DOYON
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LEADER in All We Do

March 10, 2014

Mr. Dennis J. McLerran,
Regional Administrator
Region 10
United States Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

Re: Request for Consultation Regarding EPA's Use of Clean Water Act Section 404(c)

Dear Mr. McLerran:

I am writing on behalf of Doyon, Limited ("Doyon"), an Alaskan Native Corporation ("ANC") incorporated in 1972 pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq., as amended ("ANCSA"). Doyon has more than 18,945 Alaska Native shareholders and owns 12.5 million acres of land in Interior Alaska.

Doyon has reviewed the Environmental Protection Agency's ("EPA") February 28, 2014 letter invoking the agency's Clean Water Act section 404(c) regulations to review the mining of the Pebble deposit in Southwest Alaska.[1] We also received the attached letter from Native corporations and Tribes from Southwest Alaska, including those geographically closest to the Pebble deposit.

Doyon takes no position on the mining of the Pebble deposit, but has significant concerns regarding the precedent-setting nature of EPA's action and its potential widespread implications for Alaskan Native Shareholders, ANCs, and tribes, both within and outside of Alaska. Doyon's concerns are exacerbated by the recently disclosed documentary evidence suggesting collusion between agency staff and environmental advocacy groups seeking to use the Section 404(c) process to regulate and restrict activity across the entire resource, rather than focusing only on Pebble deposit mining, and possibly beyond.

[1] *See* Letter from Mr. Dennis McLerran, EPA Region 10, to Mr. Thomas Collier, Pebble Limited Partnership ("Pebble LTD), Mr. Joe Balash, Alaska Department of Natural Resources ("ADNR"), and Col. Christopher Lestochi, US Army Corps of Engineers ("USACE"), dated February 28, 2014.

Based upon these concerns, and pursuant to *EPA Policy on Consultation and Coordination with Indian Tribes* (May 4, 2011) and the *EPA Region 10 Tribal Consultation and Coordination Procedures* (Oct. 2012), Doyon requests that EPA initiate consultation with Doyon on EPA's Section 404(c) process before EPA issues a Notice of Proposed Determination.[2]

I. EPA's Initiation of the Section 404(c) Veto Authority.

With EPA's February 28, 2014 letter, EPA has started a process that could lead to EPA, for the very first time, preemptively barring development in an entire watershed where no permit has been sought or specific project proposed. EPA has given Pebble LTD, ADNR and the USACE 15 days to submit information demonstrating that no unacceptable adverse effects to aquatic resources would result from discharges associated with mining the Pebble deposit or that actions could be taken to prevent unacceptable adverse effects to waters from such mining. Following this limited consultation period, EPA will publish a Proposed Determination, hold a public review and comment period, and then issue a Final Determination.

II. EPA's Section 404(c) Action Implicates Doyon's Interests

With ownership of 12.5 million acres of land in Interior Alaska, Doyon is the largest private landowner in Alaska. Our mission statement recognizes our dual responsibility to both protect and develop, where appropriate, our ANCSA lands. Millions of our acres were selected for economic development potential, including oil, gas, gold and base metals. Doyon has a keen interest in matters pertaining to its lands and its ability to use, enjoy and develop those lands for and on behalf of its Native shareholders. Doyon's interests in EPA's Section 404(c) process is based upon the potential precedent that an EPA Section 404(c) determination could set within Alaska and for Doyon's lands.

The State of Alaska's February 3, 2014 letter to the EPA Inspector General recognized that EPA's unique interpretation of its regulatory authority and unprecedented use of Section 404(c) could affect other development projects in Alaska and throughout the nation. Indeed, depending on the outcome, EPA's action could preempt legitimate and lawful regulatory authority – be it by a tribe or a State

[2] *EPA Region 10 Tribal Consultation and Coordination Procedures* indicate that the Region's Tribal Consultation Specialist should be contacted for ANC consultations. Accordingly, Doyon has copied JR Herbst, EPA Region 10 Tribal Consultation Specialist, on this consultation request letter.

– over tribal or state lands. In short, this precedent could threaten the fundamental ability of the State of Alaska, Alaska Natives, and private landowners to develop their natural resources.

While EPA's February 28, 2014 letter purports to limit agency review to the effects of mining the Pebble deposit, and specifically states that the agency "will not consider other mining or non-mining related development," internal EPA e-mails tell a far different story. In a September 14, 2010 email, Phil North, an EPA biologist with primary responsibility for the Bristol Bay Watershed Assessment, focuses on the incremental loss of resources, due to additional mines, highways, residential development and commercial development; in essence, Mr. North suggests that EPA use its regulatory authority as a means to limit or control development and dictate land use policy. EPA goes further, by "looking ahead" to future development plans in state planning documents and characterizing such plans as a threat to aquatic resources "state or private land, (including tribal) open for development . . . with little land use planning." The only significant category of private land in rural Alaska is ANCSA land, like the land that Doyon owns.

For these reasons, Doyon informed EPA of its concerns on multiple occasions. On July 16, 2012, we submitted a letter identifying the need for consultation and an extended comment period on the Bristol Bay Watershed Assessment. Similarly, in a letter dated May 31, 2013, we expressed our "grave concerns" regarding the Bristol Bay Watershed Assessment and the potential for EPA to use its Section 404(c) authority to preemptively veto a permit for the Pebble project.

