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ENVIRONMENTAL PROTECTION AGENCY

[EPA-R10-OW-2017-0369]

Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability; Request for Comment

SUMMARY: The United States Environmental Protection Agency (EPA) Administrator and Region 10 Regional Administrator are requesting public comment on this proposal to withdraw the EPA Region 10 July 2014 Proposed Determination that was issued pursuant to Section 404(c) of the Clean Water Act, to restrict the use of certain waters in the South Fork Koktuli River, North Fork Koktuli River, and Upper Talarik Creek watersheds in southwest Alaska as disposal sites for dredged or fill material associated with mining the Pebble deposit, a copper-, gold-, and molybdenum-bearing ore body. EPA agreed to initiate this proposed withdrawal process as part of a May 11, 2017 settlement agreement with the Pebble Limited Partnership (PLP), whose subsidiaries own the mineral claims to the Pebble deposit. The Agency is taking today's action to afford the public an opportunity to comment on the rationale for the proposed withdrawal and to satisfy 40 C.F.R. § 231.5(c).

DATES: Comments must be received on or before **[insert date],** 90 days after publication in the Federal Register.

ADDRESSES:

I. How to Obtain a Copy of the Proposed Determination: The July 2014 Proposed Determination is available via the Internet on the EPA Region 10 Bristol Bay site at www.epa.gov/bristolbay.

II. How to Obtain a Copy of the Settlement Agreement: The May 11, 2017 settlement agreement is available via the Internet on the EPA Region 10 Bristol Bay site at www.epa.gov/bristolbay.

III. How to Submit Comments to the Docket at www.regulations.gov: Submit your comments, identified by Docket ID No. EPA-R10-OW-2017-0369, by one of the following methods:

- Federal eRulemaking Portal (recommended method of comment submission): Go to http://www.regulations.gov and follow the online instructions for submitting comments.
- E-mail: Send email to ow-docket@epa.gov. Include the docket number EPA-R10-OW-2017-0369 in the subject line of the message.
- Mail: Send your comments to: Water Docket, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460, Attention: Docket ID No. EPA-R10-OW-2017-0369.
- Hand Delivery/Courier: Deliver your comments to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20460, Attention: Docket ID No. EPA-R10-OW-2017-0369. Such deliveries are accepted only during the Docket's

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normal hours of operation, 8:30 a.m. to 4:30 p.m. ET, Monday through Friday (excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The telephone number for the Water Docket is (202) 566–2426.

Instructions: Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (e.g., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit http://www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION:

Visit www.epa.gov/bristolbay or contact a Bristol Bay-specific phone line, (206) 553-0040, or email address, r10bristolbay@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

On July 21, 2014, EPA Region 10 published in the **Federal Register** (79 FR 42314) a Notice of Proposed Determination under Section 404(c) of the Clean Water Act (CWA) to restrict the use of certain waters in the South Fork Koktuli River, North Fork Koktuli River, and Upper

Talarik Creek watersheds (located within the larger Bristol Bay watershed) as disposal sites for dredged or fill material associated with mining the Pebble deposit. The notice started a public comment period that ended on September 19, 2014. EPA Region 10 also held seven hearings throughout southwest Alaska during the week of August 11, 2014. More than 830 community members participated in the seven hearings, more than 300 of whom provided oral statements. In addition to testimony taken at the hearings, EPA Region 10 received more than 670,000 written comments during the public comment period.

The Pebble Limited Partnership ("PLP"), whose subsidiaries own the mineral claims to the Pebble deposit, have not yet filed a CWA Section 404 permit application ("permit application") with the U.S. Army Corps of Engineers ("Army Corps"). EPA Region 10's initiation of the Section 404(c) process did not prohibit PLP from filing a permit application and the Army Corps could have processed such a permit application while a Section 404(c) review was ongoing. The Army Corps could not have, however, issued a final decision on a permit application while a Section 404(c) process remained open and unresolved. 33 CFR § 323.6(b).

In 2014, PLP filed three lawsuits against EPA relating to the Agency's work in the Bristol Bay watershed. As part of one of the lawsuits, PLP obtained a preliminary injunction on November 25, 2014, which halted EPA Region 10's Section 404(c) review process until the case was resolved in May of 2017. Prior to the preliminary injunction, the next step in the Section 404(c) process would have been for EPA Region 10 to either forward a Recommended Determination to EPA Headquarters or to withdraw the Proposed Determination pursuant to 40 CFR § 231.5(a).

The EPA and PLP resolved all outstanding lawsuits in a May 11, 2017 settlement agreement and the court subsequently dissolved the injunction and dismissed the case. Under the settlement

agreement, the EPA agreed to "initiate a process to propose to withdraw the Proposed Determination." Settlement Agreement at page 5, *available at https://www.epa.gov/sites/production/files/2017-05/documents/pebble-settlement-agreement-05-11-17.pdf*. Today's action is the agreed-upon initiation. In addition, should PLP submit a permit application for this project, the Agency agreed to not exercise its discretion regarding Section 404(c) review for a certain period of time. Specifically, the settlement agreement limits the Agency's ability to move forward with a signed Recommended Determination if PLP submits a permit application to the Army Corps within 30 months from the date of settlement. If PLP files a permit application during that time, EPA may not move forward with a signed Recommended Determination for 48 months from the effective date of the settlement agreement or following issuance of a final environmental impact statement on PLP's permit application, whichever comes first. The settlement agreement does not require or guarantee that PLP will submit a permit application, nor does it guarantee or prejudge a particular outcome of that permitting process or EPA's decision-making under Section 404(c) or otherwise constrain EPA's discretion except as provided in the terms of the agreement.

