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6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-R10-OW-2017-0369]**

**Notification of Decision to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

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**SUMMARY:** The United States Environmental Protection Agency (EPA) Region 10 Regional Administrator is providing notice of the EPA's decision to withdraw the Proposed Determination to restrict the use of certain waters in the South Fork Kaktuli River, North Fork Kaktuli River, and Upper Talarik Creek watersheds in southwest Alaska as disposal sites for dredged or fill material associated with mining the Pebble deposit.

**FOR FURTHER INFORMATION CONTACT:** Visit [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay) or call a Bristol Bay-specific phone line at (206) 553-0040, or email [r10bristolbay@epa.gov](mailto:r10bristolbay@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. General Information**

EPA Region 10 is providing notice under 40 CFR 231.5(c) of EPA's withdrawal of the Proposed Determination to restrict the use of certain waters in the South Fork Kaktuli River, North Fork Kaktuli River, and Upper Talarik Creek watersheds in southwest Alaska as disposal sites for dredged or fill material associated with mining the Pebble deposit issued under EPA's Clean Water Act (CWA) Section 404(c) authority. EPA is concluding the process it started in July 2017, suspended in January 2018, and resumed in June 2019 to withdraw the Proposed

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Determination. EPA has decided that now is the appropriate time to complete the withdrawal of the Proposed Determination in light of developments in the record and the availability of processes for EPA to address record issues with the U.S. Army Corps of Engineers (Corps) prior to any potential future decision-making by EPA regarding this matter.

*A. How to Obtain a Copy of the Proposed Determination:* The July 2014 Proposed Determination is available via the internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay).

*B. How to Obtain a Copy of the Settlement Agreement:* The May 11, 2017, settlement agreement is available via the internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay).

*C. How to Obtain a Copy of the Proposal to Withdraw the Proposed Determination:* The July 2017 proposal to withdraw the Proposed Determination is available via the internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay). Information regarding the proposal to withdraw can also be found in the docket for this effort at [www.regulations.gov](http://www.regulations.gov), see docket ID No. EPA-R10-OW-2017-0369 or use the following link: <https://www.regulations.gov/docket?D=EPAR10-OW-2017-0369>.

*D. How to Obtain a Copy of Notification of Suspension:* The February 2018 notice announcing the EPA's decision to suspend the proceeding to withdraw the Proposed Determination at that time is available via the internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay).

## **II. Factual Background**

In 2011, EPA initiated an assessment to determine the significance of the Bristol Bay watershed's ecological resources and evaluate the potential impacts of large-scale mining on these resources. The stated purpose was to characterize the biological and mineral resources of

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the Bristol Bay watershed; increase understanding of the potential impacts of large-scale mining on the Region's fish resources; and inform future decision-making. Also in 2011, Northern Dynasty Minerals, which wholly owns the Pebble Limited Partnership (PLP), submitted information to the United States Securities and Exchange Commission that detailed its intention to develop a large-scale mine at the Pebble deposit. EPA Region 10 used this information to develop its mining scenarios for the Bristol Bay Watershed Assessment. After two rounds of public comments on drafts of the Bristol Bay Watershed Assessment in 2012 and 2013 that generated over one million comments, as well as independent external peer review, EPA Region 10 finalized the Assessment in January of 2014.

On July 21, 2014, EPA Region 10 published in the Federal Register (79 FR 42314) a Notice of Proposed Determination under Section 404(c) of the CWA to restrict the use of certain waters in the South Fork Kaktuli River, North Fork Kaktuli River, and Upper Talarik Creek watersheds (located within the larger Bristol Bay watershed) as disposal sites for dredged or fill material associated with mining the Pebble deposit. This Proposed Determination was issued preemptively; in other words, it was issued prior to PLP's submission of a CWA Section 404 permit application to the Corps. The notice started a public comment period that ended on September 19, 2014. EPA Region 10 also held seven hearings throughout southwest Alaska during the week of August 11, 2014. In addition to testimony taken at the hearings, EPA Region 10 received more than 670,000 written comments during the public comment period.

The next step in the Section 404(c) process would have been for EPA Region 10 to either forward a Recommended Determination to EPA Headquarters or to withdraw the Proposed Determination pursuant to 40 CFR 231.5(a). However, PLP filed a lawsuit that alleged that EPA formed three advisory committees in violation of the Federal Advisory Committee Act to assist

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EPA “in developing and implementing an unprecedented plan to assert EPA’s purported authority under Section 404(c) of the federal Clean Water Act ... in a manner that will effectively preempt [p]laintiff from exercising its right through the normal permit process to extract minerals from the Pebble Mine deposit in Southwest Alaska.” Second Amended Complaint for Declaratory and Injunctive Relief at 2, *Pebble Limited Partnership v. EPA*, No. 3:14-cv-00171 (D. Alaska July 7, 2015). As part of this litigation, the court issued a preliminary injunction against EPA on November 25, 2014 after the court determined that PLP had “a fair chance of success on the merits” with respect to one of the alleged federal advisory committees. Order Granting Preliminary Injunction at 1-2, *Pebble Limited Partnership v. EPA*, No. 3:14-cv-00171 (D. Alaska. Nov. 25, 2014). The injunction halted EPA Region 10’s Section 404(c) review process until the case was resolved. EPA and PLP resolved all outstanding lawsuits in a May 11, 2017 settlement agreement, and the court subsequently dissolved the injunction and dismissed the cases. As part of the settlement, EPA agreed that it would not advance to the next interim step in the Section 404(c) review process (i.e., a Recommended Determination), if such a decision is made, until either May 11, 2021 or EPA publishes a notice of the Corps’ final environmental impact statement (EIS) for the project, whichever is earlier. EPA also agreed to “initiate a process to propose to withdraw the Proposed Determination.”

