THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources
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March 28, 2022

Michelle L. Pirzadeh
Acting Regional Administrator
United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101

Dear Ms. Pirzadeh,

I received your letter of January 27, 2022, informing me of your intention to issue a revised Proposed Determination under the Clean Water Act (CWA), Section 404(c) regarding the Pebble deposit located in the Bristol Bay region of Alaska and offering the State of Alaska (State) an opportunity to provide information for your consideration. On February 2, 2022, you granted an extension to March 28, 2022, for the State and others to provide the requested information.

The State continues to be disturbed by the 12-year assault the Environmental Protection Agency (EPA) is carrying out against the sovereign rights of the State through a process created as a means to an end, rather than in the name of science.[1] Not only is the State the majority landowner in the Pebble deposit area, but the State is also a co-regulator of mineral activities under a variety of rigorous state and federal laws, including the CWA. The EPA's actions under Section 404(c) directly harm the State by preventing execution of its rights and responsibilities in response to the actual Pebble mine proposal, as well as potential future mineral activities not yet proposed in southwest Alaska. For these reasons, EPA should withdraw its Proposed Determination as its final action regarding the Pebble deposit.

The Proposed Determination must include a summary of the unacceptable adverse effects that could occur from use of the disposal site for the proposed discharge[2]. In evaluating the effects, EPA is obligated to consider the relevant portions of the section 404(b)(1) guidelines[3]. However, with the U.S. Army Corps of Engineers (USACE) denying the Section 404 permit (pending appeal), and the termination of the associated State and federal permitting processes, critical information on the

[1] The State also questions whether EPA's continued processing of any revised Proposed Determination is prudent. In 2014, EPA was enjoined from "issu[ing] any recommendation on a pending proposed determination regarding the Pebble Mine project until after the court has ruled on the merits of plaintiff's complaint." *Pebble Limited Partnership v. EPA*, No. 3:14-cv-0171-HRH, Preliminary Injunction Order (D. Alaska Nov. 24, 2014) (ECF No. 90). The State recognizes that the injunction was dissolved following a settlement agreement and stipulated dismissal between Pebble Limited Partnership and EPA, however, the predicate for that settlement agreement, *i.e.*, EPA's withdrawal of the 2014 Proposed Determination, was held unlawful by the Ninth Circuit. Because the settlement agreement in essence has failed to come to fruition, the State believes the proper course of action is to reopen the 2014 lawsuit, reinstate the preliminary injunction, and resolve Pebble Limited Partnership's legal arguments. Until that time, the continued consideration of the instant revised Proposed Determination violates the intent of the 2014 preliminary injunction.
[2] Part 231: Section 404(c) Procedures, 231.5(d)(1)
[3] Part 231: Section 404(c) Procedures, 231.2(e)

effects and measures the agencies would employ to avoid and minimize those impacts was not completed nor published. This 404(c) process short circuits the existing federal and state permitting authorities and undermines longstanding, science-based and thorough processes for environmental review and regulatory compliance.

The EPA's process being administered under Section 404(c) of the CWA appears to categorize EPA as the sole protector of habitat, even though the USACE Section 404 permitting process must evaluate the loss of habit and impacts to water quality. In addition, the State has a comprehensive, robust, and rigorous set of environmental laws that serve to avoid and minimize impacts to lands, waters, habitats, and the species that reside therein. For example, The Alaska Department of Fish and Game (ADF&G) has permitting authority over activities potentially impacting fishery resources – a unique authority for a state fish and game agency to have. This permitting authority covers all activities that occur in anadromous streams across Alaska and operates to help the State ensure that projects potentially affecting these waterbodies are completed in a manner that protects fisheries and habitats (see "**Aquatic Resources**" section below). Moreover, the State reviews potential water quality impacts from a project under Section 401 when the USACE considers a permit under Section 404.

Additionally, the Section 401 Water Quality Certification process administered by the Alaska Department of Environmental Conservation (DEC) is robust and must address the loss of all designated uses of waters of the state and satisfy the antidegradation regulations codified at 18 Alaska Administrative Code (AAC) 70.015-18 AAC 70.016, which have been approved by the EPA.

