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1
2 **UNITED STATES DISTRICT COURT**
3 **FOR THE DISTRICT OF ALASKA**
4 **AT ANCHORAGE**

5 BRISTOL BAY ECONOMIC
6 DEVELOPMENT CORPORATION,
7 BRISTOL BAY NATIVE ASSOCIATION,
8 INC., UNITED TRIBES OF BRISTOL
9 BAY, BRISTOL BAY REGIONAL
10 SEAFOOD DEVELOPMENT
11 ASSOCIATION, INC., and BRISTOL BAY
12 RESERVE ASSOCIATION,

13 Plaintiffs,

14 v.

15 CHRIS HLADICK, in his official capacity
16 as Regional Administrator of the U.S.
17 Environmental Protection Agency,
18 Region 10; MATTHEW Z. LEOPOLD, in
19 his official capacity as General Counsel for
20 EPA and delegated authority of the
21 Administrator; U.S. ENVIRONMENTAL
22 PROTECTION AGENCY,

23 Defendants.

CASE NO. 3:19-CV-00265-TMB

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

**Administrative Procedure Act, 5 U.S.C.
§§ 702–06; Clean Water Act, 33 U.S.C.
§ 1251 et. seq.**

24 Plaintiffs Bristol Bay Economic Development Corporation, Bristol Bay Native
25 Association, Inc., United Tribes of Bristol Bay, Bristol Bay Regional Seafood Development
26 Association, Inc., and Bristol Bay Reserve Association (collectively, “Plaintiffs”) file this
Complaint for Declaratory and Injunctive Relief, and allege as follows.

I. INTRODUCTION

1
2 1. The Bristol Bay watershed, and its ecologically important streams,
3 wetlands, lakes and ponds, provide habitat for the world's largest wild salmon runs,
4 ranging from 30 to 60 million fish annually. Bristol Bay salmon are economically,
5 culturally and ecologically critical to Alaskan communities, generating \$1.5 billion in
6 annual revenue and supporting 14,000 jobs. Bristol Bay salmon have also been the
7 foundation of Alaska Native cultures in the region for thousands of years and continue
8 to sustain some of the last intact wild salmon-based cultures in the world.
9

10
11 2. The proposed Pebble mine would destroy thousands of acres of critical habitat
12 and miles of salmon streams that are essential to Bristol Bay's commercial, recreational and
13 subsistence salmon fisheries.

14
15 3. This case challenges the U.S. Environmental Protection Agency's (EPA)
16 unlawful withdrawal of its Proposed Determination that development of the Pebble deposit
17 in the headwaters of Bristol Bay, Alaska could result in significant and unacceptable adverse
18 effects on ecologically important streams, wetlands, lakes, and ponds and the world-class
19 fishery they support. 84 Fed. Reg. 45,749 (Aug. 30, 2019).
20

21 4. EPA issued its Proposed Determination in July 2014 pursuant to Section
22 404(c) of the Clean Water Act ("CWA"), 33 U.S.C. §1251 et. seq. *See* U.S. Env'tl. Prot.
23 Agency, Proposed Determination of the U.S. Environmental Protection Agency Region
24 10 Pursuant to Section 404(c) of the Clean Water Act: Pebble Deposit Area, Southwest
25 Alaska (2014) ("Proposed Determination").
26

1 5. In the Proposed Determination, EPA found that “Alaska’s Bristol Bay
2 watershed . . . is an area of unparalleled ecological value, boasting salmon diversity and
3 productivity unrivaled anywhere in North America.” Proposed Determination at ES-1.

4 6. To protect these nationally and globally significant resources, EPA
5 proposed restricting “discharge of dredged or fill material related to mining the Pebble
6 deposit into waters of the United States. . . .” Proposed Determination at 5-1.

7 7. In 2014, Pebble Limited Partnership (“PLP”), the proponent of the Pebble
8 mine, sued EPA in three separate lawsuits. In May 2017, EPA and PLP settled the
9 litigation. Settlement Agreement between EPA and Pebble Limited Partnership
10 (May 11, 2017) (“Settlement Agreement”).

11 8. Under the Settlement Agreement, EPA committed to “initiate a process to
12 propose to withdraw the Proposed Determination.” Settlement Agreement, ¶ III.A.5.

