

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
202 429 3000 main
www.steptoe.com

December 19, 2022

Via Email and U.S. Mail

Radhika Fox, Assistant Administrator
U.S. Environmental Protection Agency
Office of Water
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: EPA Recommended Determination Consultation

Dear Assistant Administrator Fox:

I am writing on behalf of the Pebble Limited Partnership (“PLP”) in response to your letter dated December 2, 2022, regarding the *Recommended Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act – Pebble Deposit Area, Southwest Alaska*. In that letter, you invited PLP to notify EPA of PLP’s “intent to take corrective action to prevent unacceptable adverse effects on anadromous fishery areas from discharges of dredged or fill material associated with developing the Pebble deposit.” Because EPA’s analysis is fundamentally flawed, the only real corrective action is to withdraw the Recommended Determination. First, the Recommended Determination’s overbroad restrictions are based on entirely speculative, as opposed to demonstrated, “unacceptable adverse effects.” No corrective action could satisfy the baseless restrictions proposed by EPA. Second, the record, including but not limited to the U.S. Army Corps of Engineers’ (“USACE”) July 2020 Final Environmental Impact Statement (“FEIS”) and PLP’s existing compensatory mitigation plan, proves that corrective action is not warranted. The science strongly supports the FEIS’s conclusion that the mine can coexist with Bristol Bay fisheries with minimal impact.

Speculative Impacts

The Recommended Determination proposes a 309-square-mile Defined Area for Restriction based on speculation that undetermined “*future plans* to mine the Pebble deposit would be *likely* to result in unacceptable adverse effects on anadromous fishery areas . . . *anywhere in the* [South Fork Koktuli], [North Fork Koktuli], and [Upper Talarik Creek] watersheds if the adverse effects of such discharges are similar or greater in nature and magnitude to the adverse effects of the 2020 Mine Plan.” Recommended Determination at ES-15 (emphasis added). In addition to exceeding EPA’s authority under the Clean Water Act, these restrictions are too broad for PLP to gauge what activity could be permitted. As just one example, EPA does not explain how the restrictions actually apply to “future plans” other than the vague assurance that it “will carefully evaluate all future proposals to discharge dredged or fill material in the region.” *Id.* at 5-12. It is thus clear that the point of the Recommended

Determination is not to avoid demonstrated impacts to fish but rather to permanently prevent all development within the Pebble Deposit. EPA has effectively walled off the entire region from productive economic activity; thus, no “corrective action” is possible.

Furthermore, even if the geographic restrictions were not so excessive, the supposed harms are too speculative to address. For example, EPA continues to base its findings on impacts on salmon habitat on a series of guesses and conjecture, concluding that “losses of and impacts on salmon habitat *could* cause the extirpation of unique local populations of Coho, Sockeye and Chinook salmon,” which “*could* adversely affect the stability and sustainability of valuable subsistence, commercial, and recreational salmon fisheries.” *Id.* at 4-79 (emphasis added). Adding to the speculation, EPA highlights that harvests of “non-salmon species *could* also suffer . . . as a result of mine expansion.” *Id.* (emphasis added). In other words, EPA bases its restrictions on remote possibilities that are themselves based on unknown future plans. Even adding together all these speculative impacts, EPA can still only conclude that unacceptable adverse effects “would be *likely* to result” from developing a mine at the Pebble Deposit, *id.* at ES-1 (emphasis added), not that such effects would in fact occur. Again, this renders consultation on corrective action futile.

Corrective Action Unnecessary

Finally, there is no need for PLP to identify corrective action, as the record is clear that the Pebble Deposit can be developed safely. The Pebble FEIS concluded, based on years of data gathering from numerous stakeholders, that the Pebble Deposit could be developed without “a measurable impact on fish populations” resulting from the mine. FEIS at 4.24-1. This conclusion was based on a number of detailed factual findings, including among many other observations that the mine would not have significant downstream impacts, *id.*, that recreational use around the mine site is low, *id.* at 4.5-4, that there is little risk of a tailings storage facility failure, *id.* at ES-100, that “direct habitat losses would not be measurable,” *id.* at 4.24-46, and that portfolio effect impacts are “not likely to be noticeable in context of the Bristol Bay watershed, *id.* at 4.24-47. In light of these objective and comprehensive findings, it is hard to imagine what more corrective action could be necessary.

Moreover, EPA’s calls for corrective action ring especially hollow when it continues to dismiss compensatory mitigation. According to EPA, “known compensation measures are unlikely to adequately mitigate effects described in this recommended determination to an acceptable level.” Recommended Determination at 4-87. This statement cleverly ignores that, if the permit application process continues, USACE, the State of Alaska, *and EPA* will have the opportunity to work with PLP to identify compensatory mitigation measures that address EPA’s concerns. But by broadly concluding that “it is simply not possible to compensate for some habitats,” *id.* at C-32, EPA effectively admits that it has no interest in considering this important tool in environmental protection.

* * *

The Recommended Determination is merely the predictable next step in EPA’s quest to try to kill the Pebble project. If EPA were serious about minimizing demonstrated unacceptable adverse effects and if EPA were truly concerned about its stated commitment to environmental

justice, as opposed to wholesale prohibitions of productive economic activity, PLP could engage in a constructive process to move forward. As Alaska Native Village Corporations close to the Pebble Deposit have repeatedly pointed out, the project would provide a significant number of high-paying jobs for their shareholders and business and investment opportunities for their corporations. The scope of the Recommended Determination is proof that EPA is not serious about engaging in a productive consultation that balances the economic and environmental interests of the State of Alaska and Alaska Native Tribes.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patricia B. Palacios', with a long horizontal line extending to the right.

Patricia B. Palacios