of a permit application that described the scope and details of the project being proposed, the anticipated environmental impact, and techniques to be employed to mitigate or control that impact. An attempt by President Obama's EPA to preemptively veto a mining project in Alaska before the submission of a permit application was met with rebuke by the U.S. House Committee on Oversight and Government Reform, which called the attempted veto "an unprecedented change in the agency's process for regulating resource and development projects," and called on EPA to "cease all preemptive 404(c) activity" to allow for the normal permitting process to take place.[4]

The previous Administration's other attempts to expand its Clean Water Act veto authority do not alter this. In 2007, USACE issued a permit to the Mingo Logan Coal Company, which President Obama's EPA then revoked in 2011. After protracted litigation, the U.S. Court of Appeals for the District of Columbia Circuit upheld this retroactive veto stating that EPA had the "authority to prohibit/deny/restrict/withdraw a specification at *any* time." *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 613 (D.C. Cir. 2013). Since EPA's post-permit veto authority was all that was before the court, however, this language is at most non-precedential dicta with respect to EPA's pre-permit application authority. But even if it were not dicta, a close reading of the opinion shows that the court had no intention to expand EPA's authority to vetoes before the submission of a permit *application*. Rather, it simply reached the unremarkable conclusion that EPA could veto a permit application after it had been filed. This is because the court made clear that EPA only had the power to veto "a specification" at any time. This language is key because the court later rejected Mingo Logan's argument that a "specification" occurs before the permit issues, declaring that: "During the permitting process, the disposal sites are proposed, reviewed — perhaps even 'specified,' as Mingo Logan contends — but the final specifications are included in the permit itself." *Id.* at 614. Thus, when the court expressed that EPA may exercise its veto power "pre-permit," it was referring to prior to the *issuance* of a permit by USACE, not prior to submission of a permit application since EPA must "review the preliminary specifications *pre*-permit to determine whether discharges will have the required 'unacceptable adverse effect.'" *Id.* at 616. It would be impossible to review such preliminary specifications before a permit application has been submitted. Since the court clearly affirms that EPA's power derives from having such specifications to review, *Mingo Logan* does not expand EPA's power to authorize pre-emptive vetoes.

Legal Support for Changed EPA Positions. EPA also has the authority to change its previously-held positions by adopting regulations limiting its post-permit veto authority and heightening the standards for invoking its veto authority. First, nothing in the *Mingo Logan* decision *requires* EPA to act after the issuance of a permit, so the rulemaking remains an appropriate exercise of agency discretion. And an agency's change in statutory interpretation is entitled to deference provided that the agency is able "to provide a reasoned explanation for the

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Evaluation Of Potential Mining In Alaska's Bristol Bay Watershed (Oct. 6, 2015) ("Cohen Report") at n.42, http://files.cohengroup.net/Final-Report-with-Appendices-compressed.pdf.

[4] For the full report by the House Oversight Committee, see Staff of H. Comm. on Oversight & Gov't Reform, 114th Cong., The U.S. Environmental Protection Agency's Unprecedented 404(c) Action in Bristol Bay, Alaska (2015), https://oversight.house.gov/report/report-on-epas-unprecedented-action-in-bristol-bay-ak/.

changed interpretation." *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1365 (D.C. Cir. 1999). A changed interpretation designed to better fit Congress's intent for a statute as a whole is an example of such a "reasoned explanation." *See, e.g., Ala. Educ. Ass'n v. Chao*, 539 F. Supp. 2d 378, 384 (D.D.C. 2008) (accepting reasoned explanation that furthered "the thrust and congressional purpose behind the statute"). Here, EPA can evoke Congress's intent to strike a proper balance between USACE and EPA authorities in creating an efficient yet environmentally protective process for granting and denying 404 permits under the Clean Water Act. *See, e.g., Coeur Alaska, Inc.*, 557 U.S. at 273-77 (2009) (describing USACE's leadership role in 404 permitting process and powers not to be usurped by EPA). Moreover, as described above, it is unlikely any plaintiff would be able to allege injury from such a regulatory change sufficient to support standing.