13 9. As required by the Settlement Agreement, EPA issued a proposal to
14 withdraw the Proposed Determination in July 2017 and requested public comments.
15 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a
16 Disposal Site; Pebble Deposit Area, Southwest Alaska, 82 Fed. Reg. 33,123 (July 19,
17 2017) (“Proposal to Withdraw”).

18 10. After receiving over a million comments, the overwhelming majority in
19 opposition to EPA’s proposal to withdraw the Proposed Determination, EPA decided to
20 leave the Proposed Determination “in place pending further consideration by the
21 Agency of information that is relevant to the protection of the world-class fisheries
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1 contained in the Bristol Bay watershed.” Notice of the decision was published in the
2 Federal Register on February 28, 2018. 83 Fed. Reg. 8,668-8,671 (Feb. 28, 2018).

3 11. Subsequently, without any “further consideration,” EPA reversed course,
4 announcing its decision to withdraw the Proposed Determination on July 30, 2019.
5 Notice of the decision was published in the Federal Register on August 30, 2019.
6 84 Fed. Reg. 45,749.

7
8 12. Plaintiffs seek vacatur of EPA’s decision to withdraw the Proposed
9 Determination and declaratory and injunctive relief because the decision is arbitrary,
10 capricious, an abuse of discretion, and not in accordance with law.
11

12 **II. JURISDICTION AND VENUE**

13 13. This action arises under the CWA, 33 U.S.C. § 1251 et. seq., and the
14 Administrative Procedure Act (APA), 5 U.S.C. §§ 702–06. This Court has jurisdiction
15 over the parties and subject matter of this action pursuant to 28 U.S.C. § 1331 (federal
16 question jurisdiction) and §§ 2201–02 (declaratory judgment).
17

18 14. Venue is proper in the District of Alaska under 28 U.S.C. § 1391 because
19 a substantial part of the events giving rise to the claims occurred within the District of
20 Alaska and the waters, wetlands, and wildlife at issue are in Alaska.
21

22 **III. PARTIES**

23 **A. Plaintiffs**

24 15. Plaintiff Bristol Bay Economic Development Corporation (“BBEDC”) is
25 a 501(c)(4) non-profit corporation whose mission is to promote economic growth and
26

1 opportunities for residents of its member communities through sustainable use of the
2 Bristol Bay and Bering Sea resources. BBEDC undertakes programs and management
3 to foster economic and social benefits for the residents and communities of Bristol Bay
4 in order to ensure sustainability of the region's renewable natural resources, including
5 its salmon fisheries and other fish stocks and fisheries.
6

7 16. Plaintiff Bristol Bay Native Association, Inc. ("BBNA") is a non-profit
8 corporation and tribal consortium whose mission is to advance the social, cultural, and
9 economic interests of the Tribes and Alaska Native people of the Bristol Bay Region
10 including by prioritizing protection of Bristol Bay's salmon fisheries (commercial,
11 subsistence and sport) and salmon habitat in all land management decisions.
12

13 17. Plaintiff United Tribes of Bristol Bay ("UTBB") is a tribally chartered
14 consortium of fifteen federally recognized tribes in Bristol Bay. Each member tribe
15 passed a tribal resolution delegating its governmental powers to UTBB to implement
16 the Bristol Bay Regional Visioning Project, a region-wide action plan developed by
17 Bristol Bay's tribal communities focused on improving economic development
18 opportunities, preserving cultural and subsistence resources, and increasing educational
19 opportunities for tribal youth. UTBB is organized as a consortium of tribal governments
20 working to protect the traditional way of life of the indigenous people of Bristol Bay
21 and the natural resources upon which that way of life depends. UTBB's mission is to
22 advocate for sustainable communities through development consistent with our
23 traditional values.
24
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1 18. Plaintiff Bristol Bay Regional Seafood Development Association, Inc.
2 (“BBRSDA”) is a 501(c)(6) non-profit corporation, established in 2005 to implement
3 the provisions of AS 44.33.065. BBRSDA’s mission is to maximize the value of the
4 Bristol Bay fishery for the benefit of its members, and it works to achieve this mission
5 through strategies focused on marketing, quality, and sustainability. BBRSDA’s
6 membership consists of all 1,863 Bristol Bay salmon driftnet (S03T) permit holders and
7 operates a successful branding/marketing program for Bristol Bay Sockeye Salmon
8 which relies heavily on the fishery’s abundance and positive reputation for pristine
9 habitat.
10