In July 2017, EPA Region 10 issued a notice of a proposal to withdraw its July 2014 Proposed Determination that was published in the Federal Register (82 FR 33123, July 19, 2017). In this notice, EPA defined the scope of the input it was seeking on its proposal to withdraw. Specifically, EPA sought input on three reasons underlying its proposed withdrawal:

1. Provide PLP with additional time to submit a CWA Section 404 permit application to the Corps;

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2. Remove any uncertainty, real or perceived, about PLP's ability to submit a permit application and have that permit application reviewed; and
3. Allow the factual record regarding any forthcoming permit application to develop.

The notice opened a public comment period that closed on October 17, 2017. During the public comment period, EPA received more than one million public comments regarding its proposal to withdraw. EPA also held two hearings in the Bristol Bay watershed during the week of October 9, 2017. Approximately 200 people participated in the hearings. EPA also consulted with federally recognized tribal governments from the Bristol Bay region and Alaska Native Claims Settlement Act Regional and Village Corporations with lands in the Bristol Bay watershed on the Agency's proposal to withdraw.

On December 22, 2017, PLP submitted a CWA Section 404 permit application to the Corps to develop a mine at the Pebble deposit. On January 5, 2018, the Corps issued a notice that provided PLP's permit application to the public and stated that an EIS would be required as part of its permit review process consistent with the National Environmental Policy Act (NEPA). The Corps also invited relevant federal and state agencies, including EPA, to be cooperating agencies on the development of the EIS.

On January 26, 2018, EPA Region 10 issued a notice announcing a "suspension" of the proceeding to withdraw the Proposed Determination. This action was published in the Federal Register on February 28, 2018 (83 FR 8668).

On March 1, 2018, EPA Region 10 accepted the Corps' invitation to serve as a cooperating agency for development of the EIS for the Pebble project. As a cooperating agency, EPA has participated in meetings and provided comments on early drafts of EIS material, including on

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sections of the Preliminary DEIS in December of 2018. EPA also provided scoping comments to the Corps on June 29, 2018.

The Corps released a Draft EIS and Section 404 Public Notice (404 PN) on February 20, 2019. The public comment periods for both opened on March 1, 2019 and closed on July 1, 2019. The Corps received over 100,000 comments on the Draft EIS. EPA submitted over 100 pages of comments to the Corps on the Draft EIS and over 50 pages of comments on the 404 PN.

On June 26, 2019, the EPA General Counsel, acting by delegated authority for the Administrator, directed EPA Region 10 “to continue deliberating regarding whether to withdraw the 2014 Proposed Determination or alternatively, decide to leave the 2014 Proposed Determination in place.” The General Counsel’s memorandum indicated that the suspension notice had created confusion regarding the status of the 2014 Proposed Determination and that by “making a decision one way or the other, the Region will provide much-needed clarity and transparency to the public on this issue.” In addition, the General Counsel also asked the Region to “reconsider its previous statement that it would seek additional public comment on the 2014 Proposed Determination, in light of the ample opportunity for public comment previously provided and the current public comment opportunity on the more than 1,400-page [Draft EIS].”

### **III. Legal Background**

#### *A. CWA Section 404(c)*

CWA Section 404(a) allows the Corps to issue permits authorizing the discharge of dredged or fill material at specified disposal sites. Section 404(b) provides that “[s]ubject to subsection (c)..., each such disposal site shall be specified for each such permit by the Secretary....” CWA Section 404(c) authorizes EPA to deny or restrict the use of defined areas as a disposal site:

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The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

The statute authorizes, but does not mandate, EPA to initiate the Section 404(c) process. *City of Olmstead Falls v. EPA*, 266 F. Supp. 2d 718, 723 (N.D. Ohio 2003). EPA’s decision whether or not to exercise Section 404(c) is akin to enforcement discretion where an agency’s discretion is at its broadest. EPA may decide to exercise its discretionary authority under Section 404(c) “whenever” it makes a determination that a discharge will have an unacceptable adverse effect. 33 USC 1344(c); 40 CFR 231.1(a), (c); *see also Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 613 (D.C. Cir. 2013). Once it makes the required determination, EPA has the authority to fully prohibit discharges or issue restrictions or conditions on discharges.

#### *B. CWA Section 404(c) Regulations*

EPA’s regulations in 40 CFR Part 231 establish the procedures for EPA’s consideration of whether to use its Section 404(c) authority:

- **Step 1: Initial Notification.** If the EPA Regional Administrator has reason to believe, after evaluating the available information, that an unacceptable adverse effect could result from the specification or use for specification of a defined area as a disposal site, the Regional Administrator may initiate the Section 404(c) process by notifying the Corps, the applicant (if any), and the site owner that he intends to issue a proposed determination. Each of those parties then has 15 days to demonstrate to the

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satisfaction of the Regional Administrator that no unacceptable adverse effects will occur, or the District Engineer can provide notice of an intent to take corrective action to prevent an unacceptable adverse effect.