By implementing a 404(c) action, the EPA will be ignoring important information that would have been generated through a completed Section 404 permitting process and appears to be asserting that it does not have confidence in the State executing its own regulatory and statutory requirements to address the same concerns and issues that the EPA raises in their 404(c) action regarding the Pebble deposit area. Additionally, the EPA's 404(c) action seems to further imply that the state and federal permitting authorities would never be able to successfully address the regulatory requirements for projects of this type.

Specific to the Section 401 Water Quality Certification process, this 404(c) action usurps the power of the State to execute its own evaluation, which Congress authorized under Section 401 of the CWA. At the very least, the EPA should only consider a 404(c) action after the permitting and certifying authorities have made a full and final determination. In the current situation with the Pebble deposit, the USACE completed an Environmental Impact Statement in compliance with the National Environmental Policy Act (NEPA) and issued a Record of Decision denying the Section 404 permit without allowing DEC to complete the associated Section 401 Certification process.

The applicant is not prevented from modifying their application to address the concerns outlined by the USACE and going through the environmental review process again under NEPA. In that instance, the USACE would be able to exert their regulatory authority and issue a permit if all the regulatory standards were met. The State would also review the action under the Section 401 certification process and determine if water quality standards were met. Had it been allowed to do so for the current 404 permit application, that Section 401 certification would have had to address

designated uses of waters of the state, would have had to satisfy the antidegradation regulations, and would have had included conditions that would have ensured impacts to water quality were avoided and minimized. DEC did not get this opportunity, and as such, and without full evaluation and awareness of the litany of protections that may have been placed on the project through both the State and federal permitting process, EPA is unable to accurately gauge the effects that could occur from use of the disposal site for the proposed discharge. By making a 404(c) determination before the permitting determinations have been made, the EPA's action conflicts with federal and state laws. We strongly advise the EPA to follow the regulatory framework outlined in the CWA. To do otherwise would preemptively restrict use and management of State land and resources in Alaska, resulting in irreparable harm to the State and the people of Alaska.

A 404(c) Determination Could Undermine the Alaska Statehood Act, Could Result in Unlawful Withdrawals under Federal Law, and Could Violate the Takings Clause of the U.S. Constitution.

Should EPA issue a 404(c) finding that effectively prohibits mineral development of State lands containing the Pebble deposit, which the State selected in part due to their potential for mineral development, the EPA will contravene the Alaska Statehood Act, the Cook Inlet Land Exchange Act, and potentially the Takings Clause of the United States Constitution.

Statehood Act and the Cook Inlet Land Exchange

The Alaska Statehood Act intended that the State have the economic benefit of its selected lands including the benefit of mineral resources. Land grants were an essential part of Alaska's Statehood Act.[4] Section 6(i) of the Statehood Act specifically provided that:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the state of Alaska…Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct.[5]

As the Ninth Circuit has explained, "The purpose of the land grants under the [Statehood] Act is to serve Alaska's overall economic and social well-being."[6] In *Trustees for Alaska v. State*, the Alaska Supreme Court extensively explored the legislative history behind Section 6(i) and the intent to provide the State with economic opportunities through mineral development of selected lands.

> [T]he large grant of 103 million acres was deemed necessary because the lands available for state selection were perceived to be only marginally productive.…

[4] *See, U.S. v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1016 (D. Alaska 1977) (affirmed by *U.S. v. Atlantic Richfield Co*.,) (describing the intent of Congress in providing land grants to Alaska as being "of course, to provide the new state with a solid economic foundation").
[5] Alaska Statehood Act, 72 Stat. 339, P.L. 85-508 (1958), §6(i). This provision was the subject of significant contention. *See*, *State v. Lewis*, 559 P.2d 630, 636 (Alaska 1977) ("Throughout the process of drafting the Constitution and its adoption, there was considerable public controversy surrounding the issue of federal control over Alaska's power to dispose of its mineral resources.").
[6] *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968) (and noting that "[s]ome of the lands so selected will probably be used to protect mineral deposits").

