup>

This second EPA rationale is untethered to the reality of the factual record it references. The record can progress just as easily with a Proposed Determination in place as without. And a withdrawal that does not address the risks of unacceptable adverse impacts leaves PLP with the same question-raising record that exists now. Because the underlying Bristol Bay Watershed Assessment is, and will continue to be, part of this record, it must inform any Army Corps (or mining investor) review of the project—now or later, with or without the Proposed Determination.

Furthermore, were EPA to withdraw the Proposed Determination based on a new record that ignores or recharacterizes the Watershed Assessment, this action would constitute a policy change in violation of the APA. An agency’s policy change complies with the APA if the agency (1) displays “awareness that it is changing position,” (2) shows that “the new policy is permissible under the statute,” (3) “believes” the new policy is better, and (4) provides “good reasons” for the new policy, which, if the “new policy rests upon factual findings that contradict those which underlay its prior policy,” must include “a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>71</sup> The agency “must examine the relevant data and articulate a satisfactory explanation for its action”<sup>72</sup> including a “rational connection between the facts found and the choice made.”<sup>73</sup> Agency action

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<sup>65</sup> *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

<sup>66</sup> *United States Sugar Corp. v. EPA*, 830 F.3d 579, 629 (D.C. Cir. 2016), on reh’g en banc, 671 F. App’x 822 (D.C. Cir. 2016), and on reh’g en banc in part, 671 F. App’x 824 (D.C. Cir. 2016), and cert. denied sub nom. *Am. Mun. Power v. EPA*, 137 S. Ct. 2296 (2017) (setting standards emissions using carbon monoxide as a surrogate for measuring hazardous air pollutants deemed arbitrary and capricious where EPA failed to directly consider and respond to several comments introducing evidence that other methods could be effective).

<sup>67</sup> *United States Sugar Corp.*, 830 F.3d at 629.

<sup>68</sup> *Del. Dep’t of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 13-14 (D.C. Cir. 2015) (finding EPA action arbitrary and capricious, because it failed to respond to comments raising concerns about efficiency and reliability of energy grid).

<sup>69</sup> *Nat’l Parks Conservation Ass’n v. Jewell*, 62 F. Supp. 3d 7, 19-20 (D.D.C. 2014) (finding EPA arbitrary and capricious, because it failed to consider new studies submitted in comments, and relied instead on 12 year old data).

<sup>70</sup> Proposed Withdrawal, 82 Fed. Reg. at 33124.

<sup>71</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>72</sup> *Id.* at 513.

<sup>73</sup> *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

is arbitrary and capricious if the agency has “offered an explanation for its decision that runs counter to the evidence before the agency.”<sup>74</sup>

Agency discretion provides no safety valve for EPA in this scenario. While an agency “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate,” it “[s]ometimes [] must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy.” In such situation, “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>75</sup>

Even if EPA could provide a reasoned explanation for disregarding the Watershed Assessment that would comply with existing case law—an impossibility on the record before it—explicitly excluding public comment on the “science or technical information underlying the Proposed Determination” boxes the agency into another corner of the APA. A “flip-flop” in position between a proposal and final action complies with the APA “only if preceded by adequate notice and opportunity for public comment”<sup>76</sup>—except in the case of final action that is a “logical outgrowth” of the proposal.<sup>77</sup> But a logical outgrowth “certainly does not include [an] Agency’s decision to repudiate its proposed interpretation and adopt its inverse.”<sup>78</sup> Because the Proposed Withdrawal restricts the public’s ability to comment on the relevant science, this science—even if reinterpreted—cannot be the basis for a final withdrawal.