- **Step 2: Proposed Determination.** If within 15 days no such notice is provided, or if the Regional Administrator is not satisfied that no unacceptable adverse effect will occur, the Regional Administrator must publish a notice of the proposed determination in the Federal Register, soliciting public comment and offering an opportunity for public hearing.
- **Step 3: Withdrawal of Proposed Determination or Preparation of Recommended Determination.** Following the public hearing and close of the comment period, the Regional Administrator must either withdraw the proposed determination or prepare a recommended determination. A decision to withdraw may be reviewed at the discretion of the Assistant Administrator for Water at EPA Headquarters.<sup>1</sup> If the Regional Administrator prepares a recommended determination, the Regional Administrator then forwards it and the complete administrative record compiled in the Regional Office to the Assistant Administrator for Water.
- **Step 4: Final Determination.** Within 30 days the Assistant Administrator for Water will consider the recommended determination of the Regional Administrator and the information in the administrative record, and also consult again with the Corps, the applicant (if any), and the site owner. Following consultation and consideration of

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<sup>1</sup> In 1984, the EPA Administrator delegated the authority to make final determinations under Section 404(c) to EPA's national CWA Section 404 program manager, who is the Assistant Administrator for Water. That delegation remains in effect. With regard to EPA's Section 404(c) action for the Pebble deposit area, on March 22, 2019, Administrator Wheeler delegated to the General Counsel the authority to perform all functions and responsibilities retained by the Administrator or previously delegated to the Assistant Administrator for Water.

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all available information, the Assistant Administrator for Water makes the final determination affirming, modifying, or rescinding the recommended determination.

With regard to Step 1, the regulations provide that the Regional Administrator “may” initiate certain actions if he or she “has reason to believe” that an unacceptable adverse effect “could result.” 40 CFR 231.3(a). The regulations do not require immediate action where the Regional Administrator makes such a finding because the Regional Administrator has the “necessary discretion in deciding when to act or whether to act at all.” 44 FR 58079, October 9, 1979. In addition, EPA uses the term “could” for this early stage “because the preliminary determination merely represents a judgment that the matter is worth looking into.” 44 FR 58078, October 9, 1979. Importantly, a “proposed determination does not represent a judgment that discharge of dredged or fill material will result in unacceptable adverse effects; it merely means that the Regional Administrator believes that the issue should be explored.” 44 FR 58082, October 9, 1979.

Although the regulations provide a standard for the Regional Administrator’s decision regarding whether to issue a recommended determination (i.e., discharge of material “would be likely to have an unacceptable adverse effect.”), the regulations do not provide a regulatory standard for the Regional Administrator’s decision to withdraw a proposed determination. 40 CFR 231.5(a), (c). Such a decision is at the discretion of the Regional Administrator “after review of the available information.” 44 FR 50582, October 9, 1979. Instead, the regulations only include procedural requirements for the withdrawal of a proposed determination. In particular, the Regional Administrator must notify the Administrator of the decision who then has 10 days to notify the Regional Administrator of his or her intent to review. 40 CFR 231.5(c). In addition, the Regional Administrator must send copies of such notification to all “persons who

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commented on the proposed determination or participated at the hearing.” *Id.* The regulations provide that “[s]uch persons may submit timely written recommendations concerning review.” *Id.* EPA’s final rule preamble explains that the purpose of this requirement was to allow for “public input into the Administrator’s decision whether to review the Regional Administrator’s withdrawal of a proposed determination.” 44 FR 58081, October 9, 1979.

In addition, EPA’s implementing regulations recognize the statutory mandate for EPA to consult with the Corps on its Section 404(c) decision. Indeed, EPA’s regulations require consultation with the Corps throughout the various stages of the regulatory process. Of particular note, the regulations contemplate two specific engagements with the Corps during the initial stages of the Section 404(c) process.

First, EPA’s regulations generally contemplate that where there is a permit application pending, the Regional Administrator’s initial determination of whether the discharge “could” result in an unacceptable adverse effect would be made after considering the record developed during its coordination with the Corps on the permit application. Section 231.3(a) provides that the Regional Administrator’s decision under that provision must be based on an evaluation of “information available to him, including any record developed under the section 404 referral process specified in 33 CFR 323.5(b).”<sup>2</sup> 40 CFR 231.3(a). The regulations also include a comment stating that “[i]n cases involving a proposed disposal site for which a permit

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<sup>2</sup>“*Coordination with EPA.* Prior to actual issuance of permits for the discharge of dredged or fill material in water of the United States, Corps of Engineers officials will advise appropriate Regional Administrators, EPA of the intent to issue permits to which EPA has objected, recommended conditions, or for which significant changes are proposed. If the Regional Administrator advises, within fifteen days of the advice of the intent to issue, that he objects to the issuance of the permits, the case will be forwarded to the Chief of Engineers in accordance with 33 CFR 325.11 for further coordination with the Administrator, EPA and the decision. The report forwarding the case will contain an analysis of the economic impact on navigation and anchorage that would occur by failing to authorize the use of a proposed disposal site, and whether there are other economically feasible methods or sites available other than those to which the Regional Administrator objects.” 33 CFR 323.5(b) (1979).

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application is pending, it is anticipated that the procedures of the section 404 referral process will normally be exhausted prior to any final decision of whether to initiate a 404(c) proceeding.” 40 CFR 231.3. Although the Corps removed the Section 404 referral process from its regulations that are still referenced in EPA’s current regulations, the regulatory history associated with the Corps’ revisions to its regulations indicates that its intent was to update that reference to reflect current coordination processes with EPA established under CWA Section 404(q).<sup>3</sup>

In addition, EPA’s final rule preamble promulgating its regulations in 40 CFR part 231 states:

EPA’s announcement of intent to start a 404(c) action will ordinarily be preceded by an objection to the permit application, and under § 325.8 such objection serves to halt issuance of the permit until the matter is resolved.....