> Because Congress realized that agricultural development would not yield the revenue that Alaska would need to support statehood, the Act contained the provision granting the new state title to the mineral estate underlying the land grants. Senator Kuchel said in debate: "I believe, however, on the basis of the values of property in Alaska as they have been estimated, the tremendous wealth in the ground in minerals..., the State of Alaska will be able to make maximum use of the property which it will obtain under the bill from the Federal Government. This provision constitutes one additional assurance. I feel sure that economically the new government will succeed."[7]

The Alaska Supreme Court also explored congressional intent to leave the terms of mineral development to the discretion of the State legislature, quoting relevant legislative history as follows: "The [Statehood] bills now intend to provide [the State] with the untrammeled right to frame its own mineral leasing laws…and can, in general, fit the provisions of its mineral leasing system to whatever may be its concepts of the public interest."[8]

Under the Cook Inlet Land Exchange, the State, the Cook Inlet Region, Inc. ("CIRI"), and the federal government settled contentious litigation by entering into a contractual agreement.[9] Pursuant to the agreement, the State gave lands to the federal government and agreed to not select certain other lands in the future. As a result, the federal government was able to settle litigation, fulfill its outstanding obligations to CIRI under the Alaska Native Claims Settlement Act (ANCSA), and create the Lake Clark National Park and Preserve.

In return for this consideration, the State gained the right to select lands that were previously withdrawn and designated for conservation purposes.[10] Congress provided that "all lands granted to the State of Alaska pursuant to this subsection shall be regarded for all purposes as if conveyed to the State under and pursuant to section 6 of the Alaska Statehood Act."[11] In other words, when Congress gave Alaska the right to select Exchange lands it provided that the State could classify these lands for mineral development. Consequently, the Exchange gave the State the express authority to select lands, manage the lands, and to make the lands open for mineral development.[12] Shortly after the Exchange was approved by Congress, the State selected the Pebble area lands. The settled expectation since that time was that the State would have the right to make land use decisions for these lands.

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[7] *Trustees for Alaska v. State*, 736 P.2d 324, 336 n. 23 (Alaska 1987).
[8] *Id*. at 338, n. 29 (internal quotations and alterations omitted).
[9] *See* Pub. L. 94-204 § 12(b); Terms and Conditions for Land Consolidation and Management in Cook Inlet Area ("Terms and Conditions").
[10] *See* Pub. L. 94-204 § 12(d)(1)(i).
[11] *Id.* § 112(d)(1).
[12] *Id.*

At bottom, the Statehood Act and the Cook Inlet Land Exchange are binding compacts that limit the federal government's ability to dictate land use policy.[13] In light of these compacts, the EPA does not have the authority to usurp the State's land use designations through a 404(c) determination.[14]

Federal Laws Affecting Withdrawals in Alaska

Section 204 of the Federal Land Policy and Management Act (FLPMA) and Section 1326 of Alaska National Interest Lands Conservation Act (ANILCA) contain similar, although not identical, procedures that must be followed for the federal government to make withdrawals of lands exceeding 5,000 acres in Alaska.[15] Section 204 of FLPMA requires that the Secretary report withdrawals of greater than 5,000 acres to Congress for approval.[16] Although the Ninth Circuit in *National Mining Association v. Zinke*[17] held that FLPMA's requirement that Congress approve the withdrawal through a concurrent resolution of both Houses of Congress violated the Presentment Clause, the offending requirement could be severed.[18] Following that case, however, no court has clearly outlined what procedure remains. Indeed, in a post-*Zinke* case, District of Alaska noted that "Congress retains the sole authority to withdraw land parcels larger than 5,000 acres from mining permanently."[19]

Like FLPMA Section 204, ANILCA Section 1326 requires the Secretary to report withdrawals greater than 5,000 acres to Congress.[20] However, ANILCA Section 1326 does not suffer the same Presentment Clause issue that the *Zinke*-court found in FLPMA. Section 1326 avoids this problem because, instead of requiring a concurrent resolution, it requires a joint resolution.[21] Additionally, unlike FLPMA Section 204, ANILCA Section 1326 provides that large-tract withdrawals shall terminate unless *approved* by Congress within one year.[22] Thus, ANILCA Section 1326 places an additional time constraint not contained within FLPMA Section 204.