The amendments to the standards to be applied in a Section 404(c) veto process are also supported as an appropriate and necessary response to the staggering economic costs of permitting delays and uncertainty. The current permitting framework imposes significant risks and burdens on applicants that often stifle investment in development projects. For example, these complications make raising capital more difficult and make American mineral projects riskier investments, impacting local communities and the country's mineral supply. *See* Nat'l Mining Ass'n, *Permitting, Economic Value and Mining in the United States* 21-22 (June 2015). As one study recently concluded, the "onerous permitting process [] creates sufficient uncertainty to sometimes destroy the viability of new projects." Behre Dolbear, *Where to Invest in Mining* 8 (2015). According to some estimates, projects mired in delays in the federal permitting process represent up to 1.9 million jobs and $145 billion in gross domestic product. *See* U.S. Chamber of Commerce, *Progress Denied: A Study of the Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects* 16 (2011). When factoring in the prolonged inefficiencies of existing infrastructure, the total costs of these permitting delays could be as high as $3.7 trillion. *See* Common Good, *Two Years Not Ten Years: Redesigning Infrastructure Approvals* 1 (2015). By making it clear to stakeholders in development industries that the Agency will only initiate vetoes in limited circumstances where the record establishes the likelihood of irreparable harm to aquatic resources, EPA can avoid contributing to permitting delays and can inject more certainty into the 404 permitting process. Such a rationale would demonstrate a solid "reasoned explanation" for EPA's evolved statutory interpretation. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.") (citation omitted). The proposed amendments allow EPA to adapt to the commercial realities of modern development investment while furthering the purposes behind the Clean Water Act.

Conclusion

The proposed EPA actions are thus fully supported under existing law and would align with the current administration's goals of increasing certainty and predictability in the overall 404 permitting process, while facilitating higher levels of investment and timely advancement of U.S. resource and infrastructure projects. Given the uncertainty of achieving a legislative fix, EPA should consider taking administrative action to amend the 404(c) process.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PEBBLE LIMITED PARTNERSHIP, *et al.* **Plaintiffs,** vs. **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DENNIS J. MCLERRAN, in his official capacity as Regional Administrator of EPA Region 10,** **Defendants.**	**MOTION FOR PRELIMINARY INJUNCTION** **(33 U.S.C. § 1344; Pub. L. No. 85-508; Pub. L. No. 94-204)** **CASE NO. 3:14-cv-00097-HRH**

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INTRODUCTION

The Pebble deposit in southwest Alaska is the world's largest known undeveloped deposit of copper and gold. The Pebble Limited Partnership ("Pebble Partnership") has staked mineral claims to the Pebble deposit that it and its predecessors located through exploration in accordance with law.

The State of Alaska obtained ownership of the Pebble deposit land through a 1976 three-way land exchange (the "Cook Inlet Land Exchange") involving the State, the federal government, and Cook Inlet Region, Inc. ("CIRI"). In this land exchange (probably the largest in U.S. history) the State gave up economically valuable lands, the federal government received lands to complete a national park (Lake Clark Park and Preserve), and CIRI obtained State lands that it wanted. In return, the State received, among other lands, those containing the Pebble deposit. The State selected the Pebble lands, which had been federally protected from development, for their mineral potential.

The Challenged EPA Action

Approximately 36 years after the Cook Inlet Land Exchange, on February 28, 2014, the U.S. Environmental Protection Agency ("EPA") sent a letter to the Pebble Partnership, the State, and the U.S. Army Corps of Engineers ("Corps") formally notifying them that EPA was asserting the authority to veto a permit to discharge dredged or fill material "associated with mining the Pebble deposit"—a permit that no one had applied for.

Under Section 404, only the Corps can specify a disposal site and issue a permit, and until EPA issued that February 28 letter EPA had never tried to veto a permit that the Corps did not intend to issue. EPA's assertion of authority prior to the submission of a permit application preempts the Corps and the other permitting agencies. By asserting the authority to veto a permit that no one had yet sought, EPA substituted its own veto proceeding for the permitting process that Congress delegated to the Corps. Here, the Corps' process would include an environmental impact statement under the National Environmental Policy Act, with the participation of environmental permitting agencies (primarily State agencies) that have special expertise in the various aspects of a mining project requiring a Section 404 permit in Alaska.

EPA's New Role

EPA's action—taken in the absence of a specific proposed project—is an exercise in land use planning. EPA has decided that it has the power to ban mining in an area that the State has designated for mineral development, so the land can instead function as a conservation area to protect a fishery.

