UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ENVIRONMENTAL REVIEW
AND ASSESSMENT

January 11, 2018

Sheila Newman
U.S. Army Corps of Engineers Alaska District
Regulatory Division, CEPOA-RD
Post Office Box 6898
JBER, Alaska 99506

Dear Ms. Newman:

The U.S. Environmental Protection Agency has reviewed the December 20, 2017 U.S. Army Corps of Engineers-Alaska District-Regional Regulatory Division Draft Cooperating Agency Coordination Plan for the Pebble Project EIS (EPA Region 10 Project Number 18-0002-COE). We understand that the Corps will be the lead federal agency under the National Environmental Policy Act for completion of the EIS and that you have identified a number of potential cooperating agencies on the Pebble Project EIS, including the EPA. We have received the formal invitation to serve as a cooperating agency, and we will be responding to the invitation after our January 18 meeting. Per your request that the potential cooperating agencies review and provide comments on the Draft Cooperating Agency Coordination Plan, we have reviewed the document and offer the enclosed comments.

Overall, we note that the purpose of the Cooperating Agency Coordination Plan is to describe the roles and responsibilities of the various cooperating agencies and establish protocols for communication, early identification, and resolution of issues that could impact the completion of the EIS and federal record of decision. We agree with these goals, and we recommend that the Corps and the EPA enter into a formal Memorandum of Understanding to establish lead and cooperating agency roles and procedures, which is the framework that our agencies have used for other EISs in Alaska. The MOUs that the EPA has entered into when agreeing to serve as a cooperating agency on an EIS typically also contain provisions for confidentiality of information, FOIA request coordination, and resolution of issues, among others. As discussed in the enclosed comments, we believe that investing in the development of an MOU between our agencies will ensure a shared understanding of roles, responsibilities, and expectations at the beginning of this project, thereby fostering an efficient EIS development process.

We also recommend including local and tribal governments as potential cooperating agencies and describing that inclusion in the Cooperating Agency Coordination Plan. We are aware that local and tribal governments are typically invited to participate as cooperating agencies for other projects in Alaska, including projects where the Corps is the lead federal agency.

These and other comments on the Draft Cooperating Agency Plan are included in the enclosure. We appreciate the opportunity to comment on this document and would also appreciate the opportunity to meet with the Corps and other agencies on January 18 to discuss the issues raised. Please feel free

to contact me at (206) 553-2581 or email at Allnutt.David@epa.gov, or Patty McGrath at (206) 553-6113 or email at McGrath.Patricia@epa.gov should you have questions regarding our comments.

Sincerely

R. David Allnutt, Director
Office of Environmental Review and Assessment

EPA comments on United States Army Corps of Engineers -Alaska District-Regional Regulatory Division-Draft Cooperating Agency Coordination Plan, December 20, 2017

1. Cooperating Agency Arrangement

Per the Draft Cooperating Agency Coordination Plan, the Corps proposes that the National Environmental Policy Act lead and cooperating agency arrangement be documented in the Coordination Plan and letters of invitation and acceptance:

> To establish CA status, the Corps will send a Letter of Invitation to the eligible government entity. The Letter of Invitation will include a brief outline of the role(s) of the specific cooperating agency in the EIS and invite the agency to an agency scoping meeting prior to the agency providing response to the invitation. To establish the formal CA relationship, the eligible government entity will send a written response back to the Corps stating their intent to serve as a CA in the EIS along with their ability to fulfill responsibilities identified in the Corps invitation letter.

EPA prefers and recommends that the Corps and EPA enter into a Memorandum of Understanding, which is the typical framework used to establish the respective roles and responsibilities for the lead and cooperating agencies under NEPA. EPA has signed MOUs with the Corps for other projects in Alaska, such as the Donlin Gold Project, Nanushuk, and the Alaska Stand Alone Pipeline. These MOUs have sections pertaining to dispute resolution, confidentiality, modifications, and Freedom of Information Act coordination. We believe that establishing clarity in these, and other areas, at the outset is important, particularly for larger, more controversial projects. We would be happy to work with the Corps in reviewing the existing MOUs and revising or adapting the standard provisions for the Pebble Project, as needed. Given the existence of a working template from these ongoing projects, this should not be a time consuming process. We believe that investing now in the development of an MOU between our agencies will ensure a shared understanding of expectations, roles, and responsibilities, thereby fostering a timely and efficient decision-making process.

The EPA specifically recommends that the MOU address the following. If the Corps decides to utilize the Cooperating Agency Plan instead of an MOU, then we recommend that the Plan or revised Letter of Invitation include.