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[13] *Cf. Texas v. New Mexico*, 482 U.S. 124, 128-29 (1987) (interstate compact when approved by Congress becomes a law of the United States, but also noting that "[a] Compact is, after all, a contract" subject to contractual interpretation and enforcement).

[14] *Cf. Sims*, 341 U.S. at 28 ("a compact is after all a legal document. . . . It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States."); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 632 (1989); *see also Office of Hawaiian Affairs*, 556 U.S. at 176 (Congress is without authority "to create a retroactive 'cloud' on the title that Congress granted to the State of Hawaii.").

[15] 43 U.S.C. § 1714(c); 16 U.S.C. § 3213.

[16] 43 U.S.C. § 1714(c).

[17] 877 F.3d 845, 857 (9th Cir. 2017).

[18] *Id.*

[19] *Chilkat Indian Vill. of Klukwan v. Bureau of Land Mgmt.*, 399 F. Supp. 3d 888, 899 n.31 (D. Alaska 2019) (citing, *inter alia*, *Zinke*, 877 F.3d at 854-857).

[20] 16 U.S.C. § 3213(a).

[21] *Id*. Like a bill, a joint resolution requires approval of both Chambers of Congress and Presidential signature to become law.

[22] *Id.*

Here, should EPA issue a 404(c) determination that effectively withdraws greater than 5,000 acres from mineral development, that action would violate both FLPMA Section 204 and ANILCA Section 1326 unless it were to be approved by both houses of Congress and signed by the President.

Taking Clause of the U.S. Constitution

Finally, the Takings Clause of the U.S. Constitution provides that "property [shall not] be taken for public use, without just compensation."[23] In addition to physical intrusions, the Fifth Amendment likewise prohibits federal regulation that denies the landowner of economically viable use of the land.[24] Here, should EPA issue a 404(c) determination that effectively withdraws the Pebble Deposit from development, *i.e.*, results in the diminution of the State's reasonable economic expectations in selecting the lands, EPA will have effected a taking on the State that must be compensated. Given that the Pebble Deposit is a multi-billion dollar mineral deposit, the State fully intends to pursue such a claim if necessary.

National Environmental Policy Act Process

In December 2017, the USACE received a permit application regarding discharge of fill material into waters of the U.S. and for work, including the placement of structures, in navigable waters for the purpose of developing a copper-gold-molybdenum porphyry deposit (i.e., Pebble deposit).

USACE, as the lead federal agency under NEPA, determined that an EIS was necessary to inform the permit decisions on the project and administered the necessary environmental review. The State participated in the federal environmental review process under NEPA as a Cooperating Agency. On November 20, 2020, the USACE issued a Record of Decision determining that the proposed discharge did not comply with the Section 404(b)(1) Guidelines. In addition, the USACE determined that the proposed project was contrary to the public interest.[25] The applicant administratively appealed the USACE's permit denial, per 33 Code of Federal Regulation (CFR) Part 331, and the appeal process remains ongoing. The State requested standing as the landowner, but this request was inappropriately denied by the USACE contrary to its own regulations.

The State objects to the EPA's continued pursuit of a determination under Section 404(c) while the applicant pursues administrative appeal of the USACE's permitting decision. However, should the EPA revise its Proposed Determination, as you have indicated, the Final EIS produced by the USACE should be fully considered in your final action and given considerable weight, especially compared to the EPA's Bristol Bay Assessment Final Report (2014).[26] While the EPA's Bristol Bay Assessment evaluated a hypothetical mining scenario, the USACE's EIS evaluated a specific

[23] U.S. Const. amend. V.; *see PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244, 2264 (2021) (noting that the Takings Clause applies equally between private property and state-owned lands).
[24] *See Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).
[25] U.S. Army Corps of Engineers (2020), Department of the Army Permit No. POA-2017-00271, Record of Decision, November 20, 2020.
[26] EPA (2014), An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska. EPA 910-R-14-001ES. January 2014. https://www.epa.gov/bristolbay/bristol-bay-assessment-final-report-2014

mining proposal and mitigation measures in addition to a range of reasonable alternatives.[27]

