survival of local businesses, including the Iliamna Development Corporation.[195] Because the Ninth Circuit has held that "[t]he effect on the health of the local economy is a proper consideration in the public interest analysis,"[196] the requested injunction is in the public interest.

Third, informed decision-making by government agencies serves the public interest. Here, EPA's decision to preemptively exercise its Section 404 authority forecloses a fully-informed analysis because it preempts many of the most valuable elements of the usual permitting process, including participation by the Corps and the State. EPA's decision to evade the usual Section 404 permitting process is premised almost entirely on the BBWA.[197] The BBWA, however, makes assumptions about hypothetical mine scenarios that would not be capable of being permitted, and it suffers from a numerous other fundamental flaws.[198] Both EPA and BBWA peer reviewers agree it does not provide a sufficient basis for regulatory

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[195] *See id.* ¶¶ 31-39.

[196] *Alliance for the Wild Rockies*, 632 F.3d at 1138-39.

[197] *See* Ex. 18 (Letter from D. McLerran, US EPA, to T. Collier, Pebble Partnership (Feb. 28, 2014)).

[198] *See, e.g.*, Hodgson Decl. ¶¶ 6-21; Declaration of Michael Kavanaugh (June 12, 2014) ¶¶ 10-23 (describing myriad fundamental errors in EPA's BBWA); Declaration of Jaime Cathcart (June 20, 2014) ¶¶ 7-11 (EPA assessment of tailing dam failure risks was based on overbroad, outdated data); Declaration of Randy Bailey (June 24, 2014) ¶¶ 23-45 (EPA ignored extensive data provided by Pebble on fish abundance and density and also ignored data on mitigation measures); Declaration of Les Galbraith (June 23, 2014) ¶¶ 5-6 (EPA assumptions on dam failures and earthquakes are contradictory); Van Zyl Decl. ¶¶ 9-13 (describing inadequacy of EPA's BBWA as a decision document); Taylor Decl. ¶¶ 20-24 (EPA failed to consider relevant, extensive environmental baseline data); Buell Decl. ¶¶ 15-22, 24-25 (critical EPA assumptions on impacts on spawning habitat, culvert failure rates, and tailings dam failures are unsupported and there are ample opportunities for mitigation in the project area and off-site); Ford Decl. ¶¶ 18-20 (EPA failed to properly consider precipitation in predicting tailings pond chemistry; did not account for leachate controls; and erroneously assumed improper transportation corridor and road maintenance); Declaration of Jason Quigley (June 23, 2014) ¶¶ 15-20 (EPA mischaracterized independent findings regarding success of fish mitigation).

decision-making.[199] The public interest favors enjoining EPA's ill-informed veto proceeding and allowing a more thorough and inclusive analysis to take place during a permit proceeding.[200]

The public also has an interest in transparent and accountable government decision-making.[201] As discussed above (at 7-9), EPA records show that EPA was coordinating with Pebble opponents regarding a possible veto as of 2009 and continued to do so for years. Tellingly, EPA's conduct recently prompted an EPA Inspector General review to determine whether the agency has "adhered to laws, regulations, policies and procedures in developing its assessment of potential mining impacts on ecosystems in Bristol Bay, Alaska."[202] Because EPA's decision to conduct Section 404(c) proceedings rests on conduct that was opaque at best (and potentially unlawful and improper), an injunction is in the public interest.

Finally, the public would be harmed by wasting public (and private) resources in an unlawful preemptive veto proceeding. When the Pebble Partnership (or another applicant) submits a permit application, a veto proceeding would remain unnecessary and premature until the Corps and the State approved the applicable permits. An injunction therefore benefits the public by halting a proceeding that may be entirely unnecessary.

## CONCLUSION

For all the foregoing reasons, the Court should grant the Pebble Partnership's motion and enjoin EPA from moving forward with the preemptive Section 404(c) veto proceeding.

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[199] *See supra* at 10-11 and notes 51 & 52.

