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October 17, 2017

Water Docket
U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Ave NW
Washington, DC, 20460
Attention: Docket ID No. EPA-R10-OW-2017-0369

Re: EPA Notice of Proposal to Withdraw Pebble Mine Proposed Determination

To Whom It May Concern:

The Alaska Miners Association (AMA) appreciates the opportunity to provide comments on the U.S. Environmental Protection Agency (EPA) proposal to withdraw proposed Clean Water Act restrictions of mining the Pebble deposit in Alaska's Bristol Bay Watershed.

AMA is a professional membership trade organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,400 members that come from eight statewide branches: Anchorage, Denali, Fairbanks, Haines, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, suction dredge miners, small family mines, junior mining companies, and major mining companies, Alaska Native Corporations, and the contracting sector that supports Alaska's mining industry.

AMA's mission is to promote responsible mineral development in Alaska. We are proud of our industry, including the five large hardrock mining operations that have been permitted and regulated over the last three decades, all which boast solid environmental and safety records. In 2012, EPA attempted to stop a mining project in Alaska before a mine plan was even submitted. To circumvent the permitting process and preemptively deny the right to evaluation under the National Environmental Policy Act (NEPA), was – and is, appalling. Mine proposals, no matter where they are located, should always be allowed to access the permitting process, and it is this process that determines whether or not a mine can be done responsibly, and therefore, be allowed to proceed. **AMA has on several occasions voiced its grave concerns with the EPA's precedent setting preemptive actions in Alaska, and we strongly support the EPA's proposal to withdraw its Proposed Determination at Pebble.**

AMA wishes to present the following arguments in support of the EPA's proposal to withdraw the Proposed Determination to remedy the prior overreach by the agency:

Basis of Proposed Determination and Bristol Bay Watershed Assessment

It is our view that the EPA had no statutory basis to initiate a Section 404(c) process in the absence of a permit application. Under the Clean Water Act (CWA), the United States Army Corps of Engineers (herein referred to as "Corps") has the authority to evaluate and grant permits while the EPA has only the

authority to veto a Corps decision. The CWA does not permit the EPA to impose preemptive restrictions on development over large areas of land in the absence of a permit application, as EPA has attempted to do in Bristol Bay. Rather than waiting for the Pebble Limited Partnership (PLP) to file a Section 404 permit application, and adhering to the traditional permitting process, EPA commissioned a watershed assessment of the Bristol Bay region – the Bristol Bay Watershed Assessment (BBWA). The BBWA – the so-called scientific analysis underlying the Proposed Determination – was fatally flawed.

Specifically, under Section 404(a) of the CWA, the Corps evaluates a permit for a specific mining project, with specific control and mitigation measures, using guidelines developed in conjunction with EPA. The Corps complies with NEPA and regulations developed by the Council on Environmental Quality throughout this extensive process. EPA, under 404(c), may ***then*** prohibit “the *specification ... of any defined area*” or deny or restrict the use of “any *defined area for specification.*” EPA cannot act prior to the submittal of a permit application, which specifies and details the proposed development area.

The legislative history of Section 404 of the CWA confirms that EPA cannot act preemptively to restrict projects. The Senate debate on the Conference Report on the CWA explained that EPA “should have the veto over the *selection of the site for dredged soil disposal* and over any *specific soil* to be disposed of in any *selected site.*” Congress therefore intended to allow EPA to rule on *specific proposals*, not to allow EPA to create blanket restrictions over large areas of land. In 2015, the House Oversight Committee concluded that “EPA’s use of a preemptive veto (at Pebble) was unprecedented and without a legal basis.” The Committee described EPA’s course of action as “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.

Over the last 40 years, the actions of EPA have been such that the issuance of a preemptive veto is unprecedented. EPA has only exercised its authority under Section 404(c) thirteen times, and in each instance, EPA invoked its actions ***only after receipt 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.

Removing the Proposed Determination is an important step in returning fair and due process to the EPA, and to evaluate project proposals through a defined permitting process.

NEPA Process for Mining Projects

During the NEPA process, a thorough permit application details major project components. Absent of this, EPA compiled its BBWA and reached its Proposed Determination examining three hypothetical mines and their imagined impacts on salmon fisheries: mines that are categorically unpermissible under state and national laws and unsurprisingly, had negative impacts on the environment. The data and analyses set forth in the assessment were speculative and unquantifiable; thus the assessment did not demonstrate anything about the magnitude of adverse effects on the environment, let alone whether such effects were unacceptable. To invoke 404(c), EPA must determine that “the discharge of such materials into such area *will have an unacceptable adverse effect.*” A hypothetical mine development scenario cannot possibly support that determination.

Both the Corps and the State of Alaska questioned EPA’s circumvention of NEPA; the Corps declined to

participate in the BBWA and the State of Alaska objected to EPA's announcement that it would conduct an assessment of the Bristol Bay watershed, stating: "This assessment and the evolving process that EPA proposes is, frankly, unprecedented and not prescribed in statute or regulation. Indeed, the State believes that if EPA deems a review under Section 404(c) of the Clean Water Act is needed, that review should be conducted in conjunction with a pending permit application where actual activities and potential disposal sites are clearly specified, not in the abstract as it will be in this assessment process."

EPA acknowledged there were significant gaps in the BBWA. Likewise, its peer reviewers noted that the BBWA lacked important information about the potential effects of mine development that must be examined during a more rigorous and comprehensive NEPA EIS process. Even setting aside the scientific flaws in the BBWA's analysis, the BBWA cannot serve as the basis for a 404(c) veto.