The USACE evaluated four action alternatives and the No Action Alternative in detail in the EIS. The USACE thoroughly evaluated and disclosed the current conditions of aquatic resources (EIS Chapter 3.24 Fish Values) in terms of aquatic habitat, fish distribution, and aquatic invertebrates, as applicable, for each project component or variant under each alternative. The USACE also fully analyzed and described the potential direct and indirect impacts to aquatic resources (EIS Chapter 4.24 Fish Values) including the following specific topic areas:

- Direct loss of aquatic (stream, lake, estuarine, and marine) habitat;
- Direct impacts to fish and other aquatic organisms, including displacement, injury, and mortality;
- Changes in surface water and groundwater flows that could indirectly affect stream productivity and spawning or rearing habitat;
- Increased sedimentation of aquatic habitat caused by erosion from vegetation removal, access road stream crossing construction, or shoreline vessel wake; and
- Changes to freshwater and marine water quality, including water temperature, turbidity, pH, dissolved oxygen, and metal or chemical concentrations changes.

The Final EIS summarized potential impacts from USACE's preferred alternative as follows (Section 4.24.5.4):

> The entire Bristol Bay drainage contains 9,816 miles of documented anadromous waters. (Johnson and Blossom 2018). Therefore, the loss of [North Fork Koktuli (NFK)] tributaries NK 1.190 and NK 1.200 represent a 0.08 percent reduction of documented anadromous stream habitat. However, the total estimated mileage of anadromous waters in Bristol Bay drainage is likely much higher than what is currently documented. The mine site is one of the few locations in the Bristol Bay drainage where numerous small channels and tributaries have been extensively surveyed for fish distribution. Documented anadromous waters only represent waters where salmon have been observed and are not considered representative of all anadromous waters in the Bristol Bay drainage. The duration of direct impacts of the removal of anadromous habitat would be permanent. However, considering the physical characteristics and current fish use of habitat to be removed, the consequently low densities of juvenile Chinook and coho observed in the affected tributaries, and the few numbers of spawning coho observed (see Section 3.24, Fish Values), **impacts to anadromous and**

[27] The State expressly incorporates herein by reference all comments that it has submitted to EPA regarding the 2014 Proposed Determination, all comments that it has submitted regarding the Pebble Project EIS, all legal and factual arguments that it has made related to its appeal of the USACE's denial of PLP's Section 404 permit, and all legal and factual arguments that it has made related to litigation in *Bristol Bay Economic Development Corporation v. Hladick*, No. 3:19-cv-0265-SLG (D. Alaska) and *Salmon State v. Hladick*, No. 3:19-cv-0267-SLG (D. Alaska), and all related appeals.

> **resident fish populations from these direct habitat losses would not be measurable, and would be expected to fall within the range of natural variability.** [emphasis added]

Aquatic Resources

The Alaska Department of Fish and Game (ADF&G) has the statutory responsibility for conserving freshwater anadromous fish habitat and providing free passage for all fish in freshwater bodies. The Anadromous Fish Act (Alaska Statute (AS) 16.05.871- .901) requires prior notification and permit approval from ADF&G before altering or affecting "the natural flow or bed" of a specified anadromous waterbody. All activities within or across a specified anadromous waterbody require approval from the ADF&G Habitat Section, including road crossings, gravel removal, mining, water withdrawals, the use of vehicles or equipment in the waterway, stream realignment or diversion, bank stabilization, and the placement, excavation, deposition, or removal of any material. Permitting requirements apply to individuals, commercial entities, government agencies, and other organizations.

Specified anadromous waterbodies are described in the "Catalog of Waters Important for the Spawning Rearing or Migration of Anadromous Fishes" (Anadromous Waters Catalog). The Anadromous Waters Catalog is updated annually and adopted into regulation (5 AAC 95.011) after public review, defining the legal record of known anadromous fish streams in Alaska.

The Fish Passage Act (AS 16.05.841), requires that an individual or government agency notify and obtain authorization from the ADF&G, Habitat Section for activities within or across a stream used by fish if it is determined that such uses or activities could represent an impediment to the efficient passage of resident or anadromous fish.