**Reason No. 3:** *EPA retains “discretion to act [under section 404(c)] prior to any potential Army Corps authorization”<sup>79</sup>*

For years, PLP has argued that it is “unfair” and a violation of its “due process” for EPA to initiate Section 404(c) action in advance of a permit application, and instead should wait until permits have been submitted. EPA has strongly opposed this position, stating that “since at least 1979, EPA construes § 404(c) to authorize the agency to prohibit, withdraw, deny or restrict specification of a disposal site ‘before a permit is applied for, while an application is pending, or after a permit has been issued.’”<sup>80</sup> Yet here, EPA appears to give credence to PLP’s longstanding

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<sup>74</sup> *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

<sup>75</sup> *Fox Television Stations, Inc.*, 556 U.S. at 515-16. See also *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 46-49 (agency’s rescission of regulation after change in presidential administration arbitrary and capricious because the agency did not address its prior factual findings); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Unexplained inconsistency” between agency actions is “a reason for holding an interpretation to be an arbitrary and capricious change”); *Humane Soc’y of the United States v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (NMFS’ factual findings in earlier environmental assessments were “relevant data” such that it was incumbent on the agency to offer a “satisfactory explanation” for its determination in light of the earlier findings); *Bluewater Network v. EPA*, 370 F.3d 1, 21 (D.C. Cir. 2004) (“generalized discussion” that snowmobile makers were “resource constrained” and would find it difficult to develop and implement new technologies failed to provide an adequate explanation for a rule that did not mandate the most aggressive emissions reductions).

<sup>76</sup> *Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 997 (D.C. Cir. 2005).

<sup>77</sup> *Id.* at 996.

<sup>78</sup> *Id.* at 998.

<sup>79</sup> Proposed Withdrawal, 82 Fed. Reg. at 33124.

<sup>80</sup> Memorandum in Support of Def.’s Motion to Dismiss and Opposition to Pls.’ Mot for a Prelim. Inj. (Fed. R. Civ. P. 12(b)(6), 65), *Pebble Ltd P’ship v. EPA*, No. 3:14-cv-00171-HRH (D. Alaska Nov. 7, 2014), ECF No. 70.

position, which, if so, would constitute a change in EPA's statutory interpretation of Section 404(c).

What distinguishes a change in agency policy (that otherwise satisfies the APA) and a change in statutory interpretation is the former is entitled to deference, and the latter is not.<sup>81</sup> A policy change "acknowledges that politics impact agency action," whereas a statutory interpretation "presumes the law does not change simply because an administration does."<sup>82</sup> For this reason, an agency is entitled to "considerably less deference" when its "interpretation of a relevant provision conflicts with the agency's earlier interpretation."<sup>83</sup>

EPA's Proposed Determination states: "EPA Region 10 is taking this step pursuant to section 404(c) of the CWA and its implementing regulations at 40 CFR part 231." This is consistent with EPA's longstanding position that it may pursue 404(c) restrictions proactively before permitting. It is also in line with EPA's Clean Water Act implementing regulations that specifically allow prospective 404(c) action during the pre-permitting timeframe,<sup>84</sup> and EPA's unswerving 35-year interpretation that 404(c) authorizes it to act, as here, when no permit application has yet been filed.<sup>85</sup> EPA has three times before asserted this prospective 404(c) authority;<sup>86</sup> the Proposed Determination was EPA's fourth practical confirmation of the scope of its authority under 404(c).

EPA now seeks to withdraw the Proposed Determination because it has "discretion to act prior to any potential Army Corps authorization of discharge of dredged or fill material associated with mining the Pebble deposit"<sup>87</sup>—in other words, at the permitting stage. Just as the Ninth Circuit held that a change of statutory interpretation on what constitutes "contamination"

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<sup>81</sup> *Defs. of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1208-09 (D. Mont. 2009).

<sup>82</sup> *Id.* at 1209.

<sup>83</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987). See also *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir. 2008) ("Because NMFS's approach is a novel one, completely at odds with NMFS's prior scientific approaches, it merits little deference")

<sup>84</sup> Denial or Restriction of Disposal Sites; Section 404(c) Procedures, 44 Fed. Reg. 58,076, 58,078 (Oct. 9, 1979) (to be codified at 40 C.F.R. pt. 231) (hereinafter "Denial or Restriction of Disposal Sites").