Pursuant to the settlement agreement and policy direction from EPA's Administrator, EPA is proposing to withdraw the July 2014 Proposed Determination at this time and is taking public comment on this proposal. The proposal reflects the Administrator's decision to provide PLP with additional time to submit a permit application to the Army Corps and potentially allow the Army Corps permitting process to initiate without having an open and unresolved Section 404(c) review. While the pendency of a Section 404(c) review would not preclude PLP from submitting an application and the Army Corps from reviewing that application, as noted above, the Army Corps could not have issued a permit while a Section 404(c) process was ongoing. A withdrawal

of the Proposed Determination would remove any uncertainty, real or perceived, about PLP's ability to submit a permit application and have that permit application reviewed. Because the Agency retains the right under the settlement agreement to ultimately exercise the full extent of its discretion under Section 404(c), including the discretion to act prior to any potential Army Corps authorization of discharge of dredged or fill material associated with mining the Pebble deposit, the Agency believes that withdrawing the Proposed Determination now, while allowing the factual record regarding any forthcoming permit application to develop, is appropriate at this time for this particular matter.

The Agency is only seeking public comment on whether to withdraw the July 2014 Proposed Determination at this time for the reasons stated above. In light of the basis upon which EPA is considering withdrawal of the Proposed Determination, EPA is not soliciting comment on the proposed restrictions or on science or technical information underlying the Proposed Determination. While EPA's regulations provide for a specified time period for decision making in 40 C.F.R. § 231.5(a), EPA has determined that there is good cause to extend this period under 40 C.F.R. § 231.8 to allow for this process and full consideration of the comments submitted.

Under EPA's regulations, when a Regional Administrator decides to withdraw a proposed determination, the Regional Administrator is required to notify the Administrator of such decision. The Administrator then has ten days to determine whether to review the withdrawal decision. The regulations also require the Administrator to provide notice to "all persons who commented on the proposed determination or participated at the hearing," and specifies that "[s]uch persons may submit timely written recommendations concerning review." 40 C.F.R. § 231.5(c). Rather than require parties to comment on today's proposed withdrawal of the Proposed Determination and then to comment again should the Regional Administrator finalize

the withdrawal and forward it to the Administrator, the EPA is providing notice through this Federal Register Notice to all who commented on the Proposed Determination in the 2014 comment period or participated in any of the hearings the Agency held on this matter and providing them and other interested parties with a timely opportunity to provide recommendations regarding further review by the Administrator of any final decision to withdraw. Specifically, EPA is also taking public comment now on whether the Administrator should review and reconsider a final withdrawal decision, if such a decision is made.

Providing the opportunity to make recommendations regarding the potential for Administrator review in today's notice is the most efficient and effective way to provide such an opportunity. The Administrator is actively engaged in this matter because of his involvement with and direction regarding the settlement agreement, and this process enables the Administrator to effectively receive and consider any such recommendations that are submitted. Finally, this approach provides for earlier input by the public in the process (i.e., on whether the Agency should withdraw the Proposed Determination now), thereby enhancing transparency regarding the Agency's decision-making, conserving Agency and public resources, and avoiding duplicative comment periods and comments. While EPA's regulations provide for a 10-day review period for the Administrator, EPA has determined that there is good cause to extend this period under 40 C.F.R. § 231.8 to allow for this process and full consideration of the comments submitted concerning the Administrator's review.

In summary, the EPA is seeking comments on:

- whether to withdraw the July 2014 Proposed Determination at this time for the reasons stated above; and

- if a final withdrawal decision is made following this comment period, whether the Administrator should review and reconsider the withdrawal decision.

Following the close of the public comment period, in making the decision whether to withdraw the July 2014 Proposed Determination the EPA will consider the public comments submitted in response to this notice consistent with 40 C.F.R. § 231.5.

II. Solicitation of Comments on the Proposal to Withdraw the Proposed Determination and Recommendations Regarding the Potential for Additional Review by the Administrator:

Please see the section above entitled ADDRESSES for information about how to obtain a copy of the July 2014 Proposed Determination, the settlement agreement, and how to submit comments on the proposal to withdraw the July 2014 Proposed Determination as well as recommendations regarding the potential for review by the Administrator. The EPA Administrator and Region 10 Regional Administrator are soliciting comments as described above.

The record will remain open for comments until [INSERT DATE 90 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER]. EPA has received a number of emails and letters regarding the July 2014 Proposed Determination since EPA announced the May 11, 2017 settlement agreement. EPA will enter this correspondence into the docket and all comments, including this correspondence, will be fully considered as the EPA Administrator and Region 10 Regional Administrator decide whether to withdraw the July 2014 Proposed Determination at this time.

Dated: July 10, 2017.

Michelle L. Pirzadeh,

Acting Regional Administrator, EPA Region 10.