



THE STATE
of **ALASKA**
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April 29, 2014

Via Email & Certified First Class Mail

Mr. Dennis McLerran
Regional Administrator
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RA 140
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Seattle, WA 98101
McLerran.Dennis@epa.gov

DEPARTMENT OF
NATURAL RESOURCES

APR 30 2014

COMMISSIONER'S OFFICE
ANCHORAGE

Re: State of Alaska's Response to the Environmental Protection Agency's
Notice of Intent to Issue a Public Notice of Proposed Clean Water Act Section
404(c) Determination on Mining in the Bristol Bay Watershed

Dear Mr. McLerran:

This is in response to your February 28, 2014 notice of intent to issue public notice of a proposed determination on mining activities at the Pebble project area in the Bristol Bay watershed. We also incorporate by reference the points and authorities set out in the letters the State has submitted to you on this matter since 2010.¹ Consistent with our earlier correspondence, we continue to believe the Environmental Protection Agency's (EPA's) work on the Bristol Bay Watershed Assessment (watershed assessment)² and its apparent intent to place restrictions on fill activities in the Nushagak and Kvichak watersheds are premature, speculative, without precedent, illegal in terms of both process and substance, and unnecessary.

The EPA's actions have had and will continue to have a profound impact on employment opportunities for citizens in our state, throwing Alaskans out of work and hurting small businesses. Sadly, all of this suffering was easily avoided by EPA, by allowing the scientifically

¹ Although already part of EPA's administrative record, for convenience, copies of the State's earlier submittals can be found at
<http://dnr.alaska.gov/mlw/mining/largemine/pebble/bbwa/pebble2review28jun2013.pdf>
and at
<http://dnr.alaska.gov/mlw/mining/largemine/pebble/bbwa/pebble2review28jun2013enclosures.pdf>.

² *Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska.*

defensible, robust permitting review that all large mine project proposals must go through in Alaska.

EPA's harmful actions also spread beyond Pebble. An enormous cloud of uncertainty now hangs over all lands in the Bristol Bay watershed, including other State lands and the thousands of acres of lands held by Alaska Native Corporations. The federal government promised Alaskans the right to select lands with mineral values and "to prospect for, mine, and remove the same" in the 1958 Statehood Act, and made similar commitments to Native corporations regarding their land selections. EPA should refrain from a Section 404(c) review and give Alaskans and their permitting processes a chance to work.

As I stated in my February 28, 2014 letter to you, EPA should not seek to assert its Clean Water Act Section 404(c) authority – if at all – until permit applications for an actual Pebble mine proposal have been submitted and reviewed by State and federal agencies through their respective regulatory, public processes. Until then, EPA does not have the information and analyses available to it to legitimately, credibly, and competently consider whether it is appropriate for EPA to exercise its 404(c) authority.

There is no risk to the environment in following the standard processes under the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and other relevant federal and State statutes. No mine will be constructed unless and until the mine proponents have successfully completed those processes and all legal reviews have been concluded. Experience with other major resource projects in Alaska shows the complete process is likely to take five years or more and involve numerous and thorough analyses by multiple agencies, agencies with experience and knowledge superior to that of EPA in a number of areas potentially relevant to a 404(c) decision. In addition, this superior work by the collective agencies will be focused on an actual proposal, not a theoretical construct. The merits of each aspect of the proposed mine will be judged based on the relevant, objective regulatory criteria of each agency with jurisdiction in stark contrast with EPA's apparent course of action, which appears to consist of applying its own subjective judgment to an amalgam of theoretical impacts that could arise over decades if not hundreds of years.

Your February 28, 2014 letter does not describe the nature or scope of conditions, limitations, or prohibitions EPA might have in mind relating to future fill activities in the Kvichak and Nushagak watersheds. Nor is there any indication of the criteria that EPA would use to judge whether a particular modification, selection of an alternative, or addition of a mitigation measure would make an unacceptable fill activity acceptable in EPA's judgment. Given the breadth of speculation in EPA's watershed assessment and lack of objective criteria under which to judge any contemplated fill activity, it is difficult for the State to respond substantively to your request. Again, if we had a real project proposal before us and regulatory criteria to follow, it would be possible to proceed to an informed and legally-competent conclusion.