11
12 19. Plaintiff Bristol Bay Reserve Association (“BBRA”) is a non-profit
13 corporation which was established in 2013. BBRA’s mission is to promote the interests
14 of its members who own commercial fishing vessels and participate in the Bristol Bay
15 commercial salmon drift fishery. BBRA has approximately three hundred and fifty
16 (350) member vessel owners. Approximately twenty-five percent (25%) of the vessels
17 participating in the Bristol Bay commercial salmon drift fishery are BBRA member
18 vessels.
19

20
21 20. Plaintiffs and their members and supporters have long-standing interests
22 in the world-class fisheries of Bristol Bay. Plaintiffs’ staff and members live and/or
23 work in Bristol Bay and near the Pebble deposit area. Plaintiffs’ interests in the
24 environmental and aquatic resources protected by EPA’s Proposed Determination are
25
26

1 legally protected under the CWA. Each Plaintiff submitted comments on the Proposed
2 Determination, and on EPA's proposal to withdraw the Proposed Determination.

3 21. EPA's decision to withdraw the Proposed Determination has caused and
4 will continue to cause actual, concrete injuries to Plaintiffs, their members and staff
5 unless redressed by the relief sought in this case.
6

7 **B. Defendants**

8 22. Defendant Chris Hladick is the Regional Administrator of Region 10 of
9 EPA and is sued in his official capacity.
10

11 23. Defendant Matthew Z. Leopold is General Counsel for EPA, acting by
12 delegated authority for the EPA Administrator, and is sued in his official capacity.
13

14 24. Defendant EPA is the federal agency responsible for implementing and
15 enforcing a variety of federal environmental laws, including the CWA. Specifically,
16 EPA is charged with oversight of the permitting program under Section 404 of the
17 CWA.
18

19 **IV. STATUTORY FRAMEWORK**

20 **A. The Clean Water Act**

21 25. Congress enacted the CWA in 1972 to "restore and maintain the chemical,
22 physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).
23
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1 26. Congress established several goals for the Act, including attainment and
2 preservation of “water quality which provides for the protection and propagation of fish,
3 shellfish, and wildlife. . .” 33 U.S.C. § 1251(a)(2).

4 27. To further these goals, Congress prohibited “discharge of any pollutant”
5 into navigable waters except in accordance with the CWA. 33 U.S.C. § 1311(a).
6

7 28. Congress delegated authority to the U.S. Army Corps of Engineers
8 (“Corps”) to issue permits for the discharge of dredged or fill material under Section
9 404 of the CWA. 33 U.S.C. § 1344.

10 29. In its permit review, the Corps must evaluate applications under a public
11 interest review, as well as the environmental criteria set forth in the CWA Section
12 404(b)(1) Guidelines, regulations promulgated by EPA. *See* 33 C.F.R. Part 320,
13 40 C.F.R. Part 230.
14

15 30. The Guidelines prohibit the permitting of any discharge of dredged or fill
16 material: (1) if a practicable alternative to the proposed discharge would have less
17 adverse impact on the aquatic ecosystem; (2) if the discharge will cause or contribute to
18 significant degradation of the environment; (3) if the discharge will cause or contribute
19 to violations of water quality standards; and (4) unless all appropriate steps have been
20 taken to minimize potential adverse impacts. 40 C.F.R. § 230.10.
21

22 31. Under Section 404(c), Congress gave the EPA Administrator the authority
23 “to prohibit the specification (including the withdrawal of specification) of any defined
24 area as a disposal site, and he is authorized to deny or restrict the use of any defined area
25
26

1 for specification (including the withdrawal of specification) as a disposal site, whenever
2 he determines, after notice and opportunity for public hearings, that the discharge of
3 such materials into such area will have an unacceptable adverse effect on municipal
4 water supplies, shellfish beds and fishery areas (including spawning and breeding
5 areas), wildlife, or recreational areas.” 33 U.S.C. § 1344(c); 40 C.F.R. § 231.1(a). CWA
6 404(c) is commonly referred to as EPA’s “veto authority” because Congress authorized
7 EPA to preclude or override the Corps’ decision to issue a 404 permit.
8