<sup>85</sup> EPA's interpretation of the CWA provision, as enacted in its 1979 Guidelines, states that EPA "may . . . prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps." 40 C.F.R. § 231.1(a). It is well established that when Congress revisits a statute with a longstanding administrative interpretation, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986); *Fed. Deposit Ins. Corp. v. Phila. Gear Corp.*, 476 U.S. 426, 437 (1986). The CWA was enacted in 1977, and EPA issued its 404(c) Guidelines in 1979. Over seven years later, Congress enacted major amendments to the CWA in the form of the Water Quality Act of 1987, and Section 404(c) remained unchanged. Pub. L. No. 100-4, 101 Stat. 7 (1987).

<sup>86</sup> EPA Recommended Determination to Prohibit, Deny, or Restrict the Specification, or the Use for Specification, of an Area as a Disposal Site, August 30, 1985; Final Determination, Three Wetland Properties Owned by Henry Rem Estate, *et. al.*, 53 Fed. Reg. 30093 (Aug. 10, 1988); Proposed Determination to Restrict the Specification of Leonard Pond and Its Wetlands and Disposal Sites, 54 Fed. Reg. 35927 (Aug. 30, 1989). See also Final Determination, Bayou Aux Carpes, 50 Fed. Reg. 47267 (Nov. 15, 1985).

<sup>87</sup> Proposed Withdrawal, 82 Fed. Reg. at 33124.

under the Clean Water Act is not entitled to deference,<sup>88</sup> so is a change in EPA’s statutory interpretation of the permissible timing for 404(c) subject to non-deferential review.

**Reason No. 4:** *Withdrawal removes “any uncertainty, real or perceived, about PLP’s ability to submit a permit application and have that permit application reviewed.”*<sup>89</sup>

EPA’s emphasis on “real or perceived” uncertainty about a private business’ ability to submit a mining permit reveals a focus on the economic prospects of PLP—a factor explicitly outside the bounds of EPA’s 404(c) mandate, as described above. The Proposed Withdrawal explicitly concedes that no “real” uncertainty exists as to whether PLP can submit a permit application and whether the Army Corps can review it: “the pendency of a section 404(c) review would not preclude PLP from submitting an application and the Army Corps from reviewing that application...” Absent any “real” uncertainty, EPA’s reasoning involves some sort of “perceived” uncertainty; this rationale bears more semblance to PLP’s own hyperbolic statements (“the precedent established by EPA taking pre-emptive action at Pebble would be devastating for the future of investment in the State of Alaska and throughout the United States”<sup>90</sup>) than to the Clean Water Act’s directive. Basing a withdrawal upon this economic reasoning is arbitrary and capricious and represents a change in statutory interpretation of the permissible factors in a 404(c) analysis.<sup>91</sup>

If EPA were instead to couch this as a fairness argument, that, too, would fail. In reality, maintaining the Proposed Determination would actually provide *more* certainty to a mining company seeking to navigate the permitting process. The Watershed Assessment exists in the record with or without a Proposed Determination; the Proposed Determination provides guidance about how the Watershed Assessment findings translate into unacceptable impact thresholds—and what to avoid in the interest of successfully obtaining a permit.

#### **IV. FINALIZING THE PROPOSED DETERMINATION WOULD SERVE THE PUBLIC INTEREST BY PROTECTING BRISTOL BAY’S WORLD-CLASS SALMON FISHERY**

EPA has received hundreds of thousands of requests from citizens, tribes, business interests, conservation organizations, and others asking the agency to take action to protect Bristol Bay. In its Watershed Assessment, EPA provided a detailed analysis of Bristol Bay’s natural resources, and the unacceptable impacts that large-scale mining would impose. Principal

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<sup>88</sup> *Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 607 (9th Cir. 2008).

<sup>89</sup> Proposed Withdrawal, 82 Fed. Reg. at 33124.

<sup>90</sup> Press Release, Northern Dynasty Ltd., Northern Dynasty responds to EPA proposal for Alaska’s Pebble Project (July 18, 2014), <http://www.northerndynastyminerals.com/news/news-releases/2014/northern-dynasty-responds-to-epa-proposal-for-alaskas-pebble-project/> (last visited Oct. 11, 2017).