III. Request for Consultation

Based upon Doyon's demonstrated interest in EPA's Section 404(c) process, and the precedential and potential far reaching implications of EPA's action for ANCs like Doyon, Doyon requests that EPA initiate consultation with Doyon prior to issuing a Proposed Determination. Timely consultation is imperative so that EPA's Proposed Determination can be appropriately tailored to the issue at hand – i.e., the potential mining of the Pebble deposit – and can avoid unintended adverse consequences to ANCs such as Doyon. Again, Doyon is not advocating for or against a Pebble deposit mining project, but is seeking to make its concerns known so that EPA can proceed with this first of its kind action in an informed manner.

While ANCs differ from federally-recognized Indian tribes, federal law requires that EPA consult with ANCs on the same basis as Indian tribes under Executive Order 13175, *Consultation and Coordination with Indian Tribal*

Governments. See Public Law 108-199, 118 Stat. 452 as amended by Public Law 108-447, 118 Stat. 3267. A recent EPA consultation guidance document confirms this, stating:

> EPA intends to consult with ANCs subject to the same general conditions of practicability, expense, and scheduling that apply to our interactions with Federally-recognized tribal governments. Moreover, EPA interprets the term "same basis" as meaning providing a meaningful and timely opportunity to provide input . . . .

Frequently Asked Questions, Interim Tribal Consultation FAQS- Internal Use Only, 19 Aug. 2011. Indeed, EPA has consulted with a number of ANCs in its Bristol Bay Watershed Assessment. *See* News Release: *EPA releases Bristol Bay Assessment describing potential impacts to salmon and water from copper, gold mining* (Jan. 15. 2014).[3]

Consultation with EPA in Region 10 is governed by both the *EPA Policy on Consultation and Coordination with Indian Tribes* (May 4, 2011) and the *EPA Region 10 Tribal Consultation and Coordination Procedures* (Oct. 2012) (collectively "EPA Consultation Policy"). EPA Consultation Policy allows a tribe (or in this case, an ANC) to request consultation, and indicates that "Region 10 will generally agree to consult" where a potential action "could affect that tribe's interests." As demonstrated in this letter, and Doyon's previous letters to EPA concerning the Bristol Bay Assessment, EPA's precedent-setting action could affect Doyon and its significant land holdings.

In its February 28, 2014 letter, EPA has outlined a four-step Section 404(c) process, the first step of which involves consultation with direct project stakeholders. While Doyon's land holdings are not located in Southwest Alaska, the implications of EPA's action throughout Alaska make it imperative that EPA hear from stakeholders such as Doyon before issuing a Proposed Determination, to allow for informed decision-making. EPA Consultation Policy recognizes that for consultation to be meaningful, it must occur early enough so that "major policy and environmental considerations" can be discussed in a manner that can inform EPA's action. *See EPA Region 10 Tribal Consultation and Coordination Procedures*, at 10. EPA's agency-wide consultation policy is consistent on this point: "Consultation

[3] While it appears that EPA has engaged in consultation with tribes, Native Villages and other ANCs, these consultations cannot substitute for consultation with Doyon, which has its own distinct interests, issues and concerns regarding EPA's Section 404(c) process.

should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration." *EPA Policy on Consultation and Coordination with Indian Tribes, at 7.* To be timely and meaningful, consultation must occur before EPA issues its Proposed Determination. EPA has expressly recognized that participation in the public review and comment process is not a substitute for EPA engaging in required consultation.

Finally, the need for consultation with Doyon is underscored by the unprecedented nature of the process that EPA has initiated, the potential consequences that could reach throughout Alaska, and the apparent irregularities associated with the Bristol Bay Watershed Assessment and the planning and implementation of the Section 404(c) process. While it is unnecessary to go into a detailed discussion of these matters here, brief explanations are presented below:

- EPA's Action is Unprecedented. EPA has invoked Section 404(c) only 12 times in 42 years, and only twice in the past 20 years. Further, we are not aware of EPA having ever used its Section 404(c) authority preemptively, in a manner that could potentially restrict development before an applicant has filed an application.

- Broad Scope and Nature of EPA's Action. EPA has acknowledged that it has never applied the 404(c) authority in as broad a manner as currently proposed. The outcome of EPA's action could preclude mineral extraction or more general development in an entire watershed (that is roughly the size of West Virginia).

- Far-Reaching Ramifications. Taken to its extreme, EPA's Section 404(c) process could set the precedent for EPA to target other Alaskan watersheds – including those where Doyon lands are located – for limitations on development that go far beyond mining activities, to roads, residential and commercial development, and other vital infrastructure.

- Process Irregularities. Records released through a Freedom of Information Act request paint a picture of a highly irregular Bristol Bay Assessment and Section 404(c) process, involving collusion with non-governmental environmental advocacy organizations, biased EPA staff, apparent efforts to use the Section 404(c) process to achieve larger land use and anti-development policy goals, and a pre-determination that the agency would veto the Pebble project not only in the project area, but development efforts in a much larger area in southwest Alaska.

IV. Conclusion

Doyon has demonstrated both the need for consultation on the Section 404(c) process and the potential for EPA's decision-making to affect Doyon's interests. For these reasons, as more fully explained above, Doyon is requesting that EPA initiate consultation with Doyon prior to making a Proposed Determination in the Section 404(c) process. Consistent with EPA Consultation Policy, Doyon looks forward to a prompt response to this request.

Thank you,

Aaron M. Schutt, President and CEO
Doyon Limited

cc: JR Herbst, EPA Region 10 Tribal Consultation Specialist