9 32. An “unacceptable adverse effect” is an “impact on an aquatic or wetland
10 ecosystem which is likely to result in significant degradation of municipal water
11 supplies (including surface or ground water) or significant loss of or damage to fisheries,
12 shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of
13 such impacts, consideration must be given to the relevant portions of the Section
14 404(b)(1) [G]uidelines (40 CFR part 230).” 40 C.F.R. § 231.2(e).
15
16

17 33. In making a decision under 404(c), the EPA Administrator must “take into
18 account all information available to him, including any written determination of
19 compliance with the Section 404(b)(1) Guidelines.” 40 C.F.R. § 231.1(a).
20

21 34. If the Regional Administrator has reason to believe that an “unacceptable
22 adverse effect” could result from using a defined area for the disposal of dredged or fill
23 material, the Regional Administrator must notify the Corps of his intent to issue a public
24 notice of a proposed determination. 40 C.F.R. § 231.3(a)(1).
25
26

1 35. After the Corps receives the Regional Administrator’s notice, it “will not”
2 issue a 404 permit for the defined area. 33 C.F.R. § 323.6(b). However, the Corps may
3 process a permit application while a Section 404(c) review is underway. *Id.*

4 36. Separate from the Section 404(c) process, Section 404(q) of the CWA
5 authorizes EPA and the Corps to enter into agreements to minimize the delays in the
6 issuance of Section 404 permits. 33 U.S.C. § 1344(q). Pursuant to Section 404(q), EPA
7 and the Corps have executed a Memorandum of Agreement (“MOA”) that sets forth
8 procedures through which EPA can elevate its concerns about pending permit
9 applications. Memorandum of Agreement Between the EPA and the Department of the
10 Army 7-8 (Aug. 11, 1992), available at
11 https://www.epa.gov/sites/production/files/2015-06/documents/1992_moa_404q.pdf.

12 37. Under the MOA, if EPA believes that a permit “may result in substantial and
13 unacceptable impacts to aquatic resources of national importance” it must send the Corps a
14 letter during the public comment period for the permit application. MOA at 7. After sending
15 the Corps its letter, EPA has 25 calendar days to determine whether a “discharge will have
16 a substantial and unacceptable impact” and notify the Corps of its conclusion. *Id.* A finding
17 that a discharge will have a substantial and unacceptable adverse impact triggers
18 consultation procedures between the Corps and EPA. However, the Corps may still issue a
19 permit if, after the end of consultation, it disagrees with EPA. *See id.* at 8–10.
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1 **B. The Administrative Procedure Act**

2 38. The Administrative Procedure Act (“APA”) requires a court to “hold
3 unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary,
4 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.
5 § 706(2)(A).
6

7 39. An agency’s analysis is arbitrary and capricious if it has “relied on factors
8 which Congress has not intended it to consider, entirely failed to consider an important
9 aspect of the problem, offered an explanation for its decision that runs counter to the
10 evidence before the agency, or is so implausible that it could not be ascribed to a
11 difference in view or the product of agency expertise.” *Ctr. for Biological Diversity v.*
12 *Bureau of Land Mgmt.*, 833 F.3d 1136, 1146 (9th Cir. 2016).
13

14 40. Under the APA, an agency “must examine the relevant data and articulate
15 a satisfactory explanation for its action, including a rational connection between the
16 facts found and the choice made.” *Humane Soc’y of the U.S. v. Locke*, 626 F.3d 1040,
17 1048 (9th Cir. 2010); *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut.*
18 *Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856 (1983).
19
20

21 41. An agency’s change in position is arbitrary and capricious under the APA
22 unless the agency (1) displays “awareness that it is changing position,” (2) shows that
23 “the new policy is permissible under the statute,” (3) “believes” the new policy is better,
24 and (4) provides “good reasons” for the new policy, which, if the “new policy rests upon
25 factual findings that contradict those which underlay its prior policy,” must include “a
26

1 reasoned explanation . . . for disregarding facts and circumstances that underlay or were
2 engendered by the prior policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502,
3 515–516, 129 S. Ct. 1800 (2009).