<sup>91</sup> EPA’s Proposed Determination acknowledges the appropriate statutory interpretation. It states: “EPA Region 10 is taking this step pursuant to section 404(c) of the CWA and its implementing regulations at 40 CFR part 231,” and all recommended restrictions therein are based entirely on potential “unacceptable adverse impacts” to the Bristol Bay environment. Proposed Determination, 79 Fed. Reg. at 42315. This is consistent with EPA’s position dating back to its statement of purpose accompanying the 404(c) rulemaking, which states: “section 404(c) does not require a balancing of environmental benefits against non-environmental costs such as the benefits of the foregone project.” Denial or Restriction of Disposal Sites, 44 Fed. Reg. at 58078 (“When Congress intended EPA to consider costs under the Clean Water Act, it said so”).

among the area’s abundant fish and wildlife—and central to the ecosystem as a whole—is the largest sockeye salmon fishery in the world, sustaining half of the world’s wild sockeye salmon, averaging annual runs of 37.5 million fish, and generating \$1.5 billion annually. The Bristol Bay fishery forms the foundation of a robust and sustainable economy, including commercial, sport, and subsistence fishing; sport and subsistence hunting; and recreation and tourism. Upon it depend over 14,000 full and part-time jobs.

Only after a four-year public process that included two draft scientific assessments, two peer reviews, and multiple opportunities for public hearings and comments, EPA determined that mining the Pebble deposit would cause environmental losses of a nature and magnitude that are unprecedented for the Clean Water Act Section 404 permitting program in Bristol Bay, in all of Alaska, and perhaps in the nation. Even under the smallest mining scenario, these unacceptable adverse effects would devastate the area, threatening wild salmon and the sustainable economies and jobs that depend on them. Large-scale mining would also pose serious threats to Alaska Natives for whom salmon defines their culture, and sustains their way of life.<sup>92</sup>

The Proposed Determination is grounded in careful analysis of these findings, thorough scientific study, and extensive public and stakeholder input. Far from a preemptive “veto,” the regulations would establish impact limits, below which mining interests could seek 404 permits through the standard Army Corps permitting process.<sup>93</sup> These proposed impact limits are a reasoned response to EPA’s Clean Water Act mandate.

Administrator Pruitt’s summary directive to withdraw the proposed 404(c) determination—and the agency’s subsequent rationale developed to justify that direction—ignore all of this. Indeed, other than politics, nothing has changed since EPA issued its final Watershed Assessment and Proposed Determination in 2014. The facts, law, and science—including a voluminous scientific record—remain unchallenged, and all dictate deference to the agency’s 404(c) proposed determination to protect Bristol Bay.

For these reasons, and those detailed in NRDC’s prior comments hereby incorporated by reference,<sup>94</sup> EPA should incorporate public comments into a Recommended Determination, such that EPA Administrator Pruitt can finalize a 404(c) Determination to protect Bristol Bay.

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<sup>92</sup> Proposed Determination, 79 Fed. Reg. at 42315-16.

<sup>93</sup> *Id.*; See also Press release, Northern Dynasty Ltd., *supra* note 90 (PLP’s acknowledging in its July 18, 2014 press release that “the agency is seemingly moving away from pre-emptively vetoing the Pebble Project in favor of imposing specific conditions on future development.”).

<sup>94</sup> *E.g.*, *Comments on Behalf of the Natural Resources Defense Council on the U.S. Environmental Protection Agency’s Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska* (Sept. 18, 2014); *Comments on Behalf of the Natural Resources Defense Council on the U.S. Environmental Protection Agency Second Draft Bristol Bay Watershed Assessment* (June 28, 2013); *Comments on Behalf of the Natural Resources Defense Council on the U.S. Environmental Protection Agency Draft Bristol Bay Watershed Assessment* (July 23, 2012); *Brief on Behalf of the Natural Resources Defense Council in Support of Petitions to the U.S. Environmental Protection Agency for Action Regarding the Proposed Pebble Mine Under Section 404(c) of the Federal Water Pollution Control Act* (Mar. 28, 2012).

