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Via Email

Michelle Pirzadeh
Acting Regional Administrator
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101-3140

Dear Ms. Pirzadeh:

I am writing on behalf of the Pebble Limited Partnership (PLP) in response to the U.S. Environmental Protection Agency's (EPA) January 27, 2022, letter, which states that EPA intends to issue a revised proposed determination under Section 404(c) of the Clean Water Act regarding the proposed mining of the Pebble deposit in southwest Alaska (Pebble Project).

EPA's letter asserts that "Region 10 continues to have reason to believe that the discharge of dredged or fill material associated with mining the Pebble deposit could result in unacceptable adverse effects on important fishery areas." And EPA invites PLP to submit information "to demonstrate that no unacceptable adverse effects to aquatic resources" would result from the Pebble Project. Without further explanation of the basis for EPA's "belief" regarding potential impacts, however, it is difficult to determine what information would be responsive to address EPA's concerns. We therefore reserve the right to submit further information in response to any future EPA actions under 404(c), including a revised proposed determination.

I. Introduction

Much has changed since EPA originally began this 404(c) process in 2014.

In December 2017, PLP filed a permit application pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 to USACE Alaska District (District) (POA-2017 271) for the purpose of developing a copper-gold-molybdenum porphyry deposit. PLP's proposal is worlds apart from the hypothetical scenarios EPA evaluated in its 2014 Proposed Determination and Bristol Bay Watershed Assessment (BBWA). PLP put significant resources into project design elements that would minimize potential impacts:

- The project footprint is smaller and more compact than prior conceptual plans.
- There are no major mine facilities in the Upper Talarik/Kvichak drainage.

- The tailings storage facility has enhanced safeguards, including a flow through design to prevent the build-up of water in the facility and added structural stability to the embankments. Additionally, pyritic tailings will be lined for storage during operations and returned to the pit at closure.
- PLP committed to avoid any use of cyanide in the mine operation.

These are just a few examples of mitigation and design features proposed by PLP to minimize the impacts of the project. In fact, over 70 different applicant-proposed mitigation measures are summarized in the USACE's Final Environmental Impact Statement (EIS).

The USACE nonetheless denied the permit on November 25, 2020, citing alleged deficiencies in the compensatory mitigation plan among other reasons. PLP filed an administrative appeal of the permit denial with the USACE Pacific Ocean Division on January 19, 2021, and that appeal remains pending.

In the meantime, the global energy market continues to change, with an increased push to move to renewable energy sources such as solar and wind. Renewable energy systems utilize significantly more copper than conventional power. And the existing power infrastructure is rapidly deteriorating and in desperate need of modernization. Copper is vital to upgrading the electrical grid and is a key component in the clean energy technologies needed to respond to the global climate agenda. The current push to improve the energy infrastructure that is the backbone of the US economy will require minerals that are increasingly difficult to obtain.

Given this context, there is no justification for EPA to proceed with a 404(c) proposed determination. The 2014 Proposed Determination is obsolete and based on a flawed record. A preemptive 404(c) action is also unnecessary since EPA retains its veto authority if the PLP permit decision is remanded to the District, or if a new permit application is submitted. For the reasons outlined more fully below, EPA should withdraw the 2014 Proposed Determination and refrain from any further action under 404(c) with regard to the Pebble deposit.

II. EPA Lacks Authority and Justification for Undertaking 404(c) Action

EPA's authority under Section 404(c) is narrowly prescribed: Congress restricted EPA's authority to veto permits for specified disposal sites based on a permit application. 33 U.S.C. 1344(c). The Supreme Court has similarly interpreted the CWA to give EPA authority to veto a USACE permit only "for a particular disposal site."¹ Section 404(c) also does not authorize EPA to make broad land use or watershed decisions: EPA may only veto a specific disposal site if it can demonstrate unacceptable adverse effects to aquatic resources based on a specific permit application.

Prior to the 2014 Proposed Determination, EPA only exercised its 404(c) authority as a last resort, after it reviewed a proposed USACE permit decision and it had given the USACE and applicant an opportunity to address EPA's concerns through amended project design and/or project- and site-specific mitigation. The 404(c) regulations make clear that EPA's 404(c)

¹ *Coeur Alaska v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467 (2009).

authority should only be exercised if the permit process is complete, including the 404(q) referral process, and EPA's concerns have not been addressed. EPA recognized this in its 2019 decision withdrawing the 2014 Proposed Determination as well, concluding that "it is more appropriate to use well-established mechanisms to raise project-specific issues as the record develops during the permitting process."² Taking 404(c) action preemptively is indefensible and inconsistent with EPA policy and precedent.