4 42. Although an agency is entitled to change its course when its view of what
5 is in the public’s interest changes, the “agency changing its course must supply a
6 reasoned analysis indicating that prior policies and standards are being deliberately
7 changed, not casually ignored, and if an agency glosses over or swerves from prior
8 precedents without discussion it may cross the line from the tolerably terse to the
9 intolerably mute.” *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-
10 88 (9th Cir. 2007).

13 **V. FACTUAL BACKGROUND**

14 43. The Bristol Bay watershed is a pristine and intact environment. Proposed
15 Determination at ES-1. As Former EPA Regional Administrator Dennis McLerran
16 noted, the streams, rivers, wetlands, lakes, and other waters of Bristol Bay “comprise
17 one of the most productive, pristine, valuable, and vulnerable ecosystems remaining in
18 North America today.” Dennis McLerran, Letter, EPA Regional Administrator, to
19 Thomas Collier, et al., Feb. 28, 2014 at 1.

22 44. The Bristol Bay watershed also supports the largest sockeye salmon
23 fishery in the world. *Id.* at 2. Nearly half of the world’s sockeye salmon catch comes
24 from Bristol Bay. EPA, An Assessment of Potential Mining Impacts on Salmon
25 Ecosystems of Bristol Bay, Alaska (2014) (EPA 910-R-14-001C) (“Watershed
26

1 Assessment”), at 1-1. The Bristol Bay fishery drives a regional economy, with far-
2 reaching impacts throughout Alaska down to the lower-48. *See* U.S. Army Corps of
3 Engineers, Pebble Project EIS Draft Environmental Impact Statement (“Draft EIS”),
4 Feb. 2019, at 3.6-5, 3.6-13 to 3.6-14.

5
6 45. Many of those in the Bristol Bay region, including Plaintiffs’ members,
7 lead a subsistence way of life, and are dependent on the fisheries and wildlife of the
8 Bristol Bay watershed. EPA, Frequently Asked Questions about Bristol Bay 404c
9 Process, available at [https://www.epa.gov/bristolbay/frequently-asked-questions-about-](https://www.epa.gov/bristolbay/frequently-asked-questions-about-bristol-bay-404c-process)
10 [bristol-bay-404c-process](https://www.epa.gov/bristolbay/frequently-asked-questions-about-bristol-bay-404c-process); Proposed Determination at ES-1 and 3-52.

11
12 46. The Bristol Bay watershed also supports a prolific outdoor recreation
13 industry dependent on the thriving fishery. *See* Letter from 43 Senators and
14 Congressman to President Trump, Oct. 11, 2017; Proposed Determination at 6-2 to 6-3.

15
16 47. Given these significant resources, and the threat posed by potential mining,
17 in 2010, six federally recognized tribes, all of whom later founded Plaintiff UTBB,
18 petitioned EPA to exercise its authority under Section 404(c) of the CWA to protect the
19 Nushagak and Kvichak watersheds from development of the Pebble deposit. Joint Letter
20 from Nondalton Tribal Council, Koliganik Village Council, New Stuyahok Traditional
21 Council, Ekwok Village Council, Curyung Tribal Council, and Levelock Village
22 Council, to Lisa P. Jackson, Administrator: U.S. Env’tl. Prot. Agency, & Dennis J.
23 McLerran, Regional Administrator: U.S. Env’tl. Prot. Agency, Region 10 (May 2, 2010).

1 48. In response, EPA initiated a scientific assessment “to determine the
2 significance of Bristol Bay’s ecological resources and evaluate the potential impacts of
3 large-scale mining on these resources.” Watershed Assessment at ES-1.

4
5 **A. The Bristol Bay Watershed Assessment**

6 49. Explaining its decision to undertake the Watershed Assessment, EPA
7 stated “[b]ased upon information known to EPA about the proposed mine at the Pebble
8 deposit and its potential impacts on fishery resources, and as a result of multiple
9 inquiries, concerns, and petitions to EPA to use its authorities to protect these fishery
10 resources, EPA decided to conduct an ecological risk assessment before considering any
11 additional steps” under 404(c). Proposed Determination at ES-3.