- Roles and responsibilities of EPA and the Corps
- Materials that will be exchanged between EPA and the Corps
- What materials EPA will review and minimum timeframes for review
- How EPA's role as a cooperating agency will be acknowledged in the EIS
- Acknowledgement of EPA's review authority pursuant to Clean Air Act Section 309, and that EPA's role as a cooperating agency does not alter that review
- Dispute resolution
- FOIA request notification and coordination
- Confidentiality of information
- Staff leads, contact information, and notification requirements
- Modification and termination

2. Local Governments

We note that local governments are not currently included in the Draft Coordination Plan as potential cooperating agencies in the Pebble Project EIS development. According to the application information submitted by the Pebble Limited Partnership to the Corps, dated December 2017, the project will require permits from the Lake and Peninsula Borough and the Kenai Peninsula Borough. Therefore, we recommend that the Corps invite both Boroughs to serve as cooperating agencies throughout the NEPA process. The inclusion of local governments as cooperating agencies in the process is supported by the statute itself, the Council on Environmental Quality's NEPA regulations, and related guidance. See 42 U.S.C. §§ 4331(a) and 4332(2); https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf.

3. Tribal Governments

We also note that the Draft Coordination Plan currently refers to government-to-government consultation with tribal governments, but does not include tribal governments as potential cooperating agencies. We recommend that the Corps invite tribal governments that have special expertise to participate as cooperating agencies in the NEPA process for the Pebble Project. Tribal governments that currently and/or traditionally utilize land and resources that could be impacted by the project may offer special expertise related to baseline information and prediction of impacts to fish, wildlife, subsistence, cultural resources, socioeconomics, and other resources. There is precedent for tribal governments participating as cooperating agencies on EISs for other projects in Alaska (e.g., Red Dog Aqqaluk expansion, Donlin Gold, Chuitna Mine, Nanushuk). In addition, the inclusion of tribes is supported by NEPA and CEQ guidance. See 42 U.S.C. §§ 4331(a) and 4332(2); link provided above.; see also 45 C.F.R. § 900.104 (stating that the Denali Commission "will typically invite Alaska Native villages and state and local government partners to serve as cooperating agencies").

4. The EIS Process

The Coordination Plan describes cooperating agency roles from EIS Initiation through EIS finalization. The Plan refers to the draft EIS and final EIS and "document sections." We recommend that the Corps clarify in the Coordination Plan whether a preliminary draft EIS and a preliminary final EIS will be developed for cooperating agency review prior to release for the public, as is typically done with large NEPA projects requiring EIS development.

5. The EIS Schedule

Per the Draft Coordination Plan,

> A final schedule will not be produced until after public scoping has occurred and the agencies have had opportunity to identify data gaps and any additional requirements identified as a result of scoping.". .... Agencies will be actively involved in writing and revising the Draft EIS within their respective areas of special expertise. Specific development and revision periods will be identified in the project schedule.

We agree that it is appropriate to develop the schedule following scoping and identification of data gaps. And we recommend that the lead agency-cooperating agency agreement (MOU preferably) include a list of the expected documents that would be reviewed and the minimum review timeframes to be expected. MOUs that we have entered into on NEPA projects also typically include provisions for the minimum timeframes for the review of unanticipated documents.

6. EPA Role

We appreciate that Appendix A of the Draft Coordination Plan includes a table that summarizes the roles and responsibilities of each invited cooperating agency. We recommend that the Corps revises EPA's role and responsibilities in the Coordination Plan as follows. Because of our overarching Clean Air Act Section.309 authority, our Clean Water Act and Clean Air Act permit oversight authorities, and special expertise, we request the opportunity to review all of the documents associated with the coordination points listed in Appendix C of the Coordination Plan.

Agency Name	Role	Responsibilities
U.S. Environmental Protection Agency	Cooperating Agency – Special Expertise	<u>Authorities</u> Clean Water Act 404 authority to review project compliance with 404(b)(1) guidelines CWA 402 oversight of State APDES permits Clean Air Act oversight of State CAA permits CAA 309 authority and responsibility to review and comment in writing for the public on EISs. Marine Protection, Research, and Sanctuaries Act, Section 103(c), review and concurrence on any Corps-issued permit for the ocean disposal of dredged material <u>Special expertise</u> NEPA review of mining projects NEPA and CWA 404(b)(1) alternatives analysis Impact assessment particularly pertaining to impacts to air, wetlands, water, and land