Under the Clean Water Act, only the Corps can issue Section 404 dredge and fill permits. EPA's role under Section 404 is to issue guidelines (Section 404(b)), to comment, and under certain circumstances to veto a Corps' permit after consultation with the Corps (Section 404(c)). Permit applicants submit specific proposals and the Corps and EPA respond. EPA has never tried to use Section 404 to prospectively ban activity in an area.

For the Pebble deposit, however, EPA has upended the Clean Water Act permitting process: bypassing permit application, review, and issuance, it has skipped directly to the final Clean Water Act Section 404(c) veto stage. By claiming authority to preemptively veto mining in the area of the Pebble deposit, EPA has moved from relying on permitting to control potential environmental harms to forbidding private parties access to permitting procedures and prohibiting other agencies from evaluating activities in a given region. EPA's decision that it can veto projects before they are identified, proposed, or put through the permitting process not only violates the Clean Water Act, but it usurps Alaska's land use planning authority mandated under the Cook Inlet Land Exchange.

Injury Caused by EPA's Action

This assertion of power irreparably harms the parties:

1. As for the State, EPA is overriding the bargain struck with the federal government and CIRI in the Cook Inlet Land Exchange. EPA also is assuming the power to control how those state lands will be used.
2. As for the Pebble Partnership, it impedes its ability to obtain an investment partner to develop the project and threatens its existence.
3. For the Alaska Peninsula Corporation, it causes lost employment, lost income and threatens its economic viability.

EPA's action has effectively foreclosed resumption of work on the mine project, threatening the well-being of families with few employment alternatives, and threatening the continued existence of local villages with inadequate economic options besides the mine project.

For the public, this preemptive EPA action does nothing, because no environmental impact is possible without the Section 404 permit that EPA could veto prior to issuance by the Corps, if a veto would truly be justified.

Requested Preliminary Injunction

Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining the U.S. Environmental Protection Agency from conducting an unlawful veto proceeding. EPA's assertion of the authority to veto a permit that no one has applied for is a final decision that exceeds its statutory authority under Section 404(c) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(c). EPA's action also violates the Cook Inlet Land Exchange legislation and the Alaska Statehood Act.[1]

FACTUAL AND PROCEDURAL BACKGROUND

I. The Potential Pebble Mine

The Pebble deposit is located 200 miles southwest of Anchorage and 15 miles north of Lake Iliamna in the Bristol Bay basin, in the Nushagak and Kvichak River watersheds. The deposit is located on lands owned by the State of Alaska.[2] The State selected these lands in 1978 under the terms of the Alaska Statehood Act,[3] and, more specifically, as part of a three-way land exchange with the federal government and CIRI—the Cook Inlet Land Exchange.[4] Each party to the land exchange pursued a targeted interest: (i) the federal government sought to create a viable Lake Clark National Park (but CIRI held key lands), and it simultaneously sought to resolve

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[1] Counsel for the Plaintiffs conferred with counsel for the Defendants regarding this motion on June 26, 2014. Although Defendants have not yet expressed a position on this motion, Plaintiffs anticipate that they will oppose it.

[2] *See* Dkt. No. 18 (Edmund Fogels Decl.) ¶ 4.

[3] Pub. L. No. 85-508, 72 Stat. 339 (1958).

[4] *See* Declaration of Michael C.T. Smith (June 17, 2014) ("Smith Decl.") ¶¶ 14-17, 20-22.

outstanding land selection claims by CIRI against the federal government; (ii) CIRI's villages wanted lands closer to their village locations in the Matanuska and Susitna valleys and on the Kenai Peninsula (but those lands had previously been patented to the State); and (iii) the State was interested in federal lands that the government had previously placed off-limits to the State by withdrawing them under Section 17(d)(2) of the Alaska Native Claims Settlement Act ("ANCSA")).[5]

As a result of the three-way exchange, each party got what it wanted: (i) the federal government obtained additional lands to add to the future Lake Clark National Park (approximately 49,000 acres from CIRI and 675,000 acres from the State); (ii) CIRI's villages received over 12,000 acres of patented state lands near their village locations; and (iii) the State was given the right to select lands in the Bristol Bay area (that included the Pebble deposit) that were previously off-limits to the State.[6] As the State's lead negotiator for the Cook Inlet Land Exchange explains, the State purposefully chose lands in the Bristol Bay area for multiple resource management purposes and, in particular, because of their mineral potential.[7] The other parties to the land exchange were "well aware of the State's interest in these lands" for their mineral potential.[8] Not surprisingly, since at least 1984, the lands that include the area of the Pebble deposit have been designated by the State for mineral development.[9]

The Pebble Partnership obtained the mineral claims for the Pebble deposit in 2002.[10] Since then, it has spent over $500 million—including over $150 million on environmental

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[5] *See id.* ¶¶ 14-17.