Mitigation for impacts to anadromous or resident fish waterbodies, including compensation for loss of habitat, is required. For most projects, the Fish Habitat Permit review process and development of required mitigation take place after the federal environmental review process is completed.

The ADF&G recently published a technical report containing the methods and results of four years of aquatic biomonitoring for the Pebble Project at three selected sites located downstream from proposed project facilities. The objective of this biomonitoring program was to establish baseline data related to the physical aquatic environment (geomorphology, hydrology, water quality) and different trophic levels of aquatic communities (periphyton, macro-invertebrates, and fish), using repeatable methods to allow for assessing potential changes over time.[28] Although this sampling was completed from 2010 to 2013, the data are previously unpublished and, therefore, were not available to the EPA for consideration in its 2014 Proposed Determination under Section 404(c) of the CWA.

[28] ADF&G (2022), Technical Report No. 22-09: Aquatic Biomonitoring at the Pebble Prospect, 2010-2013. https://www.adfg.alaska.gov/static/home/library/pdfs/habitat/22_09.pdf

Additionally, on June 1, 2020, ADF&G clarified information with the EPA regarding sockeye salmon spawning in the Koktuli River. ADF&G recommended the EPA consider two publications: Dann et al. (2012)[29], and Shedd et al. (2016)[30]. As stated in ADF&G's letter, sockeye salmon spawning in the Koktuli River are considered a separate population within ADF&G's genetic baseline, and the river-type ecotype of sockeye salmon is recognized as an evolutionarily important life history. However, the Koktuli River population is one of four genetically similar but distinct populations of river-type sockeye salmon within the Nushagak River basin in ADF&G's baseline. In addition, while river-type sockeye salmon are uncommon within Bristol Bay, five other populations of river-type sockeye salmon included in ADF&G's baseline spawn within the Bristol Bay Management Area, including populations in the Togiak, Wood, and Ugashik watersheds (see enclosure).

Mine Reclamation

Pursuant to AS 27.19.020, "[a] mining operation shall be conducted in a manner that prevents unnecessary and undue degradation of land and water resources, and the mining operation shall be reclaimed as contemporaneously as practicable with the mining operation to leave the site in a stable condition." The phrase "stable condition" means "the rehabilitation, where feasible, of the physical environment of the site to a condition that allows for the reestablishment of renewable resources on the site within a reasonable period of time by natural processes."[31] Moreover, reclamation performance standards are detailed in 11 AAC 97.200 through 11 AAC 97.250. For a more complete listing of applicable mining laws and regulations in Alaska, please refer to the Division of Mining, Land and Water's *Mining Laws and Regulations Booklet.*[32]

Alaska Dam Safety Program

A Certificate of Approval to Construct, Modify, or Repair a Dam is required prior to any new construction, or major modification or repair of an existing dam.[33] A Certificate of Approval to Operate a Dam is required before a new or modified dam can be put into service. A Certificate of Approval to Abandon a Dam is required prior to removal or abandonment (de-regulation) of a dam. For a more complete description of the applicable dam safety laws and regulations in Alaska, please refer to the *Draft Revised Guidelines for Cooperation with the Alaska Dam Safety Program*.[34]

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[29] Dann, T. H., C. Habicht, J. R. Jasper, E. K. C. Fox, H. A. Hoyt, H. L. Liller, E. S. Lardizabal, P. A. Kuriscak, Z. D. Grauvogel, and W. D. Templin. 2012. Sockeye salmon baseline for the Western Alaska Salmon Stock Identification Project. Alaska Department of Fish and Game, Special Publication No. 12-12, Anchorage.

[30] Shedd, K. R., T. H. Dann, H. A. Hoyt, M. B. Foster, and C. Habicht. 2016. Genetic baseline of North American sockeye salmon for mixed stock analyses of Kodiak Management Area commercial fisheries, 2014–2016. Alaska Department of Fish and Game, Fishery Manuscript Series No. 16-03, Anchorage.

[31] AS 27.19.100(7)

[32] https://dnr.alaska.gov/mlw/mining/pdf/Mining_Statute_and_Regulation_Book.pdf

[33] AS 46.17.900 defines a dam as an "artificial barrier and its appurtenant works" which meets one or more of the following criteria: Impounds 50 acre-feet or more and is at least 10 feet high; is 20 feet high or more; or would threaten lives and property if the dam failed. Federally owned or operated dams or hydroelectric dams regulated by the Federal Energy Regulatory Commission are exempt from state regulation under AS 46.17.100(c).