V. **ALTERNATIVELY, FOR ALL REASONS DETAILED ABOVE, THE PROPOSED DETERMINATION SHOULD REMAIN IN PLACE TO GUIDE THE PERMITTING PROCESS**

EPA has a history and practice of retaining proposed determinations in place even where they are not finalized. EPA has initiated the 404(c) process twenty-nine times. While thirteen of these instances culminated in a 404(c) final determination,<sup>95</sup> in five instances EPA's proposed determination was neither finalized nor withdrawn, but rather left in place without progressing to a final outcome.<sup>96</sup>

Notably, in one of these five examples, EPA issued a "Notification of Indefinite Suspension" of the proposed section 404(c) proceedings "pending additional studies."<sup>97</sup> EPA's justification for suspending the 404(c) process at that stage was to wait for a report addressing project alternatives, costs, and mitigation. In addition, the applicant wished to suspend its 404 application with the Army Corps to "allow it to further evaluate the environmental impacts and proposed mitigation plan ... and investigate additional water supply alternatives."<sup>98</sup> In other words, EPA's current stated withdrawal rationale of "allowing the factual record ... to develop" has previously been employed by the agency to justify precisely the alternative course—tabling the proposed determination—as it should again here.

In only one instance has a proposed determination been withdrawn, and in that case withdrawal occurred *after* the applicant revised its project proposal such that it had become "environmentally acceptable to EPA."<sup>99</sup> As this historical example reveals, leaving the Proposed Determination in place provides EPA a platform upon which to usher PLP towards 404(c) compliance. Withdrawal offers no such advantage, is contrary to EPA's prior practice, and as described above, is arbitrary and capricious. The Proposed Determination should remain in place while the parties seek and review the underlying permit applications.

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<sup>95</sup> See *Chronology of 404(c) Actions*, EPA.GOV, <https://www.epa.gov/cwa-404/chronology-404c-actions>.

<sup>96</sup> Determination to Prohibit, Deny, or Restrict the Specification of Santa Ysabel Creek as Disposal Site, 52 Fed. Reg. 49,082 (Dec. 29, 1987); Proposed Determination to Restrict the Specification of Leonard Pond and Its Wetlands as Disposal Sites, 54 Fed. Reg. 35,927 (Aug. 30, 1989); Proposed Determination to Prohibit or Restrict the Nashua-Hudson Wetlands and Other Waters as Disposal Sites, 59 Fed. Reg. 53,791 (Oct. 26, 1994); Proposed Determination to Prohibit, or Deny the Specification, or the Use for Specification, of an Area as a Disposal Site, 48 Fed. Reg. 41,810 (Sept. 19, 1983); Notice of Public Hearing and Proposed Determination to Prohibit Specification Area as Disposal Site, 49 Fed. Reg. 30,111 (July 26, 1984).

<sup>97</sup> Notification of Indefinite Suspension of Determination to Prohibit, Deny, or Restrict the Specification of Santa Ysabel Creek as Disposal Site, 54 Fed. Reg. 30,599 (July 21, 1989).

<sup>98</sup> *Id.*

<sup>99</sup> Withdrawal of Proposed Determination to Withdraw or Restrict the Specification of Kuparuk River Unit for Use as a Disposal Site, 56 Fed. Reg. 58,247 (Nov. 18, 1991).

In conclusion, we respectfully request that EPA expeditiously review and incorporate the 2014 public comments into a Recommended Determination and that EPA Administrator Pruitt issue a Final Determination to protect Bristol Bay, consistent with the 404(c) determination previously proposed. In the alternative, we urge EPA to maintain the 404(c) Proposed Determination in place as a guide to mining companies, the Army Corps, and EPA in whatever upcoming Pebble permitting process may occur.

Respectfully submitted,

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