

**ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-R10-OW-2022-0418; FRL-9860-01-R10]**

**TITLE: Proposed Determination to Prohibit and Restrict the Use of Certain Waters Within Defined Areas as Disposal Sites; Pebble Deposit Area, Southwest Alaska**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability and public hearing.

**SUMMARY:** Pursuant to Section 404(c) of the Clean Water Act (CWA), the Environmental Protection Agency (EPA) Region 10 is requesting public comments on its 2022 Proposed Determination to prohibit and restrict the use of certain waters in the South Fork Koktuli River (SFK), North Fork Koktuli River (NFK), and Upper Talarik Creek (UTC) watersheds as disposal sites for the discharge of dredged or fill material associated with mining the Pebble deposit, a copper-, gold-, and molybdenum-bearing ore body located in Southwest, Alaska. EPA Region 10 also is announcing public hearings on this proposed determination.

**DATES:** Submit comments on the proposed determination on or before July 5, 2022. See PUBLIC HEARING section below for public hearing dates and related information.

**ADDRESSES:**

*I. How to Obtain a Copy of the Proposed Determination:* The proposed determination is available primarily via the Internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay).

*II. How to Submit Comments to the Docket at [www.regulations.gov](http://www.regulations.gov):*

Submit your comments, identified by Docket ID No. EPA–R10–OW–2022–0418, by one of the following methods:

*Federal eRulemaking Portal (recommended method of comment submission):* Follow the online instructions at <http://www.regulations.gov> for submitting comments.

*Email:* [ow-docket@epa.gov](mailto:ow-docket@epa.gov). Include the docket number EPA–R10–OW–2022–0418 in the subject line of the message.

*Mail and Hand Delivery/Courier:* Send your original comments and three copies to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA–R10–OW–2022–0418.

*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–2022–0418. Such deliveries are accepted only during the Docket’s 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.

*Submit at Public Hearing:* see PUBLIC HEARINGS section below.

*Instructions:* EPA’s policy is that all comments received will be included in the public docket without change and will be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information disclosure of which is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected

information through <http://www.regulations.gov> or email. The <http://www.regulations.gov> website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through <http://www.regulations.gov>, your email address will be captured automatically and included as part of the comment that is placed in the public docket and made publicly available on the Internet. 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. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, 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 <https://www.epa.gov/dockets/commenting-epa-dockets>.

*III. Public Hearings:* In accordance with EPA regulations at 40 CFR 231.4, the Regional Administrator determined that public hearings on this CWA Section 404(c) proposed determination are in the public interest. Give the continued uncertainty related to COVID, EPA intends to host a virtual hearing in addition to in-person hearings. The hearing dates and locations are as follows:

June 16, 2022 — 9am to 12pm, AKDT, Dillingham, Alaska

June 16, 2022 — 5pm to 8pm, AKDT, Virtual

June 17, 2022 — 2pm to 5pm, AKDT, Iliamna, Alaska

Additional hearing details and any changes to the schedule are available at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay). The purpose of the public hearings is to obtain public testimony and comment on EPA Region 10's CWA Section 404(c) proposed determination to prohibit and restrict the use of certain waters in the Bristol Bay watershed for disposal of dredged or fill material associated with mining the Pebble deposit. The Regional Administrator will designate the official who will preside at the public hearing (the Presiding Officer). Any person may appear at the hearing and submit oral and/or written statements or data and may be represented by counsel or other authorized representatives. If you would like to submit written comments, you may do so at the public hearings or by one of the methods described in the section of this public notice entitled: *How to Submit Comments to the Docket at www.regulations.gov*.

Registration is required to participate in the public hearings. Please visit [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay) for information on how to register. Online preregistration is available and includes an option to register to speak during the public hearing. The last day to preregister is June 13, 2022.

Members of the public can also sign up to make a comment at the venue on the day of the meeting. The following information will be requested for each commenter: First name, last name, organization and title (if applicable), city, state, email address, and phone number. Tribal elders and elected officials will be invited to comment first. The facilitator will then use a random number system to select individuals who signed up to determine speaking order. Audio-visual equipment will not be provided.

To maximize the number of individuals who are able to speak at the hearing, oral statements may be limited to three minutes per person. EPA encourages commenters to provide the agency with

a copy of their oral testimony electronically by emailing it to *r10bristolbay@epa.gov*. EPA also recommends submitting the text of your oral comments as written comments to the docket.