A Section 404(c) veto is unnecessary since EPA retains its veto authority if the PLP permit decision is remanded to the District, or if a new permit application is submitted. EPA will be able to participate in the EIS and CWA review processes well before any mine development activities could proceed. Therefore, no harm to the environment will occur should EPA follow the proper permitting process for this project—only acting if the USACE is proposing to issue a permit to which EPA objects.

A preemptive veto will also substantially deter investments in other major projects requiring Section 404 permits. Preemptive action by EPA creates significant regulatory uncertainty for all major projects that require Section 404 permits, and will cause developers to distrust the entire Section 404 permitting process. The financial risk of backing a project that requires a Section 404 permit is significantly increased if a possibility exists that a project could be vetoed by EPA based on hypothetical scenarios and speculative impacts. The potential harm resulting from decreased domestic and foreign investment is significant: the USACE processes approximately 60,000 permits a year, and billions of investment dollars per year depend on these permits.³ EPA should respect the permitting process that Congress established, as to usurp the USACE's (and State's) role here will only serve to undermine the legitimacy and predictability of the Section 404 permitting process.

III. EPA's Assertion of Impacts to Fish is Unsupported

EPA's January 27 letter vaguely asserts that "Region 10 continues to have reason to believe that the discharge of dredged or fill material associated with mining the Pebble deposit could result in unacceptable adverse effects on important fishery areas." However, there is no credible basis for EPA's "belief." The issue of potential impacts to fisheries was comprehensively reviewed and studied by the USACE and its expert consultants. The EIS found no measurable impact to fish and concluded that salmon harvests would not be compromised as a result of the proposed Pebble Project:

There would be no measurable change in the number of returning salmon . . . Under normal operations, the Alternatives would not be expected to have a measurable effect on fish numbers and result in

² 84 Fed. Reg. 45749 (Aug. 30, 2019).

³ See e.g., David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit to Arch Coal*, at 1 (May 2011).

long-term changes to the health of the commercial fisheries in Bristol Bay.⁴

The EIS also found:

The mine site area is not connected to the Togiak, Ugashik, Naknek, and Egegik watersheds and is not expected to affect fish populations or harvests from these [Bristol Bay] watersheds. The mine site is not expected to affect Cook Inlet commercial fisheries.⁵

The only spill or release that could pose a risk to population levels of fish/habitat is a full catastrophic TSF failure, which the USACE already determined not to be a reasonably foreseeable risk. The EIS demonstrates that the risk of a catastrophic TSF release is too insignificant to be reasonably considered under the CWA. The EIS reviewed estimates of the probability of tailings dam failures, which range from one failure for every 714 dam-years to 250,000 dam-years.⁶ The EIS explains why the proposed Pebble design significantly reduces the risk of these types of failures.⁷ As discussed in the EIS, the tailings storage facilities that have been shown to be the most robust and resistant to failure are those that have periodic technical review by qualified engineers throughout the lifetime, including after closure.⁸ The Alaska Dam Safety Program would require this periodic technical review throughout the life of the proposed facility.⁹ Thus, the already low risk of dam failure would be further reduced by the safety measures that will be in place for the Project. After evaluating the design of each embankment, and assessing the likelihood of a wide range of potential failure modes, the probability of a full breach of the bulk or pyritic TSF tailings embankments was assessed to be extremely low, and therefore was too remote to be assessed in the EIS.¹⁰ The record therefore does not justify any attempt to base a 404(c) action on a TSF failure.

EPA has cited no new information that contradicts the EIS's findings on fish or the fisheries. And there can be no justification for relying on the 2014 BBWA. The BBWA's biased findings based on hypothetical development scenarios have been discredited, and any conclusions reached in the BBWA have no bearing on the actual project proposed by PLP. The BBWA was prepared without the benefit of an actual permit application for the Pebble mine, and was instead based on EPA's guess of what a future application might look like. The EPA's hypothetical mine scenarios did not include basic elements of best practice in modern mining and as a result

⁴ EIS at ES-87.

