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December 12, 2022

Dear Assistant Administrator Fox:

Thank you for your December 2, 2022 letter seeking consultation with the Alaska Department of Natural Resources regarding Region 10's 404(c) Recommended Determination to prohibit and restrict the use of certain waters of the United States in the Bristol Bay area as disposal sites for dredged or fill material in connection with developing the Pebble Deposit. As the Recommended Determination reflects, Region 10's basis for this action is that discharges associated with developing the deposit "would be likely to result in unacceptable adverse effects on anadromous fishery areas."

Your letter is an invitation to share our "intent to take corrective action" in response to Region 10's concerns about protecting the anadromous fish in the Bristol Bay area.

The State of Alaska's intent to take corrective action is beyond dispute. It is *codified*. Alaska's state agencies are constitutionally required to ensure the availability of a sustained yield of fish for future generations<sup>1</sup> and statutorily required to protect Alaska's anadromous fish, including their habitat.<sup>2</sup>

The Alaska Department of Fish & Game ("ADF&G") implements these requirements through a state permitting process that Region 10—with the initiation of this action—has choked off. An ADF&G Title 16 permit is required for "all activities"<sup>3</sup>

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<sup>1</sup> Alaska Const, art. VIII, § 4; *West v. State, Bd. of Game*, 248 P.3d 689, 695 (Alaska 2010).

<sup>2</sup> Alaska Statutes ("AS") 16.05.871–.901 (Anadromous Fish Act).

<sup>3</sup> Including road crossings, gravel removal, mining activities, water withdrawals, the use of vehicles or equipment in the waterway, stream realignment or diversion, polluting, bank stabilization, and the placement, excavation, deposition, or removal of any material. This applies to individuals, commercial entities, government agencies, and other organizations.

altering or affecting “the natural flow or bed” of catalogued anadromous waterbodies.<sup>4</sup> ADF&G’s experts will only approve Title 16 permits if “*any adverse effect upon fish or wildlife, or their habitat*”<sup>5</sup> is sufficiently mitigated pursuant to ADF&G’s robust mitigation requirements.<sup>6</sup>

In other words: if ADF&G issues a Title 16 permit, anadromous fish in Alaska *will be protected*. The failure to obtain a Title 16 permit is a state crime.<sup>7</sup>

Region 10 has initiated this action before our Title 16 permitting process has begun. As a result, the Recommended Determination fails to consider the measures that ADF&G must require to be taken to protect the anadromous fish, wildlife, and their habitat.<sup>8</sup> This could include denial of a Title 16 permit for the proposed or any future project should the State determine that these resources cannot be protected. Failure to take the discharge of the State’s Title 16 responsibilities into account leaves the Recommended Determination not only premature but arbitrary. The “corrective action” to be taken by the State will be denial of a Title 16 permit should it determine that development of the Pebble Deposit will result in “*any adverse effect upon fish or wildlife, or their habitat*” that cannot be appropriately mitigated.

Without any indication as to which of our Title 16 regulations Region 10 believes would be insufficient to protect the anadromous fish in Bristol Bay, Alaska is at a loss for what “corrective action” EPA expects us to now take.

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<sup>4</sup> AS 16.05.871(b). Catalogued anadromous waterbodies are “rivers, lakes, and streams or parts of them that are important for the spawning, rearing, or migration of anadromous fish.” AS 16.05.871(a).

<sup>5</sup> 5 Alaska Administrative Code (“AAC”) 95.900(a) (emphasis added).

<sup>6</sup> 5 AAC 95.900(b) provides that “[m]itigation techniques must be employed in the following order of priority: (1) avoid an impact altogether by not taking a certain action or parts of an action; (2) minimize an impact by limiting the degree of magnitude of the action; (3) rectify the impact by repairing, rehabilitating, or restoring the affected environment; (4) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; (5) compensate for the impact by replacing or providing substitute resources or environments.”

<sup>7</sup> AS 16.05.881.

<sup>8</sup> The United States Army Corps of Engineers (“USACE”)’s permitting process remains pending. Permittees generally abstain from seeking state permits until after they receive their federal permits. The permittee in this case would be required to apply for and receive a Title 16 permit before the project could proceed.

We request an in-person meeting with you and your staff to further discuss.

Respectfully,



Akis Gialopsos  
Acting Commissioner  
Alaska Department of Natural Resources



Jason Brune  
Commissioner  
Alaska Department of Environmental Conservation



Douglas Vincent-Lang  
Commissioner  
Alaska Department of Fish & Game



Treg Taylor  
Attorney General  
Alaska Department of Law