[6] *See id.* ¶¶ 17, 20.

[7] *See id.* ¶¶ 20-22.

[8] *Id.* ¶ 23. Tellingly, a press release issued by a conservation organization "lament[ed] a possible mining district" shortly after the land exchange. *Id.* ¶ 20.

[9] *See* Declaration of James W. Buell (June 26, 2014) ¶¶ 22-23; *see also* Ex. 1 (Alaska Dep't of Natural Res., Bristol Bay Area Plan (Sept. 1984) (excerpts)); Ex. 2 (Alaska Dep't of Natural Res., Bristol Bay Area Plan (Apr. 2005) (excerpts)).

[10] *See* Declaration of Ronald W. Thiessen (June 25, 2014) ("Thiessen Decl.") ¶ 6. Northern Dynasty, which owns 100% of the Pebble Partnership and Pebble Mines Corp., originally acquired the mineral claims in 2002. *Id.* ¶¶ 6, 10. Northern Dynasty and Anglo American

(continued...)

studies—to investigate this site.[11] The Partnership has publicly committed that it will not proceed with any mining project in the area that would not safeguard Bristol Bay's ecological resources, including, above all, the salmon fishery.[12] It has not yet determined, however, the details of a project it would propose in a permit application to the Corps.[13]

The mine has the potential to provide significant economic benefits to Alaska and to local Native villages.[14] A Pebble mining project could result in nearly 5,000 Alaska jobs during the four or five years of construction and almost 3,000 full-time jobs in Alaska for the productive life of the mine (estimated to be at least 25 years).[15] Such a mining project could generate approximately $165 to $213 million in annual taxes and royalties to the State.[16] The project also stands to "result in broad levels of economic contributions for Alaska and the Lower 48 states,"

(continued...)

formed the Pebble Partnership in 2007, but Anglo American withdrew from the Partnership in October 2013. *Id.* ¶¶ 8, 10.

[11] *See id.* ¶ 9; *see also* Declaration of Bruce W. Jenkins (June 27, 2014) ("Jenkins Decl.") ¶¶ 6-14 (discussing Pebble's extensive environmental baseline studies and observing that, "[i]n terms of the volume and number of years of data collected and the number of scientific disciplines engaged, this effort far exceeds any other environmental baseline project of which I am aware of anywhere in the world"); Declaration of Loretta Y. Ford (undated) ("Ford Decl.") ¶ 5 (noting that Pebble conducted environmental baseline studies from 2004 to 2013 and that, in peak years (2007 to 2008), Pebble spent approximately $20 million per year); Declaration onf Ken Taylor (June 20, 2014) ¶¶ 13-19 (describing the environmental baseline data compiled for the Pebble Project and observing that it is "based on the highest caliber of work I have ever seen").

[12] *See* "Pebble's Promise," *available at* http://corporate.pebblepartnership.com/publications (last visited June 24, 2014).

[13] *See* Thiessen Decl. ¶¶ 20-24; Declaration of Stephen Hodgson (June 26, 2014) ("Hodgson Decl.") ¶ 9 (noting that the "project team continues to evaluate different scenarios").

[14] *See* Declaration of Robert Flanagan (June 23, 2014) ("Flanagan Decl.") ¶¶ 4-7; *see also* Hodgson Decl. ¶¶ 23, 25.

[15] *See* Flanagan Decl. ¶ 6.

[16] *See id.* ¶ 6. The Pebble Deposit is estimated to contain 10.78 billion tons of rock containing copper, molybdenum, gold, silver, and rhenium that has potential for economic extraction. Declaration of James Lang (June 26, 2014) ("Lang Decl.") ¶¶ 16, 18. The deposit is estimated to contain approximately 72.2 million tonnes of copper equivalency in the form of copper, gold, and molybdenum, including approximately 37.1 million tonnes of copper alone, along with potential additional value in silver and rhenium. *Id.* ¶ 17.