EPA may ask clarifying questions during the oral presentations but there will be no cross examination of any hearing participant.

EPA Region 10 will not respond to questions/comments during the hearing. EPA Region 10 will consider the oral and written statements received at the public hearings and other written comments submitted pursuant to the instructions set forth in the section of this public notice entitled: How to Submit Comments to the Docket at *www.regulations.gov*. Any person may present written statements for the hearing file, including rebuttals to other commenter statements, prior to the time the hearing file is closed to public submissions.

Please note that any updates made to any aspect of the hearing will be posted online at *www.epa.gov/bristolbay*. While the agency expects the hearing to go forward as set forth above, please monitor our website to determine if there are any updates. EPA does not intend to publish a document in the **Federal Register** announcing updates.

**FOR FURTHER INFORMATION CONTACT:** For information on the public comment period, contact the Water Docket; telephone: (202) 566–2426 or email: *owdocket@epa.gov*. For information concerning the proposed determination, contact Erin Seyfried; telephone (206) 553-0040 or email: *r10bristolbay@epa.gov*. For more information about EPA’s efforts in Bristol Bay, copies of the Section 404(c) proposed determination, see *http://www.epa.gov/bristolbay*.

**SUPPLEMENTARY INFORMATION:**

*I. Clean Water Act Section 404(c) Review Process.*

EPA's mission is to protect human health and the environment. The CWA, the objective of which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C § 1251(a), is essential to EPA's mission and establishes the basic structure for regulating discharges of pollutants into waters of the United States. To advance this overall objective, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into waters of the United States except as authorized by specific provisions of the Act, including a permit issued pursuant to Sections 402 or 404, 33 U.S.C. § 1342; 33 U.S.C. § 1344. Section 404(a) of the CWA authorizes the United States Army Corps of Engineers (USACE) to issue permits for the discharge of dredged or fill material into waters of the United States. 33 U.S.C. § 1344(a). Section 404(c) of the CWA authorizes EPA to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, "whenever" it determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. 33 U.S.C. 1344(c). EPA's regulations at 40 CFR part 231 govern the Agency's exercise of its CWA Section 404(c) authority.

*II. 2014 Proposed Determination.*

In July 2014, after careful consideration of available information, including the findings of EPA's Bristol Bay Watershed Assessment and consultation with PLP and the State of Alaska,

EPA Region 10 published a Proposed Determination under Section 404(c) of the CWA to restrict the use of certain waters in the SFK, NFK, and UTC watersheds as disposal sites for dredged or fill material associated with mining the Pebble deposit (2014 Proposed Determination) for public comment.

On November 25, 2014, the U.S. District Court for the District of Alaska, in litigation brought by PLP, issued a preliminary injunction against EPA that halted EPA Region 10's CWA Section 404(c) review process until the case was resolved. Order Granting Preliminary Injunction at 1-2, *Pebble Limited Partnership v. EPA*, No. 3:14-cv-00171 (D. Alaska Nov. 25, 2014). On May 11, 2017, EPA and PLP settled that lawsuit and the court subsequently dissolved the injunction and dismissed the case with prejudice. As part of that settlement agreement, EPA Region 10 agreed to “initiate a process to propose to withdraw the [2014] Proposed Determination” and ultimately withdrew it in August 2019.<sup>1</sup> In October 2019, twenty tribal, fishing, environmental, and conservation groups challenged EPA’s withdrawal of the 2014 Proposed Determination in the U.S. District Court for the District of Alaska. This litigation ultimately resulted in an October 29, 2021 District Court decision to vacate EPA’s 2019 decision to withdraw the 2014 Proposed Determination and remand the action to the Agency for reconsideration.

The District Court’s vacatur of EPA’s 2019 decision to withdraw the 2014 Proposed Determination had the effect of reinstating the 2014 Proposed Determination and reinitiating EPA’s CWA Section 404(c) review process. The next step in the CWA Section 404(c) review process required the Region 10 Regional Administrator to decide whether to withdraw the 2014

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<sup>1</sup> On January 26, 2018, EPA Region 10 announced a “suspension” of the proceeding to withdraw the 2014 Proposed Determination at that time. This action was published in the Federal Register on February 28, 2018 (83 FR 8668, February 28, 2018).

Proposed Determination or prepare a recommended determination within 30 days. On November 23, 2021, EPA Region 10 published in the Federal Register a notice extending the applicable time requirements through May 31, 2022, to provide sufficient time for the Agency to consider information that has become available since EPA issued the 2014 Proposed Determination and determine the appropriate next step in the CWA Section 404(c) review process.

