Congress of the United States
House of Representatives
Washington, DC 20515-0301

May 3, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Mail Code: 1101A
Washington, D.C. 20460

Dear Administrator Pruitt,

We write to express our concerns with regards to the EPA's decision not to scrap the Obama Administration's preemptive veto, also known as the Proposed Determination, for the prospective Pebble Limited Partnership mining project in Bristol Bay, Alaska. It is our view that the process has deviated into improper and irregular territory for having engaged in a repeated, economically damaging back-and-forth as to whether the EPA would exercise a preemptive veto of the project under Section 404(c) of the Clean Water Act. This has already set a harmful precedent which has the potential to undercut the standard National Environmental Policy Act (NEPA) review processes for years to come.

In a future administration, this dangerous precedent could be utilized as a tyrannical tool to restrict entire territories of the United States based on unilateral zoning edicts of the EPA on the basis of "unacceptable adverse" environmental effects – and decided under a paucity of evidence or before a project has even been proposed. It therefore poses a threat to the integrity of our entire project review system while casting the spectre of a double standard over this particular project.

We the undersigned understand and value the dual role EPA has to play in exercising its Congressionally-mandated task of ensuring environmental and ecological integrity right alongside its obligation to ensure strict due process in its regulatory actions. We would also not miss the chance to recognize that you, Administrator Pruitt, are a longtime friend of responsible economic and resource development. In this case, you have taken numerous steps to facilitate a holistic fact-finding process and right wrongs of the past administration which will allow Pebble ample opportunities to propose and defend a mining plan that is consistent with environmental protection of Bristol Bay. That is a world of improvement over the tenure of those who served at EPA prior to you.

It is because we recognize the above points that we raise the below concerns. The EPA's January 26, 2018 decision not to overturn what was widely considered a preemptive veto of the Pebble Limited Partnership mining project by the Obama Administration has sowed tumult for interested companies like Pebble and Northern Dynasty Minerals, for capital markets and for multiple mining stocks and indexes. Northern Dynasty Minerals' stock dropped more than 40% in the five trading days following EPA's announcement, and there is concern that the industry partnership comprising the potential project could fall apart due to this regulatory uncertainty, before a project proposal has even been fully analyzed.

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This is surely inconsistent with the intent of our project review processes enshrined in law, and the due process that is accorded to participants thereof. Our system is designed to facilitate the proposal of credible projects and sift the acceptable from the unacceptably adverse. What we have seen in this instance, however, is unpredictable regulatory action imperiling private entities and whole industries before a project has been sufficiently reviewed, a mere few weeks after an actual mine plan was finally allowed to be proposed.

If EPA's actions in this regard were necessary in order for it to execute its statutory mandate of environmental protection, then they would likely represent the proper steps having been taken. The public interest comes first as the mission of our federal agencies, and as Members of Congress we absolutely support that mission. However, it is well-known that the environmental protection of Bristol Bay is not dependent on the withdrawal of the Proposed Determination being suspended. Those conditions are independent of one another because the Pebble Limited Partnership mining project has yet to undergo the rigors of the Environmental Impact Statement (EIS) which requires the analysis of in-depth plans as well as intensive ecological, chemical and geological study.

As such, we respectfully question your premise when you stated during the announcement of the suspension, "Today's action allows EPA to get the information needed to determine what specific impacts the proposed mining project will have on those critical resources." Such an outcome is secured regardless of the suspension and as a consequence of the EIS, insofar as its scoping will encompass concerns surrounding the Bristol Bay Watershed. *That the necessary safeguards are already in place makes the damage that has been done to the interested parties all the more regrettable.*

The effect of suspending this withdrawal of the Proposed Determination is to retain an arbitrary and unnecessary "failsafe" against the Pebble Mine project. But if we believe our NEPA project review process is sufficiently fair and robust so as to constitute federal policy towards environmental review and mineral development, we should abstain from abruptly interjecting options which diverge from it in order to respond to a perceived threat. That law exists to analyze and deal with such a threat on its own, in a fair and comprehensive manner. In the case of its general failure as a protective statute, the proper remedy is legislative rather than agency action.

To our knowledge, there has been no such general failure of NEPA to establish scoping and criteria that ensures environmental integrity. As such, in taking this dramatic and rare step, the burden is on EPA to demonstrate that its mandate of environmental stewardship is substantially unlikely to be fulfilled following the completion of an EIS, such that queuing a disruptive preemptive veto at this stage is a compelling necessity for the public good. With a project only having just been proposed and not fully analyzed, this is simply not possible at this juncture under even the best scientific scrutiny.