The promulgation of regulations under 404(c) will not alter EPA’s present obligations to make timely objections to permit applications where appropriate. It is not the Agency’s intention to hold back and then suddenly to spring a veto action at the last minute. The fact that 404(c) may be regarded as a tool of last resort implies that EPA will first employ its tool of “first resort,” e.g. comment and consultation with the permitting authority at all appropriate stages of the permit process.

44 FR 58080, October 9, 1979. Therefore, the comment that exists in EPA’s regulations indicates that where there is a permit application pending it is anticipated that the 404(q) process “will normally be exhausted prior to any final decision of whether to initiate a Section 404(c)

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<sup>3</sup> Congress added CWA Section 404(q) to the statute in 1977. EPA issued its 404(c) regulations in 1979. 44 FR 58076, October 9, 1979. In 1980, the Corps proposed amendments to reflect the 1977 amendments to the CWA. 54 FR 62732, September 19, 1980. Specifically, the Corps proposed to move section 323.5 to 323.6 and amended paragraph (b), which is still the language included in the Corps’ current regulations. When issuing its 1980 proposal, the Corps explained that “[p]aragraph (b) would be revised in accordance with interagency agreements called for by Section 404(q) of the CWA and EPA regulations for Section 404(c) veto procedures (40 CFR Part 231).” 45 FR 62733, September 19, 1980. When finalizing its revised rule language in 1982, the Corps further explained that the purpose was “to be consistent with current agreements between the Corps and EPA which reflect EPA authority to veto disposal site specifications under Section 404(c).” 47 FR 31795, July 22, 1982. Therefore, this regulatory history demonstrates that the 404 referral process referenced in 231.3(a) is now manifested as the coordination processes EPA and the Corps have established under CWA Section 404(q).

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proceeding” and that the record developed under the 404(q) process would be considered by the Region Administrator when evaluating information under 40 CFR 231.3(a).

Second, once the Regional Administrator has made the requisite finding, the regulations provide an opportunity for the Corps, among others, to consult with the Regional Administrator prior to the issuance of a proposed determination. The purpose of this consultation is to provide information to demonstrate that no unacceptable adverse effects will occur or for the Corps to notify the Regional Administrator of his or her intent to take corrective action to prevent unacceptable adverse effects. 40 CFR 231.3(a)(2).

In addition to the initial stages, the remainder of the 404(c) process, including the opportunity for public comment and consultation with the Corps, is intended to obtain information relating to whether corrective action is available to reduce the adverse impacts of the discharge. 40 CFR 231.4(a), 231.6. EPA’s final rule preamble recognized the role the Corps permitting process would play in implementing corrective action identified during the Section 404(c) process. In response to a commenter that asked for EPA to provide an opportunity for public comment on any corrective action “proposed by the permitting authority during the consultative process, where the effect of such corrective measures is to obviate the need for the 404(c) action,” EPA indicated that “in such a situation, it would be more appropriate for the public comment to come as part of the permit process rather than the 404(c) procedure, since it will be the permitting authority who will have the responsibility for incorporating appropriate corrective measures into a permit.” 44 FR 58081, October 9, 1979.

It is important to note that the regulations envision that all the 404(c) regulatory steps would occur over relatively short timeframes. 40 CFR 231.3(a)(2), 231.4(a), 231.5(a), 231.6. Although

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EPA's regulations allow for an extension of time, this exception was only intended where there is good cause. 40 CFR 231.8; *see* 44 FR 58079, October 9, 1979.

### *C. CWA Section 404(q)*

Section 404(q) directs the Secretary of the Army to enter into agreements with various federal agencies, including the EPA "to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section." The agreements must be developed "to assure that, to the maximum extent practicable" the Corps decision on a permit application will be made no later than 90 days after the application is published.

EPA and the Corps have entered into various agreements pursuant to Section 404(q). The operative agreement was entered in 1992. Part IV, paragraph 3 of the 1992 EPA and Army Memorandum of Agreement to implement Section 404(q) (hereinafter referred to as the "404(q) MOA"), sets forth the "exclusive procedures" for elevation of individual permits cases. Once the process is initiated, the 404(q) MOA outlines a process to resolve EPA's concerns that, if necessary, culminates with the Corps providing EPA with a copy of the Statement of Findings/Record of Decision prepared in support of the permit decision "to assist the EPA in reaching a decision whether to initiate 404(c) before the permit is issued or activity may begin." The MOA provides a 10-day period for EPA to initiate the Section 404(c) process before the permit is issued or the activity may begin.

### **IV. Withdrawal of the Proposed Determination**

After conferring with EPA's General Counsel, EPA Region 10 is concluding the withdrawal process that was initiated on July 19, 2017. EPA's July 19, 2017 notice stated that it was

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proposing to withdraw the 2014 Proposed Determination “[b]ecause the Agency retains the right under the settlement agreement to ultimately exercise the full extent of its discretion under Section 404(c), including the discretion to act prior to any potential Army Corps authorization of discharge of dredged or fill material associated with mining the Pebble deposit, the Agency believes that withdrawing the Proposed Determination now, while allowing the factual record regarding any forthcoming permit application to develop, is appropriate at this time for this particular matter.” 82 FR 33124. In suspending this withdrawal process, EPA noted that “the factual record regarding the permit application can develop notwithstanding the Proposed Determination” and EPA “has discretion to consider that factual record after it has developed.” 83 FR 8670, February 28, 2018.