[200] Maccay Decl. ¶¶ 22-23, 28; Gallagher Decl. ¶¶ 16-22; Taylor Decl. ¶¶ 33-35; Declaration of Dudley Reiser W. Reiser (June 20, 2014) ("Reiser Decl.") ¶¶ 11-16 (explaining how extensive data gathered to date on fish habitat and available mitigation measures in the project area are reliable and should be part of the evaluation of project impacts).

[201] *See* Transparency and Open Government, 74 Fed. Reg. 4685-86 (Jan. 26, 2009); *cf. Creosote Council v. Johnson*, 555 F. Supp. 2d 36, 40 (D.D.C. 2008) (concluding that a preliminary injunction "serves the general public interest in open and accountable agency decision-making").

[202] Ex 21 (Memorandum from P. Gilbride, US EPA, to Nancy Stoner, US EPA (May 2, 2014)).

Respectfully submitted,

CROWELL & MORING LLP

/s/ Kyle W. Parker

Kyle W. Parker, ABA 9212124
Jonathan W. Katchen, ABA No. 0411111
CROWELL & MORING LLP
1029 West 3rd Avenue, Suite 550
Anchorage, Alaska 99501
Telephone: (907) 865-2600
Facsimile: (907) 865-2680
kparker@crowell.com
jkatchen@crowell.com

Richard E. Schwartz, *Pro Hac Vice*
John C. Martin, *Pro Hac Vice*
Susan M. Mathiascheck, *Pro Hac Vice*
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
Telephone: (202) 624-2500
Facsimile: (202) 628-5116

*Attorneys for Plaintiff Pebble Limited Partnership*

Samuel J. Fortier
FORTIER & MIKKO, P.C.
1600 A. St. Suite 101
Anchorage, AK 99501
Telephone: (907) 277-4222
Facsimile: (907) 277-4221
sfortier@fortmikk.alaska.com

*Attorney for Plaintiff Alaska Peninsula Corporation*

Dated: June 27, 2014

**CERTIFICATE OF SERVICE**

I certify that on this 27th day of June, 2014, I electronically filed a copy of the foregoing using the CM/ECF system, which will electronically serve the attorneys of record in this case. A true and correct copy of the foregoing was served via U.S. mail on the following defendants as they have not entered an appearance in the matter for electronic service:

Karen L. Loeffler, US Attorney General
222 W. 7th Avenue, Room 253, #9
Anchorage, AK 99513-7567

Eric H. Holder, Jr., Attorney General
US Department of Justice
950 Pennsylvania Ave., NW
Washington D.C. 20530-00001

Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

Dennis J. McLerran
Regional Administrator of US EPA Region 10
1200 6th Avenue, Suite 900
Seattle, WA 98101

/s/ Joyce Sheppard
Joyce Sheppard, Legal Secretary

SAM HIRSCH
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
KAREN L. LOEFFLER
United States Attorney
District of Alaska
MARK A. NITCZYNSKI
United States Department of Justice - ENRD
Environmental Defense Section
999 18th Street; South Terrace, Suite 370
Denver, CO 80202
Phone: (303) 844-1498; Fax: (303) 844-1350
Email: mark.nitczynski@usdoj.gov
KENT E. HANSON
U.S. Department of Justice - ENRD
Environmental Defense Section
P.O. Box 7611
Washington, DC 20004
PHONE: (206) 220-4198; Fax: (202) 514-8865
Email: kent.hanson@usdoj.gov
RICHARD POMEROY
Assistant United States Attorney
Federal Building & U.S. Courthouse
222 West Seventh Avenue, #9
Anchorage, Alaska 99513
Telephone: (907) 271-5071

Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ALASKA**

| | |
|---|---|
| PEBBLE LIMITED PARTNERSHIP and ALASKA PENNINSULA CORPORATION,<br><br>Plaintiffs,<br><br>and<br><br>STATE OF ALASKA,<br><br>Intervenor-Plaintiff,<br><br>vs.<br><br>UNITED STATES ENVIRONMENTAL | Case No. 3:14-cv-00097-HRH<br><br>**DEFENDANTS' OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION** |

PROTECTION AGENCY and DENNIS J. MCLERRAN, in his official capacity as Regional Administrator of EPA Region 10,

Defendants,

and

UNITED TRIBES OF BRISTOL BAY, NUNAMTA AULUKESTAI, and NATURAL RESOURCES DEFENSE COUNCIL,

Intervenor-Defendants.