### *III. Proposed Mine at the Pebble Deposit*

The Pebble deposit is a large, low-grade copper-, gold-, and molybdenum-bearing ore body deposit located at the headwaters of the pristine Bristol Bay watershed that underlies portions of the SFK, NFK, and UTC watersheds. The SFK, NFK, and UTC watersheds drain to two of the largest rivers in the Bristol Bay watershed, the Nushagak and Kvichak Rivers.

In December 2017, the PLP submitted a CWA Section 404 permit application to USACE to develop a mine at the Pebble deposit that triggered the development of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA). In response to the CWA Section 404 permit review and NEPA processes, PLP submitted a revised permit application to USACE in June 2020 (i.e., the 2020 Mine Plan).

On July 24, 2020, USACE published a Notice of Availability for the Final EIS (FEIS) in the Federal Register and on November 20, 2020, USACE issued its Record of Decision (ROD) denying PLP's CWA Section 404 permit application on the basis that the 2020 Mine Plan would not comply with the CWA Section 404(b)(1) Guidelines and would be contrary to the public interest. By letter dated November 25, 2020, USACE notified PLP that the proposed project failed to comply with the CWA Section 404(b)(1) Guidelines because "the proposed project



would cause unavoidable adverse impacts to aquatic resources which would result in Significant Degradation to aquatic resources.”

#### *IV. Summary of Factual Basis for the 2022 Proposed Determination*

The Bristol Bay watershed is an area of unparalleled ecological value, boasting salmon diversity and productivity unrivaled anywhere in North America. The watershed provides intact, connected habitats—from headwaters to ocean—that support abundant, genetically diverse wild Pacific salmon populations. The Bristol Bay watershed supports the world’s largest runs of Sockeye Salmon, producing approximately half of the world’s Sockeye Salmon, as well as significant Chinook, Coho, Chum, and Pink salmon populations. Bristol Bay’s salmon populations support world-class, economically important commercial and sport fisheries, as well as a more than 4,000-year-old subsistence-based way of life for Alaska Natives.

EPA Region 10 has considered the information that has become available since EPA issued the 2014 Proposed Determination, including the more than 670,000 public comments EPA received on the 2014 Proposed Determination; technical information contained in PLP’s CWA Section 404 permit application and updated mine plan; analysis developed during the NEPA process and contained in USACE’s FEIS and its permit denial; as well as new and potentially relevant science and technical information produced through other contemporaneous efforts. As a result of its review, EPA Region 10 has determined that the appropriate next step in this CWA Section 404(c) review process is to revise the 2014 Proposed Determination.

Construction and routine operation of the mine proposed in the 2020 Mine Plan would result in discharge of dredged or fill material into waters of the United States, including streams, wetlands, lakes, and ponds overlying the Pebble deposit and within adjacent watersheds. The

direct and certain secondary effects of such discharges would result in the total loss of aquatic habitats important to anadromous fishes. These losses are the result of the construction and routine operation of the various components of the mine site, including the open pit, bulk tailings storage facility, pyritic tailings storage facility, power plant, water management ponds, water treatment plants, milling/processing facilities, and supporting infrastructure. According to the FEIS and ROD, discharges of dredged or fill material to construct and operate the mine site proposed in the 2020 Mine Plan would result in the total loss of approximately 99.7 miles (160.5 km) of stream habitat, representing approximately 8.5 miles (13.7 km) of streams with documented anadromous fish occurrence and 91.2 miles (146.8 km) of additional stream habitat. Such discharges of dredged or fill material would also result in the total loss of approximately 2,113 acres (8.6 km<sup>2</sup>) of wetlands and other waters at the mine site.

Additional secondary effects of the proposed discharges of dredged or fill material at the mine site would degrade anadromous fishery areas downstream of the mine site. Specifically, the stream, wetland, and other aquatic resource losses from the footprint of the 2020 Mine Plan would reverberate downstream, depriving downstream anadromous fish habitats of nutrients, groundwater inputs, and other ecological subsidies from lost upstream aquatic resources. Further, streamflow alterations from water capture, withdrawal, storage, treatment, or release at the mine site are another secondary effect of the discharge of dredged or fill material associated with the construction and routine operation of the 2020 Mine Plan. Such streamflow alterations would adversely impact at least 29 miles (46.7 km) of anadromous fish streams downstream of the mine site due to greater than 20 percent changes in average monthly streamflows. These streamflow alterations would result in major changes in ecosystem structure and function and would reduce both the extent and quality of anadromous fish habitat downstream of the mine. All instances of

complete loss of aquatic habitat and most impairment to fish habitat function would be permanent.