EPA has carefully considered the positions articulated in 2014 Proposed Determination and the 2017 and 2018 notices in light of the developments since they were published. First, the Corps’ DEIS includes significant project-specific information that was not accounted for in the 2014 Proposed Determination and, based on that information, the Corps has reached preliminary conclusions that in certain respects conflict with preliminary conclusions in EPA’s 2014 Proposed Determination. Second, there are other processes available now, including the 404(q) MOA process, for EPA to resolve any issues with the Corps as the record develops. EPA believes these processes should be exhausted prior to EPA deciding, based upon all information that has and will be further developed, to use its Section 404(c) authority. The issues relating to the development of the record align with EPA’s original, July 2017 rationale for withdrawing the 2014 Proposed Determination. For these reasons, Region 10 has now concluded that it is more appropriate to use well-established mechanisms to raise project-specific issues as the record develops during the permitting process and consider the full record before potential future

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decision-making on this matter, instead of maintaining a Section 404(c) process that is now five years old and does not account for the voluminous information provided in the permitting process.

#### *A. Record Developments*

EPA is withdrawing the 2014 Proposed Determination because there is new information that has been generated since 2014, including information and preliminary conclusions in the Corps' DEIS, that conflict with EPA's Proposed Determination and that EPA will need to consider before any potential future decision-making regarding this matter. As discussed below, the current record before the agency is different from the one considered by the Regional Administrator in 2014 and, consistent with general administrative law principles for agency decision-making, EPA must consider the entire record of this proceeding. As a result, any decision-making process under Section 404(c) should, if initiated, be based on the available information at that time rather than based on a proposed determination which, through the passage of time, the submittal of a permit application, and a significant expansion of the record, has effectively grown stale.

Shortly after EPA issued the 2014 Proposed Determination, EPA was enjoined from working on the 2014 Section 404(c) process when a Federal District court issued a preliminary injunction. That injunction remained in place until May 11, 2017 when EPA and PLP settled the pending cases. EPA's record and work relating to the Proposed Determination was completely frozen from November 2014 until May 2017. Within a few months of its settlement with EPA, PLP submitted its permit application, and since that time, the Corps' record has grown significantly to include project-specific information, analyses, and preliminary conclusions developed during the permitting process.

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The record will only continue to grow until the Corps issues a final EIS, and during this time Region 10 is precluded under the settlement agreement from forwarding a Recommended Determination to EPA Headquarters until the Corps issues a final EIS or May 2021, whenever is sooner. EPA used its extension authority under 40 CFR 231.8 to suspend the process and keep the Proposed Determination pending during the timelines provided in the settlement agreement. 83 FR 8671, February 28, 2018. Although the regulations allow extensions for the short regulatory timeframes if there is good cause, these timeframes provide evidence that extensions authorized under 40 CFR 231.8 were not intended to allow for long-term gaps, as in this case, that could result in decision-making without the full record.

When EPA entered into the settlement agreement in 2017 and proposed to withdraw the Proposed Determination, EPA did not know if or when PLP would submit a CWA Section 404 permit application. And even once PLP submitted a permit application and despite the Corps' estimated schedule, EPA did not know and could not know when it issued its 2018 suspension exactly how long the NEPA process would take and how it would proceed. Given the current status of the NEPA process, it is now clear that EPA's 2014 Proposed Determination does not account for the significant project-specific information that has been developed and will be developed during the multi-year permitting process.

In particular, PLP's current proposal is to produce 1.3 billion tons of ore from the Pebble deposit over 20 years. The 2014 Proposed Determination relied heavily on the Bristol Bay Watershed Assessment, which evaluated three hypothetical mine scenarios that represented different stages of mining at the Pebble deposit, based on the amount of ore processed: Pebble 0.25 (approximately 0.25 billion tons of ore over 20 years), Pebble 2.0 (approximately 2.0 billion tons of ore over 25 years), and Pebble 6.5 (approximately 6.5 billion tons of ore over 78 years).

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These hypothetical mine scenarios drew on preliminary information developed by Northern Dynasty Minerals in 2011 and submitted to the Securities and Exchange Commission, consultation with experts, and baseline data collected by PLP to characterize the mine site, mine activities, and the surrounding environment. EPA 2014 ES-10, Ch. 6. The Assessment disclosed the uncertainties associated with these hypothetical scenarios and recognized that the exact details of any future mine plan for the Pebble deposit or for other deposits in the watershed would differ from EPA's mine scenarios. *Id.*

Although a number of aspects of the PLP's current proposal evaluated in the DEIS are similar to the mine scenarios evaluated in the Bristol Bay Watershed Assessment, there are aspects of PLP's proposal that differ from EPA's scenarios considered in the Assessment. While the agencies do not know the extent of the differences on the overall impacts of the project and how they may relate to the Corps' NEPA and 404 analyses, the distinctions themselves are evidence that there is now different information in the Agencies' records than in 2014.