EPA needs to recognize the significant risks it is creating when, as here, it attempts to exercise its 404(c) authority on an ad hoc basis, testing the limits of the CWA, without any regulations. Although EPA's watershed assessment makes a point of describing the productivity

of the Bristol Bay salmon fisheries, it does not point to the criteria it is using to judge whether any particular fill activity would have "unacceptable adverse effects." EPA essentially opens the gate to requests for 404(c) action on any project, public or private, needing a 404 dredge and fill permit. Without any regulations to tell EPA or the public when a particular fill activity in a particular watershed will not adequately protect municipal water supplies, shellfish beds, fishery areas, wildlife, or recreational areas, no one will be able to rely on the usual permitting process. No one will know when, where, or how EPA will trump years of work and public process with its 404(c) authority.

If EPA has identified particular aspects of a potential mining project in its watershed assessment that it believes would be a major concern under 404(c), a more appropriate alternative to taking action to prohibit or restrict a potentially overbroad set of fill activity, would be to announce EPA's concerns so they could inform the permitting process and wait to see if EPA's concerns are adequately addressed through the permitting process, with due deference to the regulatory criteria, expertise, and experience of other agencies with jurisdiction in the specific subject matter. In support of the State's position, I offer the following points.

- **EPA's actions invite the U.S. Army Corps of Engineers (Corps), the State, and Pebble Limited Partnership (PLP) to compound EPA's speculation, by speculating on potential disposal sites, effects, and causal links that EPA fails to describe with specificity in its February 28, 2014 notice of intent.**

Your letter states that "the Agency will examine whether the environmental effects of potential discharges associated with mining at the Pebble deposit are unacceptable under the CWA." The letter goes on to state that "[i]f the effects are found to be unacceptable, the Agency will determine whether and how to establish restrictions to protect against any unacceptable adverse effects." Citing "early consultation" allowed for the Corps and property owners, EPA invites the Corps, the State, and PLP to demonstrate within 15 days "that no unacceptable adverse effects to aquatic resources would result from discharges associated with mining the Pebble deposit or that actions could be taken to prevent unacceptable adverse effects to waters from such mining."

Both the February 28th notice of intent and EPA's Bristol Bay watershed assessment (assessment) evidence a bias against a mining project at Pebble, and an intent to use veto authority as a means to regulate activities beyond any fill that might be proposed for a disposal site. The test for Section 404(c) is not whether a *project* will have unacceptable adverse effects, it is whether the *fill* that might be disposed of at a site subject to CWA regulation will. EPA's veto authority under 404(c) does not extend to the regulation of other activities that might require permitting for a mine, such as a Section 402 wastewater discharge permit that is subject to review and issuance by the State under its Alaska Pollutant Discharge Elimination System Program³ and State approvals under the Alaska Dam Safety Program for the construction and operation of a dam.⁴ This is representative of why EPA's mitigation review also necessarily

³ AS 46.03.100 and 18 AAC Chapter 83.

⁴ AS 46.17 and 11 AAC 93.151-201.

exceeds its 404(c) authority in finding mining (not just fill) will have unacceptable adverse effects.

EPA failed in its February 28th notice to describe in any way the parameters of the proposed veto determination that EPA intends to publicly notice. We are left to conclude that EPA therefore appears poised to prohibit any Section 404 activities associated with mining in the Pebble project area. It appears that EPA intends to impose a sweeping veto because, in the absence of anything more specific, the 15-day review period provided under 40 C.F.R. § 231.3(a) is the State's opportunity, as landowner, to dissuade EPA from exercising its Section 404(c) authority. The vagueness, in addition to the speculation, upon which EPA is proceeding to exercise a veto against mining further renders the 15-day consultation period meaningless.

As I stated in my February 28, 2014 letter to you, it is not reasonable to expect the Corps, the State, or PLP to provide EPA information that contradicts findings and conclusions that EPA has arrived at in response to hypothetical mining scenarios in the Pebble project area. Such demonstration could only be made on information and analyses developed in response to permit applications for an actual mine proposal. That process occurs through environmental reviews conducted by the Corps, the State, and other agencies during their established permit review processes.