⁵ EIS at Table 4.6-1.

⁶ EIS at §4.27.8.5. One dam-year is the existence of one dam for one year.

⁷ EIS at §4.27.

⁸ EIS at § 4.27.8.5.

⁹ *Id.*

¹⁰ EIS at §4.27.8.9.

significantly overstated potential impacts. EPA recognized this in its 2019 decision withdrawing the Proposed Determination, finding that the EIS “includes significant project-specific information that was not accounted for in the 2014 Proposed Determination,” and that the project proposed in the permit application is substantially different than the hypothetical scenarios considered in the BBWA.¹¹ EPA has thus acknowledged that the BBWA is outdated and of no relevance to the current project.

IV. A Section 404(c) Veto Would Violate the Rights Established in the Alaska Statehood Act, ANILCA, and ANCSA

The State of Alaska obtained title to the area that includes the Pebble deposit in a 3-way exchange, known as the Cook Inlet Exchange, that allowed for establishment of Lake Clark National Park and Preserve. Upon achieving statehood, Alaska selected lands from the federal government that the State was entitled to use for mineral development; the State gained title to those lands, and “[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct.”¹² Under the Cook Inlet Exchange in 1976, lands selected by the State had the same status as if originally selected under the Alaska Statehood Act.¹³ The bargain ensured that each party would receive valuable land in exchange for what it gave up; as the agreement noted, it “involved a great deal of give and take by the parties involved.”¹⁴ Specifically, the State agreed to relinquish previous land selections and not to select lands from the Lake Clark area.¹⁵ The State specifically selected the lands where Pebble is located for its potential for economic opportunity from mining development, and thereafter designated the lands for mining.¹⁶

Any attempt by EPA to preclude development within this area of State land would violate the statutory compromise established in the Alaska Statehood Act and the Alaska National Interest

¹¹ 84 Fed. Reg. 45749 (Aug. 30, 2019).

¹² Alaska Statehood Act § 6(i), Pub. L. No. 85-508, 72 Stat. 339 (1958).

¹³ Cook Inlet Exchange Legislation, 43 U.S.C. § 1611.

¹⁴ Federal-State Land Use Planning Commission for Alaska, *Cook Inlet Report* at 9 (Mar. 6, 1976).

¹⁵ *Id.*

¹⁶ EIS at § 3.2.2.1 (“The Bristol Bay Area Plan divides the Bristol Bay area into 20 regions with management units. The mine site would be in Region 6. The transportation corridor would be in regions 6, 8, and 10 under Alternative 1a; regions 6, 9, and 10 under Alternative 1; and regions 6, 8, and 9 under Alternative 2 and Alternative 3. At the mine site, Region 6 is designated for mineral development, among other uses; and managed to ensure that impacts to the anadromous and high-value resident fish streams are avoided, reduced, or mitigated as appropriate in the permitting processes.”); EIS at § 4.2.3.2 (“The project would generally be consistent with the plan’s goals for the use of subsurface resources, which call for making metallic and non-metallic minerals available to contribute to the mineral inventory and independence of the US generally and Alaska specifically, while protecting the integrity of the environment and affected cultures.”).

Lands Conservation Act (ANILCA). Congress adopted both statutes to balance Alaska's economic interests in its land with environmental conservation efforts. Specifically, the Alaska Statehood Act provided for the State's right to select lands for the purpose of furthering development. Congress explicitly recognized and understood this intent and that the agreement would "open for development lands that should be in private ownership" and would continue to "conserve[] for public use lands that should have that status."¹⁷ Similarly, ANILCA requires federal agencies to cooperate with the state to balance the national interest in Alaska's natural resources with recognition of Alaska's interests.¹⁸

Using 404(c) to restrict development of the Pebble deposit would also run afoul of the Alaska Native Claims Settlement Act (ANCSA).¹⁹ Under ANSCA, Alaska Native Corporations are required to develop and manage their lands to the benefit of their shareholders, the families that live in their community. The Pebble Project would provide a much needed boost to struggling local communities, including employment and tax payments that would provide resources for additional schools, health facilities and other community infrastructure. The FEIS found the "increase in job opportunities, year-round or seasonal employment, steady income, and lower cost of living ... would have beneficial impacts on the EIS analysis area, especially for [local] communities."²⁰ The significant revenue benefits to the local communities are undisputed: The Project would generate \$27 million annually in severances taxes for the Lake and Peninsula Borough (LPB) during operations, and annual property tax revenue to the Kenai Peninsula Borough based on assessed value of project-related real property.²¹ Any EPA 404(c) action limiting the ability to develop the Pebble deposit denies Native Corporations the ability to fulfill this requirement and erases one of the only hopes for development and economic growth in their communities.