While any subsequent mine expansion may change the mine components and impacts, differences between the 2014 projected mining proposal evaluated by EPA and PLP's current 20-year mining proposal include the following:

- the movement of most mine component facilities out of the Upper Talarik Creek watershed which may result in reduced impacts to aquatic resources in the Upper Talarik Creek watershed;
- the elimination of cyanide leaching as part of the ore processing, which eliminates risks of impacts due to cyanide that would otherwise be in tailings and process water and eliminates risk of cyanide spills;

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- the placement of a liner under the disposal facility containing pyritic tailings and potentially acid generating (PAG) waste rock, which would minimize the potential for groundwater contamination;
- the reduction in waste rock, which may make it more feasible to backfill PAG waste rock into the open pit at closure;
- the separation of pyritic tailings from bulk tailings, which may make it more feasible to backfill pyritic tailings into the open pit at closure and may result in the ability to more effectively reclaim the pyritic tailings/PAG waste rock site and reduce surface impacts and reduce water management needs of this site following closure; and
- the relocation of treated water discharge locations, which allows flow augmentation and may reduce impacts due to open pit dewatering.

In addition to these differences in the mining proposal, the Corps' DEIS and EPA's 2014 Proposed Determination draw some conflicting preliminary conclusions regarding the information about the project. EPA recognizes that these documents have different purposes and that the Corps has not yet prepared its specific Section 404(b)(1) Guidelines analysis. DEIS, Section 4.22 Wetlands and Other Waters/Special Aquatic Sites, 4.22-4. In addition, EPA's issuance of a Proposed Determination represents a judgment that the matter should be "look[ed] into" or "explored." While the Proposed Determination describes EPA's basis for its 2014 preliminary determinations, EPA has not rendered a final determination on this matter. The Corps' conclusions are also preliminary, and EPA provided detailed comments on the Draft EIS and 404 PN on July 1, 2019 which raise issues for the Corps' consideration about some of the Corps' analyses and preliminary conclusions (including the examples discussed below). EPA's July 1, 2019 letters also make recommendations to provide significant additional information

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about key project components and plans and improve the environmental modeling and other aspects of the impact assessment.

In today's decision, EPA is not seeking to resolve any conflicting preliminary conclusions of the Agencies or conclusively address the merits of the underlying technical issues. Rather, in withdrawing the Proposed Determination, EPA has considered the full record as it now stands, including the conflicting preliminary conclusions of the Agencies. EPA is providing a few examples of the divergent views expressed by the Agencies on some key questions that will ultimately need to be resolved. The examples are not an exhaustive list but are included to illustrate that the Agencies have expressed divergent views on important issues related to the impact of the proposed project.

For example, the DEIS states in a section regarding fish displacement and habitat loss that "there is sufficient available habitat for relocation without impacts to existing populations...[t]he extent or scope of these impacts would [be] limited to waters in the vicinity of the mine site footprint, and may not be observed downstream from the affected stream channel." DEIS Section 4.24, page 4.24-8. However, EPA's 2014 Proposed Determination states that "[t]he elimination and dewatering of anadromous fish streams would also adversely affect downstream habitat for salmon and other fish species." Proposed Determination 2014, 4-9 (citations omitted).

As another example, the Alaska District's DEIS preliminarily concluded in a section discussing impacts on coho and Chinook populations that:

[C]onsidering the low quality and low use of coho and Chinook rearing habitat, the lack of spawning in SFK east reaches impacted, and the low level of coho spawning in NFK Tributary 1.190, measurable impacts to salmon populations would be unlikely...modeling indicates that indirect impacts associated with mine operations would occur at the individual level, and be attenuated upstream of the confluence of the NFK and SFK with no measurable impacts to salmon populations.

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DEIS, Section 4.24, page 4.24-6. For comparison, EPA's Proposed Determination preliminarily concluded that:

The headwater and beaver-modified habitats eliminated or dewatered by the Pebble 0.25 stage mine could support [coho and Chinook] populations that are distinct from those using habitats farther downstream in each watershed. Besides destroying the intact, headwater-to-larger river networks of the SFK, NFK, and UTC watersheds, stream losses that eliminate local, unique populations could translate into a substantial loss of genetic variability with impacts extending well beyond the footprints of the lost habitats.... Thus, loss of the SFK, NFK, and UTC watersheds' discrete fish populations could have significant repercussions well beyond that suggested by their absolute proportion within the larger watersheds.... Thus, the elimination or dewatering of nearly 5 miles (8 km) of salmon streams caused or facilitated by the discharge of dredged or fill material for the Pebble 0.25 stage mine could reduce the overall productivity of the SFK, NFK, and UTC watersheds for both species, at a level that the aquatic ecosystem may not be able to afford.

Proposed Determination 2014, 4-8 (citations omitted). Furthermore, EPA anticipates that additional information will continue to become available through the Corps' ongoing permit review process that was not available at the time of the Proposed Determination. The Corps' Draft EIS received over 100,000 public comments. In addition to these comments now in the record, EPA expects that additional information relevant to EPA's decision-making will become available through the permitting process. All this information represents the full record that EPA would ultimately need to consider as part of any regulatory decision-making.

Given the need for any final EPA 404(c) decision to be based on the entire record, EPA has concluded that a Proposed Determination which in its current form does not account for the full record and does not grapple with differing conclusions, including those noted above, cannot serve as a basis for such a decision. If in the future EPA decides to proceed under its 404(c) authority, a new proposed determination would be appropriate to ensure consideration by the Regional Administrator of the full record prior to making the required determination under 40

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CFR 231.3(a) and ensure meaningful public engagement through the public comment period on any new proposed determination. As discussed below, EPA concludes that the proper avenue for considering the full available record and resolving technical issues, including conflicting information and conclusions, should be through the now available processes before any potential decision-making by EPA.

*B. Process Opportunities as the Record Develops*

EPA is also withdrawing the 2014 Proposed Determination because it has determined that given the record developments, as well as the language and structure of the 404(c) regulations, as discussed above, at this time, the appropriate sequencing is to resolve technical issues during the Corps' permitting process rather than through a separate 404(c) process initiated in 2014 that does not reflect the full record.