Until those reviews occur, it is not possible to know, much less recommend, corrective action that would negate unacceptable adverse effects that EPA may now anticipate. Until then, the Section 404(c) review process is premature.⁵

The Corps' March 14, 2014 response letter highlights this futility: "[A]t this time, the Corps has not received a permit application for this project, and is *therefore unable to evaluate the impacts of potential discharges associated with the Pebble deposit*....The Corps has not yet begun the public interest review and evaluation process, and *it would be premature to submit any information for the record at this time*."⁶ How is it that the Corps, the federal agency that would actually be primarily responsible for reviewing all of the alternatives for developing any mine projects in the Bristol Bay area, can conclude that it is premature to even evaluate impacts of potential discharges from mining at the Pebble site, while the EPA is confident that it is somehow informed to the point that it can preemptively consider and dispose of scenarios and make a determination on the outcome of mining in the region?

The regulating agencies have not received a proposed mine plan. We do not know what will be proposed. Until it is proposed, we have no idea where operations might be sited, where material might be disposed, or the content of the material. Without this information, it is unreasonable for anyone, including the EPA, to determine causal links between a mine's activities on waters of the U.S., including any jurisdictional wetlands, and fishery resources.

⁵ Neither the State nor the Corps has stated that they are prepared – much less inclined – to issue permits that would allow mining to proceed at the Pebble deposit.

⁶ Attachment 1 (emphases added.)

- **Effects, mitigation, and compensatory mitigation analyses can only be legitimately applied in the context of reviewing an actual application.**

EPA's final Bristol Bay watershed assessment significantly expanded Appendix J and its analysis of compensatory mitigation from the version in the public comment draft. New authors were added and new material on the input of nutrients and organic materials in head water streams was added. EPA added new information on habitat connectivity and the role of beaver dams to create off-channel habitat and impact watershed connectivity. EPA's expanded emphasis on biological, physical and chemical connectivity and the agency's recent study⁷ on stream and wetland connectivity to define "waters of the U.S." is not lost on the State. We have been keenly following the rulemaking based on that study as a further attempt by EPA to redefine the boundaries of waters that may be subject to federal regulation.

Section 3 of the assessment, "Potential Compensatory Mitigation Measures in Bristol Bay," adds the new idea of "likely efficacy" of the array of compensation through mitigation bank credits, in-lieu fee (ILF) programs, and permittee-responsible mitigation. Section: 3.3.3.3, "Increase Habitat Connectivity," implies that since the Bristol Bay watersheds have few barriers now like dams or culverts, there is little opportunity for mitigation such as creation of new spawning channels by removal of barriers. This section cites current literature on positive effects associated with beaver dams and salmon habitat and the difficulty of compensatory mitigation if they are removed. The conclusion of these sections state: *"In light of their uncertain track record, it does not appear that constructed spawning channels and engineered connections of off-channel habitats would provide reliable and sustainable fish habitat in the Bristol Bay region."* EPA is not only preempting the permit process, it is preempting meaningful discussion on mitigation of impacts that would be addressed in permitting.⁸

Section 4 of the assessment, "Effectiveness of Compensation Measure at Offsetting Impacts to Salmonids," is expanded from the draft. It cites much recent literature on how little return has been achieved with attempts to restore streams and watersheds to increase salmonid productivity in Pacific Northwest, California, Canada. Several times, EPA cited Quigley and Harper (2006) and their conclusions that *"It is simply not possible to compensate for some habitats" ... "Therefore the option to compensate for [harmful alteration, disruption or destruction of fish habitat] may not be viable for some development proposals demanding*

⁷ *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evident (External Review Draft).*

⁸ The following contains just a few of the additional reviews a mine project would have to undergo and where mitigation could be explored to avoid, minimize, or compensate impacts:

- 404(b)(1) guidelines analysis;
- NEPA analysis;
- State CWA 401 certification review;
- permit review under the State's CWA Section 402 primacy program; and
- reclamation plan review under Alaska laws and regulations.

careful exploration of alternative options including redesign, relocation and rejection.” The State points out that salmon habitat and populations in those areas have been impacted for over a century by fishing pressure and man-made development that are not a factor in Bristol Bay, and certainly not a factor in the Nushagak and Kvichak watersheds. Lack of success for salmon habitat restoration there is not directly applicable to Alaska. Other mining projects in the State have had success such as habitat creation in old placer claims as part of mitigation at the Fort Knox gold mine. It is important to note that successful examples of environmental benefits of mining projects are glaringly missing from EPA's watershed assessment, which is further evidence of bias and a predetermined veto on the part of the authors.