EPA cannot use its authority under Section 404(c) to undermine Congress's explicit intent to protect Alaskans' interests. All conveyances to the State under the Alaska Statehood Act and Cook Inlet Exchange were subject to the condition that the State reserved its rights to all the underlying mineral resources within those lands.²² And the grant to the State of all mineral lands through these bargains are rendered meaningless if the State cannot develop them. As the EIS recognized:

the public also has an interest in improving the economy of the state, in the creation of jobs in the state, and in the extraction of natural resources for the benefit of the state. This is demonstrated

¹⁷ H.R. Rep. No. 94-729 (1975).

¹⁸ See ANILCA, Public Law 96-487, 6 U.S.C. §§ 3181 – 3183 (Federal-State Cooperation).

¹⁹ 43 U.S.C. 1601, *et seq.*

²⁰ EIS at ES 54.

²¹ EIS at ES 47-48.

²² Alaska Statehood Act § 6(i); Pub. L. No. 94-204 § 12(d)(1).

by scoping comments, which indicated a desire to bring economic opportunity and jobs to the region, as well as by policy language in the Alaska State Constitution and Alaska Statutes encouraging development of the state's mineral resources consistent with the public interest.”²³

EPA's stated intent to issue a revised proposed determination threatens to undermine the State's legally protected interests in the development of the lands it intentionally acquired and designated for mineral development.

V. There is a Critical Need for this Project

The world's governments are increasingly focused on transition to renewable energy sources to reduce climate impacts from fossil fuels. But the critical minerals required to create solutions to capture and distribute renewable energy are in short supply. This situation is further complicated by the fact that existing power infrastructures are rapidly deteriorating and in dire need of modernization.

Copper is needed to upgrade the electrical grid and is a key component in the clean energy technologies needed to respond to the global climate agenda. Copper is integral to micro grids and smart grids; energy storage technologies; electric vehicles; and solar and wind energy. A recent report issued by the International Energy Agency concluded that, in a scenario where the Paris Agreement goals are achieved, copper demand for power lines will more than double by 2040 and overall demand for copper will increase more than 40%.²⁴ The same report also found that current copper mines and projects under construction will only meet 80% of copper needs by 2030.²⁵

Future copper supply is at risk because there are few large-scale projects awaiting development. Almost all new capacity slated in the next five years will be in areas of heightened political risk – Central Africa, Central Asia, or South America. PLP is seeking to develop one of the world's most significant discoveries of copper, gold, molybdenum, silver, and rhenium, and to do so responsibly and within one of the strictest regulatory frameworks in the world. EPA must consider the need for the Pebble Project, and the environmental and societal costs of preventing the development of a US-based source of the minerals needed to support the clean energy market.

²³ EIS at 1-4.

²⁴ The Role of Critical World Energy Outlook Special Report Minerals in Clean Energy Transitions, International Energy Agency, May 2021.

²⁵ *Id.*

VI. Conclusion

EPA's apparent assumption that the Bristol Bay fishery would be harmed by the Pebble Project is unsupported. As the USACE recognized and the record reflects, minerals can be developed without impacting fisheries:

Other salmon fisheries in Alaska exist in conjunction with non-renewable resource extraction industries. For example, the Cook Inlet salmon fisheries exist in an active oil and gas basin and have developed headwaters of Anchorage and the Matanuska-Susitna areas. The Copper River salmon fishery occurs in a watershed with the remains of the historic Kennecott Copper Mine and the Trans Alaska Pipeline System in the headwaters of portions of the fishery.²⁶

For the reasons outlined above, EPA should withdraw the 2014 Proposed Determination and refrain from any further action under 404(c) with regard to the Pebble Deposit.

Sincerely,



Patricia Palacios
Cynthia Taub

Counsel to Pebble Limited Partnership

cc: Cami Grandinetti, EPA

²⁶ EIS at ES 86.