[34] https://dnr.alaska.gov/mlw/water/dams/AK_Dam_Safety_Guidelines072817rev2.pdf

Sincerely,

Corri A Feige
Commissioner

Enclosure:

1. ADF&G letter to EPA re: sockeye salmon spawning (June 1, 2020)

Cc:
The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
Commissioner Doug Vincent-Lang, ADF&G
Commissioner Jason Brune, DEC
Attorney General Treg R. Taylor, Alaska Department of Law

THE STATE of ALASKA
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June 1, 2020

Mr. Hladick,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101-3188

Mr. Hladick:

This letter is in response to your May 28, 2020 letter to the U.S. Army Corps of Engineers in which you reference an unpublished report by the Alaska Department of Fish and Game Gene Conservation Laboratory. This report is cited as the source of an evaluation of the sockeye salmon spawning in the Koktuli River as representing "a genetically distinct population of river-type salmon that is evolutionarily important and distinctly unique within the Bristol Bay watershed and Alaska."

The citation is to a pending report on the 2020 update of the genetic baseline used for stock identification of Bristol Bay sockeye salmon. The initial laboratory and statistical analyses have been completed, but the analyses have not been reviewed and no draft report has been written describing the baseline. As such, the above quoted statement did not originate from this report, but is an EPA interpretation based on genetic relationships among populations in the baseline as seen in the initial statistical analysis. A final version of the report will be available this fall/winter.

It would be more appropriate to cite two other publications that describe the populations in question and have been through department review. The first includes the Koktuli River as part of the Nushagak River reporting group and discusses the impact of the river-type ecotype of sockeye salmon on mixed stock analysis performance (Dann et al. 2012)[1]. This baseline was updated in Shedd et al. (2016)[2].

The current, unreported baseline shows the same relationship among Upper Nushagak/Mulchatna populations as the two published baselines. These four populations (Upper Nushagak, Upper Mulchatna, Koktuli, and Stuyahok rivers) are most closely related to each other and are all clustered together above a single node.

[1] Dann, T. H., C. Habicht, J. R. Jasper, E. K. C. Fox, H. A. Hoyt, H. L. Liller, E. S. Lardizabal, P. A. Kuriscak, Z. D. Grauvogel, and W. D. Templin. 2012. Sockeye salmon baseline for the Western Alaska Salmon Stock Identification Project. Alaska Department of Fish and Game, Special Publication No. 12-12, Anchorage.

[2] Shedd, K. R., T. H. Dann, H. A. Hoyt, M. B. Foster, and C. Habicht. 2016. Genetic baseline of North American sockeye salmon for mixed stock analyses of Kodiak Management Area commercial fisheries, 2014–2016. Alaska Department of Fish and Game, Fishery Manuscript Series No. 16-03, Anchorage.

Sockeye salmon spawning in the Koktuli River are considered a separate population within our genetic baseline, and the river-type ecotype of sockeye salmon is recognized as an evolutionarily important life history. However, the Koktuli River population is one of four genetically similar but distinct populations of river-type sockeye salmon within the Nushagak River basin in our baseline. In addition, while river-type sockeye salmon are uncommon within Bristol Bay, five other populations of river-type sockeye salmon included in our baseline spawn within the Bristol Bay Management Area, including populations in the Togiak, Wood, and Ugashik watersheds.

In the opinion of the ADF&G Principal Geneticist, the Koktuli River population of sockeye salmon represents one of four closely-related Nushagak River populations with a river-type life history in the baseline. Together, these populations represent an important component of the genetic portfolio of sockeye salmon in Bristol Bay.

Respectfully,

Doug Vincent-Lang
Commissioner

cc: Jason Brune, Commissioner, ADEC
Corri Feige, Commissioner, ADNR
Ben Stevens, COS, Governor's Office
Kip Knudsen, Director, Governor's Washington Office
Greg Siekaniec, USFWS, Alaska Region