The EPA's decision is also at odds with the Administration's stated policy on mineral development. Interior Secretary Ryan Zinke, in conjunction with the President, has made mineral development a top policy priority. In December 2017, the President signed an Executive Order promoting natural resource development to reduce foreign dependence on strategic minerals, including copper, by "increase[ing] in private-sector domestic exploration" and "streamlining leasing and permitting processes to expedite exploration, production, processing, reprocessing, recycling, and domestic refining of critical minerals." Overwhelmingly, the Administration's stance towards mining projects and minerals has been to treat them as issues of economic and national security, because they are.

As such, we have two requests. Firstly, we ask that the Proposed Determination be withdrawn, as was originally planned. Going forward with the withdrawal of the preemptive veto makes a return to the due process track and goes towards repairing the harm caused to interested parties by process uncertainty to date. It retains the protections of a full review process without setting forth a terrible precedent as well as further damaging entities and industry.

Secondly, we ask that the EPA act in accordance with the outcomes of the normal NEPA process, which requires rigorous and scientific environmental review, before deciding whether or not to let the Pebble Limited Partnership mining project proceed.

We are honored to have the support of the following organizations and individuals that agree with our position and have endorsed this letter: American Exploration & Mining Association, National Mining Association, Women's Mining Coalition, Competitive Enterprise Institute, Americans for Limited Government, Arizona Mining Association, Alaska Miners Association, American Resources Policy Network, Arizona Pork Council, Arizona Rock Products Association, AZ BASS Nation, Bass Federation-AZ, Hibbing Area Chamber of Commerce, Hudbay Rosemont Copper Project, Idaho Mining Association, MiningMinnesota, New Mexico Cattle Growers' Association, New Mexico Wool Growers Inc., Southern Arizona Business Coalition, SRT Outdoors, Sulphur Springs Valley Electric Cooperative, Utah Mining Association, Yavapai Cattle Growers Association, Arizona District 6 Senator Sylvia Allen, Apache County Supervisor Doyel Shamley and Yavapai County Supervisors Thomas Thurman and Rowle Simmons.

Thank you for your thoughtful consideration of our comments. We look forward to your timely response.

Sincerely,

Paul A. Gosar, D.D.S.
Member of Congress

Doug Lamborn
Member of Congress

Andy Biggs
Member of Congress

Rob Bishop
Member of Congress

Lamar Smith
Member of Congress

Bob Gibbs
Member of Congress

Scott DesJarlais
Member of Congress

David B. McKinley, P.E.
Member of Congress

Jeff Duncan
Member of Congress

John Duncan
Member of Congress

Randy Weber
Member of Congress

Alex Mooney
Member of Congress

Scott Perry
Member of Congress

Ted S. Yoho, D.V.M.
Member of Congress

Mark Amodei
Member of Congress

Doug LaMalfa
Member of Congress

Brian Babin
Member of Congress

Roger Marshall
Member of Congress

Cc: President of the United States Donald J. Trump

Secretary of the Department of the Interior Ryan Zinke

Bristol Bay R10/HQ Policy Briefing #3
June 10, 2019, 11am Pacific Time
HQ personnel - DC Room ARN 4045
R10 personnel - 21-Umatilla
Conference #Ex. 6. - Personal Privacy

HQ POC: John Mutz, 202-564-8043

R10 POC: Erik Peterson, 206-553-6382

Purpose

To update, inform, and receive pre-decisional feedback from senior leadership on the June 7 draft comment letters for the Corps' Pebble Mine Clean Water Act Section 404 Public Notice and draft Environmental Impact Statement.

Agenda

- Welcome/Introductions
- Context
    - i. Procedural
    - ii. Regulatory
    - iii. Environmental
    - iv. 404(c)
- EPA's draft 404 Public Notice comments
    - i. Summary of key technical issues
    - ii. Summary of key policy issues
    - iii. Political leadership feedback
- EPA's draft DEIS comments
    - i. Summary of key technical issues
    - ii. Summary of key policy issues
    - iii. Political leadership feedback
- Next steps

Welcome/Introductions

Context

I. Procedural Context

- The Corps' comment periods on two documents (draft EIS and CWA Section 404 Permit Public Notice) expire on July 1
- EPA staff have prepared draft cover letters and detailed comments to respond to each of these two comment periods.

Ex. 5 - Deliberative Process

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II. Regulatory Context

a. Section 404 Public Notice

- Pursuant to 40 CFR 230.12, the Corps must ultimately determine whether the proposed discharge complies with the Section 404(b)(1) Guidelines.
- The Corps must determine that the proposed discharge does not comply with the Guidelines if it does not comply with the restrictions on discharge found in 40 CFR 230.10 or if there is insufficient information to make a reasonable judgment.
- The Guidelines recognize that the level of required analysis and documentation must be scaled to reflect the significance and complexity of the proposed discharge activity. 40 CFR 230.6(b).
- EPA review at the PN stage is intended to assist the Corps in identifying information necessary to make a reasonable judgment as to whether the proposed discharge would comply with the Guidelines.
    - In a typical year, Region 10 reviews 60-70 CWA Section 404 Permit Public Notices from the four Corps districts in our region.
- 404(q) process: The Army/EPA 1992 Memorandum of Agreement to implement CWA Section 404(q) provides the "exclusive procedure" for elevation of individual permit cases.
    - EPA has initiated the Section 404(q) process 12 times since January 2017; permanent project impacts ranged from 0.5 to approximately 8,000 acres of wetlands