EPA is participating in the Corps' NEPA process as a cooperating agency for the preparation of the EIS pursuant to the Corps' invitation and schedule. In this role, EPA has provided significant technical comments to the Corps relating to impacts of the project. EPA has and will continue to work constructively with the Corps as a cooperating agency, providing special expertise in specific areas requested by the Corps, including: alternatives; recreation; aesthetics and visual resources; soils; surface- and groundwater hydrology; water and sediment quality; wetlands and special aquatic sites; vegetation; and mitigation. EPA plans to continue to work with the Corps and the other cooperating agencies on the next steps in the NEPA process, including the development of the final EIS and other information to inform the Corps' permit decision.

In addition to supporting the Corps as a cooperating agency, EPA is evaluating the information relevant to the Section 404(b)(1) Guidelines analysis and providing feedback to the

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Corps. EPA's July 1, 2019 comments on the 404 PN for Pebble's permit application stated that it "has concerns regarding the extent and magnitude of the substantial proposed impacts to streams, wetlands, and other aquatic resources that may result, particularly in light of the important role these resources play in supporting the region's valuable fishery resources."

In its Section 404 letter, EPA Region 10 also invoked the process to resolve these concerns pursuant to the 404(q) MOA. EPA's June 1, 2019 letter stated that "Region 10 finds that this project as described in the PN may have substantial and unacceptable adverse impacts on fisheries resources in the project area watersheds, which are aquatic resources of national importance."

EPA recognizes that the Corps, through well-established processes of continued analysis and coordination with EPA, may resolve some of the issues raised by EPA's letter. In addition, EPA recognizes that it is incumbent on the Agency to reanalyze its prior position, which was based on hypothetical scenarios, now that there is actual, non-speculative information before EPA in the form of a Section 404 permit application and associated information.

As such, EPA believes it is appropriate to defer to the Corps' decision-making process to sort out the information before deciding whether to initiate a Section 404(c) process based on the full record before the agencies. This approach is appropriate in these circumstances in light of the record developments and EPA's regulations as described above. Under the statute and regulations, the Corps is the lead agency for issuing permits under Section 404(a). The Corps should have the first opportunity to consider project-specific information here without having to contend with a 404(c) proposal that does not account for all of the available information.

Moreover, when EPA is considering use of its authority under Section 404(c), the Corps plays an important coordination and consultation role in the initial stages of EPA's decision-

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making, and that role may differ depending on whether or not there is a pending CWA 404 permit application. As discussed above, the regulations provide that where there is a permit application pending, “it is anticipated” that the coordination process “will normally be exhausted prior to any final decision of whether to initiate a 404(c) proceeding.” The current coordination procedures between EPA and the Corps on individual permitting decisions is now memorialized in the 1992 404(q) MOA. The elevation procedures represent a longstanding, well-understood, and agreed-upon process that the agencies have utilized for more than two decades.

Importantly, EPA could not have initiated the 404(q) MOA process when EPA Region 10 started its Section 404(c) process for the Pebble deposit area in 2014 or when EPA issued its February 2018 suspension notice. After the Corps noticed PLP’s 404 permit application for public comment, EPA could and did initiate the Section 404(q) MOA procedures. Now that the 404(q) MOA process is available to resolve issues, EPA has determined that it is most appropriate to use that process to resolve issues as the record develops before engaging in any possible future decision-making regarding its Section 404(c) authority. By initiating the 404(q) MOA process, EPA Region 10 is following an avenue to work with the Corps Alaska District throughout the permitting process to resolve concerns. If unresolved, EPA Region 10 can elevate to EPA Headquarters, which can decide whether to engage with the Department of the Army. If EPA proceeds through this process and its concerns remain outstanding when the Corps is ready to issue the permit, the MOA specifically contemplates that EPA will have an opportunity to consider exercising its Section 404(c) authority at that time. If EPA believes that these processes are not addressing its concerns, EPA retains the discretion and the authority to decide to use its Section 404(c) authority “whenever” it determines, in its discretion, that the statutory standard for exercising this authority has been met, including at the end of 404(q) MOA process, by

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initiating a new Section 404(c) process that is informed by the entirety of the facts and the Corps' decision-making known to the Agency at that time.<sup>4</sup>

The Corps, in addition to the public, also plays an important role in identifying information or potential corrective actions to address EPA's unacceptable adverse effects finding. In particular, EPA's regulations provide a 15-day opportunity for the Corps to provide such information prior to the issuance of the proposed determination. Although the Corps participated in EPA's 2014 process prior to the issuance of the Proposed Determination, the nature of the Corps' engagement in this instance was somewhat limited because there was no permit application pending. Now that PLP submitted a permit application, the Corps is in a different position regarding its ability to provide information relating to corrective actions to prevent unacceptable adverse effects and that information should be accounted for in the Corps' permitting process as well as by EPA.

For these reasons, EPA has determined that it is most appropriate to participate in the 404 permitting processes to address concerns as the record develops rather than continue with a separate 404(c) action initiated in 2014. This approach will ensure that both agencies will be able to consider the full record and engage on issues consistent with their respective roles provided for under the Clean Water Act and EPA's implementing regulations.