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## INTRODUCTION

As we explained in support of our motion to dismiss, the premature claims asserted by Plaintiffs Pebble Limited Partnership ("Pebble") and Alaska Peninsula Corporation ("APC") and by Intervenor-Plaintiff State of Alaska (collectively, "Plaintiffs") should be dismissed. As a result, Plaintiffs have *no* likelihood of success on the merits, and the two motions for preliminary injunction should be denied on that basis alone.

In addition, as discussed further below, Plaintiffs would not succeed on the two claims under the Administrative Procedure Act ("APA") that they have asserted, challenging the decision by Region 10 of the U.S. Environmental Protection Agency ("EPA") to evaluate whether to make a determination under section 404(c) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1344(c). First, Plaintiffs' assertion that EPA Region 10's decision to commence the 404(c) review process before Pebble has submitted a CWA section 404 permit application to the Army Corps of Engineers ("Corps") exceeds EPA's authority under CWA section 404(c) is based on a wholesale misreading of section 404(c). That provision authorizes the EPA Administrator to make a section 404(c) final determination "whenever" the Administrator determines that the statutory criteria are met. Second, Plaintiffs' claims that EPA's initiation of the 404(c) review process at this juncture violates the Alaska Statehood Act and the Cook Inlet Land Exchange legislation are defective for numerous reasons, primarily because nothing in the Statehood Act precludes the application of duly enacted federal legislation to lands and mineral deposits granted to the State; those laws, including the CWA, apply to those lands and mineral deposits just as they do elsewhere.

Plaintiffs' allegations regarding the other factors that they need to establish in order to obtain a preliminary injunction also fall short. Pebble's and APC's allegations of harm fail principally because the their financial difficulties stem from current market conditions in which there is little interest in financing long lead-time, capital intensive mining projects such as Pebble. Alaska's

allegations fail largely because they focus on revenues that would not be received for many years, and thus cannot form the basis for preliminary relief, and because the allegations are based on the unfounded assumptions that EPA's final determination under section 404(c) would prohibit all mining of the Pebble deposit while the numerous other permitting processes required for the Pebble project would not curtail the project's scope. Finally, the balancing of harms and consideration of the public interest weigh very heavily against enjoining EPA's ongoing administrative review. There already has been great public interest in moving the review process forward, and potential investors in the mine operation and other business entities would benefit greatly from the additional certainty that completing the section 404(c) process may provide.

## BACKGROUND

## I. STATUTORY AND REGULATORY BACKGROUND

### *A. Section 404 of the Clean Water Act*

Congress passed the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act sets several goals, including attainment and preservation of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife . . . ." *Id.* § 1251(a)(2). To further its goals, the Act prohibits "discharge of any pollutant" into navigable waters except in accordance with the Act's terms. *Id.* § 1311(a). The term "pollutant" encompasses not only chemical and biological waste but also, *e.g.*, rock and sand. 33 U.S.C. § 1362(6).[1]

The Act creates two types of permits that authorize discharges of pollutants. Section 404 enables the Corps and approved States to issue permits for discharges of dredged or fill material. 33

[1] Pollutants are known as "fill material" when their discharge either replaces any portion of a water of the United States with dry land or changes the bottom elevation of a water body. *See* 33 C.F.R. § 323.2(e)(1); 40 C.F.R. § 232.2. The term "dredged material" means "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2.