EPA's conclusion in Section 5 of the assessment significantly added the words “applicability” and “sustainability” to the idea of “efficacy” of compensation measures. After review of measures proposed in public comments and through literature review, EPA questions *“whether sufficient compensation measures exist that could address impacts of the type and magnitude described in the Bristol Bay Assessment.”* That question might be answered by allowing the established State and federal reviews to proceed, as Congress clearly intended.

- **EPA's interpretation that it has authority to exercise its Section 404(c) veto review process and a veto in the absence of a permit application is not supported by the CWA and legislative history, and creates unnecessary constitutional and takings concerns.**

The lands subject to EPA's action are entirely State lands. The State selected these lands under the Alaska Statehood Act, and gained all right and title to the land, including the mineral deposits.⁹ Through Section 6 of the Statehood Act, Congress intended for Alaska to select and manage lands that would benefit the economic and social well-being of the state and its residents. Indeed, in discussing how best to promote the viability of the new state, the Senate Committee on Interior and Insular Affairs

felt obligated to broaden the right of selection so as to give the State at least an opportunity to select lands containing real values, instead of millions of acres of barren tundra. To attain this result, the State is given the right to select lands known or believed to be mineral in character.¹⁰

Many of the State's statehood selections were conveyed under the Cook Inlet Exchange,¹¹ including the lands at the Pebble project. Congress made the land grants to the State “upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain reservation to the State of all the minerals in the lands so sold, granted, or patented, together with the right to prospect for, mine, and remove the same.”¹²

⁹ Pub. L. No. 85-508, 72 Stat. 339 (1958).

¹⁰ S. Rep. No. 1028, 83rd Cong. 2d Sess. 6 (1954).

¹¹ Ratified in Pub. L. No. 94-204.

¹² Statehood Act, Section 6(i).

Congress also stated that “[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct.”¹³ One of the main factors driving the State’s selection of lands in and around the Pebble project was their mineral potential. In the amendment to the Alaska Native Claims Settlement Act (ANCSA) where Congress ratified the Cook Inlet Land Exchange, Congress made clear that in conveying lands Alaska selected under the Exchange, the lands “shall be regarded for all purposes as if conveyed to the State under and pursuant to Section 6 of the Alaska Statehood Act.”¹⁴

EPA asserts it has authority to initiate a 404(c) review and exercise a veto prior to a permit application being submitted. EPA records acknowledge that its proactive watershed assessment and 404(c) action is unprecedented “in the history of the CWA.” However, EPA’s “belief” that unacceptable adverse effects from mining at Pebble “*would* result”¹⁵ are belied by (1) the fact that no potential impacts from mining are imminent because there is no permit application, and (2) EPA’s apparent intent to used Pebble as an opportunity to take action that “can serve as a *model* of proactive watershed planning,” an action akin to land management, which is a role reserved to the states.

As a matter of law, the CWA statutory regime and federalism principles do not support EPA’s interpretation of its authority under 404(c). As the United States Supreme Court has stated, in the context of the CWA,

[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limits of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.... Thus, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”¹⁶

Under the CWA, Congress specifically recognized the states’ lead role in land and water resource management:

¹³ *Id.*

¹⁴ 43 U.S.C. § 1611 (note).

¹⁵ February 28, 2014 letter from Dennis McLerran (emphasis added).

¹⁶ *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172-73 (2001) (citations omitted).

It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the State to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.¹⁷

In turn, the Corps is the CWA Section 404 permitting authority in Alaska. In reviewing applications for individual permits, the Corps considers whether the applicant has proposed sufficient measures to avoid or minimize impacts of the proposed permitted activities, in accordance with the CWA Section 404(b)(1) guidelines. The Corps also conducts a public interest review. The Corps may impose additional conditions through the permit that it believes are warranted to minimize or avoid impacts. So, too, can the State of Alaska, not only through its CWA Section 401 certification authority over Section 404 permits, but also through its CWA Section 402 permitting authority, to assure that state water quality standards in waters of the U.S. are met. Finally, the Corps is the arbiter of compensatory mitigation that may be required to offset unavoidable impacts from permitted Section 404 activities. The application a proponent submits may – and almost certainly will – change in a multitude of ways through these long-standing permitting processes.

The importance of an actual 404 permit application to the environmental analyses and any exercise by EPA of its 404(c) veto authority was highlighted by Senator Muskie, a prime sponsor of the CWA:

Thus, the Conferees agreed that the Administrator ... should have a veto over the selection of the site for dredge spoil disposal and over any specific spoil to be disposed of in any selected site.