b. DEIS

- Pursuant to Clean Air Act Section 309, EPA must "review and comment in writing" on the EIS for any "major federal agency action." EPA's comments "shall be made public at the conclusion of any such review."
- EPA review at the DEIS stage is intended to assist the action agency in identifying analytical gaps that would prevent the final EIS from disclosing significant environmental impacts or identifying appropriate mitigation for these impacts.
    - In a typical year, Region 10 reviews 70-80 NEPA documents under CAA Section 309, with about half of those being DEISs.

III. Environmental Context

a. Environmental Setting

- **Landscape**: The Pebble deposit is situated within a landscape covered by a dense network of streams, wetlands, lakes, and ponds with a complex and highly

interconnected surface and subsurface hydrology that is also subject to climate extremes and seismic risks.

  - This landscape amplifies the risk of a release during operation and into perpetuity as mine waste needs to continue to be managed.

- **Fisheries**: Most of eliminated or degraded streams, wetlands, lakes, and ponds are situated at the headwaters of the Nushagak River. Chinook salmon returns to the Nushagak River are among the world's largest. Impacts would also occur to the Kvichak River watershed, which is the world's largest producer of sockeye salmon.
  - The proposed bulk tailings storage facility (TSF) and seepage collection system alone would fill multiple tributaries, eliminating approximately ten miles of streams and 7.5 miles of anadromous habitat. Nearly the entire length of Tributary 1.190, approximately six miles, would be filled. Tributary 1.190 is used by coho salmon for spawning and rearing, and by Chinook salmon for rearing. This tributary also supports rainbow trout, Dolly Varden, Arctic grayling, and sculpin. Two specified tributaries to 1.190 are used by coho salmon for rearing and would also be eliminated by the proposed bulk TSF.
  - The headwaters are important to the fisheries: The productivity of the Bristol Bay fisheries is tied to a diverse portfolio of aquatic habitats. The complex habitat mosaic supports multiple locally adapted fish populations and plays a critical role in protecting the genetic diversity of Bristol Bay's salmon populations. Losing and degrading these fish habitats and populations would erode the genetic diversity that is crucial to the stability of the overall Bristol Bay salmon fisheries.

b. Impacts to Aquatic Resources

- The DEIS projects that the Pebble project will result in the permanent loss of approximately 3,443 acres of wetlands, 81 miles of streams, 11 acres of marine waters, and 55 acres of lakes/ponds
  - Context: in a typical year nationwide the Corps authorizes approximately 13,000 acres of wetlands impacts and 1,000 miles of stream impacts (not all are losses) under approximately 60,000 separate actions;
    - Most of these actions authorized under general permit, approximately 2,000 actions require individual permits with public notice.

IV. Interaction between 404(c) Regulatory Action and the Corps Permitting Process

- To evaluate whether PLP's permit application changes EPA's 2014 preliminary finding of unacceptable adverse effects, EPA needs sufficient information and analysis of the 404 impacts associated with the proposed mine on fishery areas, including compensatory mitigation measures.
  - The EIS process is an efficient means to obtain this information.
    - June 26, 2018 Memorandum from Administrator Pruitt: "I believe that it is critical for the agency to participate in the EIS process and review the

final EIS in detail before determining whether to proceed with the section 404(c) process in this case."

Section 404 Public Notice Comments

I. **Summary of key technical issues**

Ex. 5 - Deliberative Process

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II. Summary of key policy issues – 404 Comments

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

III. **Political leadership feedback – 404 Comments**

[questions, thoughts?]

DEIS Comments

I. **Summary of key technical issues – DEIS Comments**

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

II. Summary of key policy issues – DEIS Comments

NEPA Process: Under Clean Air Act Section 309, EPA "shall review and comment in writing on the environmental impact of any matter relating to. . . the authority of the Administrator, contained in any. . . major federal agency action. . . to which section 4332(2)(C) applies.... Such written comment shall be made public at the conclusion of any such review."

- 42 U.S.C. § 4332(2)(C) establishes the NEPA EIS requirement and states that:
  - "Prior to making any detailed statement, the responsible federal official shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."
- CEQ regulations provide that agencies with jurisdiction by law or special expertise may comment on environmental impacts, the adequacy of the statement, the merits of alternatives, methodology used, and appropriate mitigation measures -- encouraging specificity as appropriate. 40 CFR 1503.3.

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

IV. Political leadership feedback – DEIS Comments

[questions, thoughts?]

Next Steps

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