## **V. Response to Comments**

EPA's February 2018 Federal Register notice summarized the comments EPA received on the proposal to withdraw. Two of EPA's bases for withdrawal in 2017 focused on giving time for

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<sup>4</sup> The 404(q) MOA states that "This agreement does not diminish either Agency's authority to decide whether a particular individual permit should be granted, including determining whether the project is in compliance with the Section 404(b)(1) Guidelines, or the Administrator's authority under Section 404(c) of the Clean Water Act." Part I, paragraph 5.

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PLP to submit a permit application and to allow for Corps review of that permit application. EPA acknowledges that given the developments since EPA's July 2017 notice those rationales for withdrawal no longer apply to this situation.

As discussed above, EPA's withdrawal action aligns with the third basis included in EPA's original July 2017 proposed withdrawal relating to the factual development of the record for PLP's permit application and EPA's ability, consistent with its settlement agreement, to exercise Section 404(c) prior to any potential Corps authorization of discharge of dredged or fill material associated with mining the Pebble deposit. EPA is focusing its responses on that issue and on comments that EPA explained that it was not addressing in its 2018 suspension notice.

EPA's February 28, 2018 notice indicated that "in light of EPA's forbearance from proceeding to the next step of the section 404(c) process..., EPA concludes that the factual record regarding the permit application can develop notwithstanding the Proposed Determination." 83 FR 8670. Although that remains true, given the need for any final EPA 404(c) decision to be based on the entire record, EPA has concluded that a Proposed Determination which in its current form does not account for the full record and does not grapple with differing conclusions, including those noted above, should not serve as a basis for such a decision.

In response to comments that EPA cannot withdraw a Proposed Determination without considering the proposed restrictions or the science and technical information, EPA's February 28, 2018 notice stated that such comments were "moot" in light of EPA's decision not to withdraw the Proposed Determination. 83 FR 8670. Although EPA is now withdrawing the Proposed Determination, such comments remain outside the bounds of EPA's basis for its decision. Indeed, EPA's July 19, 2017 notice indicated that it was "not soliciting comment on the

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proposed restrictions or science or technical information underlying the Proposed Determination.” 82 FR 33124. Moreover, EPA’s February 28, 2018 notice made clear that such comments were outside the scope. 83 FR 8898. As in EPA’s prior notices, EPA is not basing its decision-making on technical consideration or judgments about whether the mine proposal will ultimately be found to meet the requirements of the 404(b)(1) Guidelines or results in “unacceptable adverse effects” under CWA section 404(c). The technical information is continuing to evolve through the ongoing section 404 and NEPA processes, and determinations under Section 404 will be made in conjunction with, and based on, the record when it is fully developed. Rather, EPA is withdrawing its 2014 Proposed Determination based on the considerations described in this notice and is continuing to consider the technical issues through its engagement with the Corps in these procedures. EPA will continue to consider the relevant science and technical information, including the information underlying its 2014 Proposed Determination, as part of the ongoing permitting process. This effort includes consideration of “any other information that is relevant to protection of the world-class fisheries contained in the Bristol Bay watershed in light of the permit application that has now been submitted to the Corps.” 83 FR 8670, February 28, 2018.

EPA’s February 28, 2018 notice indicated that comments received on the Administrator’s review “do not need to be addressed” because the Proposed Determination was not being withdrawn. 83 FR 8670. In general, these comments advocated for or against the Administrator’s review. Some commenters asked for additional opportunities for public input. EPA has satisfied all of the procedural requirements for withdrawing a proposed determination provided in 40 CFR 231.5(c). EPA’s regulations do not require EPA to propose a withdrawal of a proposed determination and take public comment. EPA took that step to comply with its

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settlement agreement obligation. EPA's regulations only require notification to all those that commented on the proposed determination or participated at the hearing and allow an opportunity for such persons to provide timely written recommendations concerning whether the Administrator should review the Regional Administrator's decision. 40 CFR 231.5(c); 44 FR 58081, October 9, 1979. EPA satisfied this requirement through its July 2017 notice. Through this process, the public had a full opportunity to comment on the very basis for EPA's withdrawal of the Proposed Determination and on whether the Administrator should review and reconsider the withdrawal. 82 FR 33124, July 19, 2017. EPA has now completed consideration of the issues raised as described in this notice. The General Counsel, who is the delegated official to act for the Administrator, did not notify the Regional Administrator of his intent to review as described in the regulations, thus ending the regulatory process.

EPA has also determined that it is unnecessary to seek additional public comment as indicated by the February 2018 Federal Register notice. Such an additional public comment is not required under EPA's regulations. EPA notes that it provided numerous opportunities for the public to comment on the Bristol Bay Watershed Assessment and Proposed Determination, including on the rationale for EPA's decision to withdraw the Proposed Determination. Furthermore, the Corps has provided an opportunity for the public to comment on the Draft EIS and the public has an opportunity to comment on the final EIS. *See* 40 CFR 1503.1(b). Finally, if EPA initiates the Section 404(c) process pursuant to 40 CFR 231.3 in the future and proceeds to publish a new Proposed Determination, such a decision would be subject to notice and comment under EPA's regulations.

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## **VI. Conclusion**

Today's decision provides clarity and certainty that EPA Region 10 will be working through the Corps' permitting process, including as a cooperating agency, and the 404(q) MOA process for engagement on this matter. This notice concludes EPA's withdrawal process that was initiated on July 19, 2017 and suspended on January 26, 2018. As Regional Administrator and after conferring with EPA's General Counsel, I am providing notice of withdrawal of the 2014 Proposed Determination described herein under 40 CFR 231.5(c)(1).

Dated:

Chris Hladick  
Regional Administrator, EPA Region 10.