The decision is not duplicative or cumbersome because the permit application transmitted to the Administrator for review will set forth both the site to be used and the content of the matter of the spoil to be disposed. The Conferrees expect the Administrator to be expeditious in his determination as to whether a site is acceptable or if specific spoil material can be disposed of at such site.¹⁸

EPA's veto authority under 404(c) must be construed against this statutory backdrop.

¹⁷ 33 U.S.C. § 1251(b).

¹⁸ *Senate Consideration of the Report of the Conference Committee, s. 2770, 93rd Cong. 1st Sess. Oct. 4, 1972, reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 177 (emphasis added).*

Conclusion

We share your concern, expressed in your February 28th notice of intent, that activities proposed for permitting under Section 404 be reviewed to "ensure a transparent, fair, scientifically valid and timely review." But that review can only be assured within the context of an actual permit application, during which regulatory agencies such as the Corps and the State are allowed to apply their relevant authorities in response to an actual mine project that may – someday – be proposed. Until then, EPA should refrain from attempting to exercise its Section 404(c) authority in the absence of a Section 404 permit application, and allow the Corps and the State to exercise their regulatory rights and responsibilities in the event applications for a mining project are ever submitted.

Sincerely,



Michael C. Geraghty
Attorney General

Attachment

cc: w/attachment

(Via Email and First Class U.S. Mail):

The Honorable Lisa Murkowski, United States Senate

The Honorable Mark Begich, United States Senate

The Honorable Don Young, United States House of Representatives

The Honorable Joe Balash, Commissioner, Alaska Department of
Natural Resources

The Honorable Larry Hartig, Commissioner, Alaska Department of
Environmental Conservation

The Honorable Cora Campbell, Commissioner, Alaska Department of
Fish and Game

Kip Knudson, Director of State/Federal Relations, Office of the Governor

Gina McCarthy, EPA Administrator



DEPARTMENT OF THE ARMY
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MAR 14 2014

District Commander

Mr. Dennis J. McLerran
U.S. Environmental Protection Agency
Regional Administrator, Region 10
1200 Sixth Ave, Suite 900
Seattle, WA 98101-3140

Dear Mr. McLerran,

This is in response to your February 28, 2014 letter regarding the decision to proceed under the EPA's Clean Water Act Section 404(c) regulations (40 CFR 231.3) to review potential unacceptable adverse environmental effects of discharges of dredged and/or fill material associated with potential mining activities of the Pebble deposit in southwest Alaska.

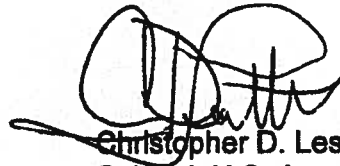
The U.S. Army Corps of Engineers (Corps) has held pre-application meetings with Pebble Limited Partnership (PLP) since 2004. Through these meetings, PLP has been made aware that the proposed work would require a Department of the Army permit under Section 404 of the Clean Water Act. This process will include a public interest review, development of an environmental document in accordance with the National Environmental Policy Act and a review for compliance with the 404(b)(1) guidelines. However, at this time, the Corps has not received a permit application for this project, and is therefore unable to evaluate the impacts of potential discharges associated with the Pebble deposit.

The Corps has not yet begun the public interest review and evaluation process, and it would be premature to submit any information for the record at this time. If PLP does submit a permit application, the Corps would process it in accordance with the regulations found at 33 CFR Part 325; however, the Corps notes that under 40 CFR Part 231.3(a)(2) and in accordance with 33 CFR Part 325.8, the Corps cannot issue a permit for discharges of dredged and/or fill material into the defined disposal site until a final determination is made by the EPA on the 404(c) action.

ATTACHMENT 1

Please contact me directly if I can be of further assistance. Detailed information desired by your staff may be obtained by contacting Ms. Karen Kochenbach, of Regulatory Division who can be reached at (907) 753-2782, or by email at Karen.a.kochenbach@usace.army.mil, or by mail at the address found on the letterhead.

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher D. Lestochi". The signature is stylized with large, overlapping loops and a long horizontal stroke at the bottom.

Christopher D. Lestochi
Colonel, U.S. Army Corps of Engineers
District Commander