Significant mining projects are subject to NEPA under CWA Section 404. NEPA requires that an applicant provide a realistic and detailed plan along with measures mitigating potential environmental impacts. Then, the Corps prepares an Environmental Impact Statement (EIS) evaluating, among other things environmental effects and strategies to mitigate them and economic considerations. Abandoning the NEPA framework, as EPA did when it initiated the Section 404(c) process in the absence of a PLP permit application, creates the potential for an agency to engage in a faulty process that is both scientifically unsound and biased.

The planning and environmental review, testing, and approval process to permit a large mine in Alaska takes many years from start to finish, with dozens of local, state and federal government agencies involved in that process. Every mine is different and requires a tailor-made plan for environmental mitigation that is discussed and altered at length by permitting agencies and the developer, with multiple stipulations that go above and beyond statutes and regulations, meaning, agencies can and do prescribe additional practices to be performed at the operation.

Upon completion of the process, a permitted mine will have in hand dozens of permits. In the case of the Pebble deposit, over 50 major permits will be required, and with stream crossing and fish habitat permits, well over 100 permits will be required for a mine to be developed. Of course, one of these permits is the Section 404 permit. Normally, a project submits a Section 404 CWA permit application to the Corps. Once the permit application is filed, NEPA requires the Corps to assess potential impacts of the development application and prepare an EIS, which includes extensive opportunities for cooperating agencies, stakeholders, and the general public to participate and communicate project concerns, suggestions, and other information.

It is important to remember that the NEPA permitting process does not guarantee approval. In many cases, permit applications are denied altogether, and likely in all cases, the final permit looks dissimilar to the initial application, as a result of agency modification to enhance environmental protection. Sometimes, the applicant cannot meet the requirements, and does not proceed with development of the project.

The law as written makes sound policy. A fully developed record, including the Clean Water Act permit application and EIS, consultation with interested state and federal agencies, and public comment and involvement, gives EPA the breadth of information necessary to make such an important decision. By prioritizing the gathering and analysis of as much information as necessary, the statutory process elevates scientific reasoning and allows for a full and objective assessment of the potential impacts of a particular project. This type of deliberative process does not lend itself to shortcuts. Because of this process, it is

inappropriate to preemptively reject a project. Accordingly, EPA would be acting in good faith to withdraw the proposed determination. This will only place the Pebble Project at the starting line – the chance to apply in the first place, and begin review of a proposed mining concept. ***This is not the mine moving forward and there is no environmental harm in allowing a permit application to proceed.***

Economic impact

Whether or not the Pebble Project is developed must be decided throughout the NEPA process, and in the process, regulators and the public can learn of economic impacts as well as environmental issues. This information is vital, and the fate of the Pebble project cannot be rationally decided without consideration of the full social, economic and environmental impacts of the project.

Considering the potential benefits of this project is even more critical considering the dire economic circumstances in the Bristol Bay region of Alaska. Many of the villages near the Pebble Project have poverty levels of over a third of the population. High unemployment levels have forced significant migration to Anchorage and other urban centers. For example, the population of the Lake and Peninsula Borough declined 17% between 2000 and 2010, while the Bristol Bay Borough lost more than 23% of its population. In several communities, schools have closed or are threatened with closure as a result of diminishing enrollment, as federal law requires at least ten students for a school to be open. When schools are closed, residents are forced to relocate so that children can receive an education - resulting in the withering of small communities.

If the NEPA process determines that Pebble can operate responsibly, the project stands to greatly contribute to local, state, and national economies. From a statewide level, mining is the State of Alaska's second largest industry, contributing millions of dollars annually to local governments, the State of Alaska, and Alaska Native Corporations. Mining employs nearly 9,000 workers that earn an average annual wage of \$108,000 – double the state average. These employees come from over 50 Alaskan communities – many in remote, rural Alaska where employment opportunities are limited.

For the Pebble Project in particular, Pebble Limited Partnership estimates an annual contribution to the State of Alaska of \$66 million in taxes, rents, royalties, and other fees. PLP also projects \$20 million annually for the local government, the Lake and Peninsula Borough. These are significant government contributions at a time where the State faces budget deficits in the millions and recessed resource sector activity. Consideration of the Pebble Project must take these local economic factors into account.

Regulatory Uncertainty

EPA's actions to preempt the NEPA process at Pebble sent shock waves through the entire regulated community on a global level as it threatened to undermine the federal environmental permitting system and demonstrated a willingness to govern by regulatory fiat. In fact, the American Exploration & Mining Association, a national mining group, warned that EPA's actions at Pebble are “sending a chilling message to the business and investment community, and has had a negative impact on exploration and mining projects not only in Alaska, but the entire United States. In fact, the world and its investment community are watching. EPA's action at Pebble will clearly indicate whether the United States is open for investment, or closed to innovation, opportunity and job creation.”



Investors do not and should not expect to be shut out of a contrived, one-sided process from the beginning and informed of the rejection at the end. Companies that will invest in Alaska, bringing jobs and numerous other economic benefits, must have the assurance that after spending significant money to design a mine plan, their plan will be reviewed fairly and objectively in accordance with the known regulatory structure. For the process to be fair, developers must have a full opportunity to present plans, defend science, and modify projects to meet legitimate concerns. This is good policy; it is also the law.

EPA must withdraw the Proposed Determination to signal to the investment community that there will be a return to normal order in the CWA permitting process. Withdrawal of the Proposed Determination will allow for this and bring stability back to our permitting system.

Thank you for your consideration of our comments outlined in this letter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Deantha Crockett", with a long, sweeping flourish extending to the right.

Deantha Crockett
Executive Director