U.S.C. § 1344(a), (e), (h). Section 402 authorizes EPA and approved States to issue permits for discharges of pollutants other than dredged or fill material. *Id.* § 1342(a), (b).

Although the Corps is charged with issuing § 404 permits, the CWA vests EPA with several authorities that are integral to implementation of the § 404 program. First, EPA can authorize individual States to issue § 404 permits. 33 U.S.C. § 1344(h). EPA oversees State programs and may object to particular permits or rescind a State's permitting authority entirely. *Id.* § 1344(i), (j). Second, the Act requires EPA, in conjunction with the Corps, to issue regulations known as "404(b)(1) Guidelines" that govern the environmental evaluation of permit applications. *Id.* § 1344(b)(1), (h)(1)(A)(i); *see* 40 C.F.R. pt. 230. Third, the Act directs EPA and the Corps to coordinate under § 404 through a memorandum of agreement ("404(q) Memorandum"). 33 U.S.C. § 1344(q). Fourth, EPA may bring enforcement actions for illegal discharges of dredged or fill material and violations of State § 404 permits. *Id.* §§ 1319(a)(3), 1344(n), (s).[2] Fifth, EPA may bring enforcement actions for discharges of dredged or fill material without § 404 permits. *Id.* Sixth, and most relevant to this lawsuit, § 404(c) authorizes EPA to prohibit the specification of, or deny or restrict the use of, any defined area as a disposal site for dredged or fill material. *Id.* § 1344(c).

The CWA places no temporal restrictions or conditions precedent on the exercise of the authority vested in EPA by § 404(c). Instead, § 404(c) authorizes the Administrator:

> 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. . . .

33 U.S.C. § 1344(c); 40 C.F.R. § 231.1(a) (emphasis added). Section 404(a) allows the Corps to issue a permit authorizing a company or individual to discharge fill into specified disposal sites:

[2] The Corps also may enforce violations of § 404 permits that it issues. 33 U.S.C. § 1344(s).

> The Secretary [of the Army, acting through the Corps,] may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites. . . .

33 U.S.C. § 1344(a). But § 404(b) makes the specification of a disposal site subject to § 404(c). "Subject to subsection (c) . . ., each such disposal site shall be specified for each such permit by the Secretary. . . ." 33 U.S.C. § 1344(b) (emphasis added). Therefore, EPA's authority under subsection (c) of is not constrained by subsections (a) or (b), which establish the Corps' authority to issue permits and specify disposal sites. And § 404(c) authorizes EPA to (1) prohibit or withdraw the specification by the Corps or an approved State of any defined area as a disposal site, and (2) deny or restrict the use of any defined area as a disposal site. 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1(a). In short, the Corps is authorized to specify a disposal site in a permit, but that is subject to EPA's authority to prohibit, deny, or restrict the use of any defined area as a disposal site any time EPA makes the requisite unacceptable adverse effects determination.[3]

Section 404's division of authority is the result of a compromise between the House and Senate versions of the Clean Water Act. In light of the Corps' then-existing authority to issue permits for discharges of fill material, *see* 33 U.S.C. § 403, the House would have allowed the Corps to continue issuing fill permits without formal EPA involvement. H.R. 11896, 92d Cong., § 2 (Mar. 11, 1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1063-64 (1973) (LEGIS. HIST.) (proposed § 404). But the Senate would have given EPA sole authority to issue fill permits. S. 2770, 92d Cong., § 2 (Nov. 2, 1971), 2 LEGIS. HIST. at 1392 (proposed § 402(m)). The Act reconciled the views of the two chambers. Congress

[3] Plaintiffs often refer to EPA's authority under § 404(c) as a "veto." While that term sometimes has been used as a kind of short-hand, it does not capture the scope of actions that EPA is authorized to take. For example, EPA may restrict the use of any defined area as a future disposal site for dredged or fill material. *See* 40 C.F.R. § 231.2(c). *See also* Dkt. 116-1 (Executive Summary of Proposed Determination) at 9.

provided the authority for the Corps to specify dredged and fill disposal sites and issue permits, but it authorized EPA to prohibit, withdraw, deny or restrict use of any defined area for disposal of dredged or fill material whenever EPA determines that the discharge of those materials will have specified unacceptable adverse environmental effects. *See generally Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 609-10, 612-14 (D.C. Cir. 2013).