EPA Region 10 believes that the discharge of dredged or fill material associated with mining the Pebble deposit within the mine site footprint for the 2020 Mine Plan could result in unacceptable adverse effects on anadromous fishery areas in the SFK and NFK watersheds due to losses of documented anadromous fish habitat and degradation of downstream anadromous fish habitat.

Based on the same record, including information about the pristine condition and productivity of the SFK, NFK, and UTC watersheds and the documented anadromous fish habitat throughout the watersheds, EPA Region 10 has reason to believe that discharges of dredged or fill material for the construction and routine operation of a mine at the Pebble deposit anywhere in the SFK, NFK, and UTC watersheds could result in unacceptable adverse effects on anadromous fishery areas in these watersheds if the effects of such discharges are similar or greater in nature and magnitude to the adverse effects of the 2020 Mine Plan.

Accordingly, consistent with 40 CFR 231.3(a)(2), EPA Region 10 is providing public notice of and requesting public comment on the 2022 Proposed Determination to prohibit and restrict the use of certain waters in the NFK, SFK, and UTC watersheds for disposal of dredged or fill material associated with mining the Pebble deposit. The Defined Area for Prohibition is the mine site footprint for the 2020 Mine Plan. The Defined Area for Restriction encompasses certain headwaters of the SFK, NFK, and UTC watersheds where discharges associated with mining the Pebble deposit are likely.

V. *Solicitation of Comments on the 2022 Proposed Determination*

EPA Region 10 is soliciting comments on all matters and issues discussed in the 2022 Proposed Determination. Please see the section entitled **ADDRESSES** (above) for information about how to obtain a copy of the 2022 Proposed Determination and how to submit comments.

Any interested persons may submit written comments on the proposed determination. All relevant data, studies, or informal observations are appropriate. The Regional Administrator will fully consider all such comments as she decides whether to withdraw the proposed determination or forward to EPA Headquarters a recommended determination to prohibit/restrict the use of certain waters in the SFK, NFK, and UTC watersheds in southwest Alaska as disposal sites for the discharge of dredged or fill material associated with mining the Pebble deposit.

VI. *Additional Background on EPA's CWA Section 404(c) Review Process for the Pebble Deposit Area*

**A.** How to Obtain a Copy of the Bristol Bay Watershed Assessment: The Bristol Bay Watershed Assessment is available via the internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay).

**B.** How to Obtain a Copy of the 2014 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](http://www.epa.gov/bristolbay).

**C.** 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](http://www.epa.gov/bristolbay).

**D. How to Obtain a Copy of the Proposal to Withdraw the 2014 Proposed Determination:** The July 2017 proposal to withdraw the 2014 Proposed Determination is available via the internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay). Information regarding the proposal to withdraw can also be found in the docket for this effort at [www.regulations.gov](http://www.regulations.gov), *see* docket ID No. EPA-R10-OW-2017-0369 or via the following website located at <https://www.regulations.gov/docket?D=EPA-R10-OW-2017-0369>.

**E. How to Obtain a Copy of Notification of Suspension:** The February 2018 notice announcing EPA's decision to suspend the proceeding to withdraw the 2014 Proposed Determination at that time is available via the internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay). Information regarding the suspension can also be found in the docket for this effort at [www.regulations.gov](http://www.regulations.gov), *see* docket ID No. EPA-R10-OW-2017-0369 or via the following website located at <https://www.regulations.gov/docket?D=EPA-R10-OW-2017-0369>.

**F. How to Obtain a Copy of the Notice of Withdrawal of the 2014 Proposed Determination:** The August 2019 notice of withdrawal of the 2014 Proposed Determination is available via the internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay). Information regarding the proposal to withdraw can also be found in the docket for this effort at [www.regulations.gov](http://www.regulations.gov), *see* docket ID No. EPA-R10-OW-2017-0369 or via the following website located at <https://www.regulations.gov/docket?D=EPA-R10-OW-2017-0369>.

Dated: May 17, 2022

Casey Sixkiller

*Regional Administrator, Region 10*