### *B. EPA's regulations implementing § 404(c)*

In 1979, EPA promulgated regulations governing the exercise of its § 404(c) authority. *See* 40 C.F.R. pt. 231; 44 Fed. Reg. 58,076 (Oct. 9, 1979). Those regulations apply to "all existing, proposed or *potential* disposal sites" for discharges of fill material. 40 C.F.R. § 231.1(c) (emphasis added). In the preamble to the regulation, EPA responded to commenters' objections that "the use of 404(c) to protect a site before there is a permit application to use the site" was "outside the scope of section 404(c)," and explained its authority to act before a permit application is filed:

> EPA feels that the statute clearly allows it to use 404(c) before an application is filed. First, the statute says that the Administrator is authorized to take action "whenever" he makes certain determinations. Second, the actions he is authorized to take are *not* limited to permit situations. Rather, he may prohibit the specification of a site or deny or restrict the use of a site for specification. The phrase "any defined area" does not lead to a contrary conclusion. That phrase merely means that a 404(c) action must be directed at a particular or identifiable area rather than "wetlands" or some other generic category. The Corps does not "define" areas through the permit process: it "specifies" them.

44 Fed. Reg. at 58,077 (emphasis added).

In sum, both the § 404(c) regulations and the preamble to those regulations clearly articulated EPA's construction of the statute. Thus, since at least 1979, EPA construes § 404(c) to authorize the agency to prohibit, withdraw, deny or restrict the use of any defined area for specification of a disposal site "before a permit is applied for, while an application is pending, or after a permit has been issued." 44 Fed. Reg. at 58,076.

EPA's regulations establish a multi-step process that includes public notices, public comment, and consultation with affected parties, all of which must be completed before EPA may make a 404(c) final determination to prohibit, deny or restrict disposal in a defined area. *See* 40 C.F.R. pt. 231. That process begins with an EPA Regional Administrator,[4] who "may" initiate § 404(c) review proceedings if he has "reason to believe," after evaluating the available information, that an "unacceptable adverse effect" could result from the use of any defined area as a disposal site for dredged or fill material. 40 C.F.R. § 231.3(a).[5] The Regional Administrator ("RA") must notify the Corps' District Engineer, the owner of the site, and the permit applicant, "if any," that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, of any defined area as a disposal site. *Id.* § 231.3(a)(1). The RA's issuance of such a notice of intent to "proceed under its Clean Water Act section 404(c) regulations to review potential adverse environmental effects of discharges of dredged and fill material associated with mining the Pebble deposit," Ex. 1 to Amended Compl. (Dkt. 22-1), is the agency "action" challenged by Plaintiffs in this case. Dkt. 22, ¶¶ 59, 65, 78; Dkt. 48, ¶¶ 7, 31, 38.

Once the RA gives notice of intent to issue a public notice of a proposed determination, the regulations allow for a minimum 15-day period during which the owner of the site or applicant, if any, may seek to demonstrate, to the satisfaction of the RA, that no unacceptable adverse effects will occur. *Id.* § 231.3(a)(2). The regulations also provide that, if such a demonstration is not made, and

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[4] EPA has ten regional offices, designated EPA Region 1 through EPA Region 10. The chief of each regional office is the Regional Administrator. *See* 40 C.F.R § 1.5(a). EPA Region 10 is based in Seattle, and has responsibility for EPA matters in Alaska, Washington, Oregon and Idaho.

[5] "Unacceptable adverse effect" is defined to mean "impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas." 40 C.F.R. § 231.2(e).