12
13 50. The Watershed Assessment was the result of “three years of study, two
14 rounds of public comment, and independent, external peer review.” *Id.* at ES-3; *see also*
15 2-7, 2-9 to 2-10.

16
17 51. In the Watershed Assessment, EPA identified and considered three mining
18 scenarios. Watershed Assessment at ES-10. The three mining scenarios “represent
19 different stages of mining at the Pebble deposit, based on the amount of ore processed:
20 Pebble 0.25 (approximately .25 billion tons . . . of ore over 20 years), Pebble 2.0
21 (approximately 2.0 billion tons . . . of ore over 25 years), and Pebble 6.5 (approximately
22 6.5 billion tons . . . of ore over 78 years).” *Id.* The major components of the mine
23 scenarios considered included an open pit mine, waste rock piles, and one or more
24 tailing storage facilities, and an 86-mile transportation corridor within the Kvichak
25
26

1 River watershed that includes a gravel-surfaced road, four pipelines and a port. *Id.* These
2 scenarios were based on “preliminary mine details put forth in Northern Dynasty
3 Minerals’¹ *Preliminary Assessment of the Pebble Mine* (Ghaffari et al. 2011)” and
4 scientific information from mines around the world. *Id.* at 6-1.

5
6 52. EPA recognized that, “[t]he exact details of any future mine plan for the
7 Pebble deposit or for other deposits in the watershed will differ from our mine
8 scenarios.” *Id.* at ES-10. The uncertainty about the specific future mine plans was
9 irrelevant because EPA’s “scenarios reflect[ed] the general characteristics of mineral
10 deposits in the watershed, modern conventional mining technologies and practices, the
11 scale of mining activity required for economic development of the resource, and the
12 infrastructure needed to support large-scale mining.” *Id.* As a result, EPA stated that the
13 three mining scenarios considered in the Watershed Assessment “realistically represent
14 the type of development plan that would be anticipated for a porphyry copper deposit in
15 the Bristol Bay watershed.” *Id.*

16
17
18 53. EPA found that even the smallest mine scenario of 0.25 billion tons of ore
19 over 20 years would: (1) eliminate, block or dewater 38 kilometers of streams;
20 (2) eliminate, block or dewater 8 kilometers of anadromous steams; (3) alter 20% or
21 more of streamflow in 15 kilometers of stream; (4) result in direct toxicity to
22 invertebrates in 21 kilometers of stream; (5) result in the loss of 4.9 square kilometers
23
24

25 ¹ The Pebble Limited Partnership (“PLP) is a subsidiary of Northern Dynasty Minerals.
26 Proposed Determination at ES-5, n.4.

1 of wetlands, lakes, and ponds from the mine footprint; (6) result in an unquantifiable
2 loss of streams from reduced streamflow below the mine footprint; and (7) impact 4.7
3 square kilometers of wetlands, lakes, and ponds from the access road. Watershed
4 Assessment at ES-18.

5
6 **B. The Proposed Determination Findings**

7 54. Based on the scientific findings in the Watershed Assessment, EPA
8 concluded in the Proposed Determination that “mining of the Pebble deposit at any of
9 [the three mining scenarios identified,] even the smallest, could result in significant and
10 unacceptable adverse effects on ecologically important streams, wetlands, lakes, and
11 ponds and the fishery areas they support.” Proposed Determination at ES-5.

12
13 55. EPA stated, the “[Watershed] Assessment established that the extraction,
14 storage, treatment, and transportation activities associated with building, operating, and
15 maintaining one of the largest mines ever built would pose significant risks to the
16 unparalleled ecosystem that produces one of the greatest wild salmon fisheries left in
17 the world. In simple terms, the infrastructure necessary to mine the Pebble deposit
18 jeopardizes the long-term health and sustainability of the Bristol Bay ecosystem.”
19 Proposed Determination at ES-3.

20
21 56. The Proposed Determination characterized the potential adverse impacts
22 identified by the Watershed Assessment as an underestimate because EPA only
23 considered “the footprint impacts associated with the mine pit, [tailing storage
24 facilities], and waste rock piles” and not the additional support facilities necessary for
25
26

1 mining in the region. Proposed Determination at 2-17. The EPA also did not consider
2 impacts “from potential accidents and failures as a basis for its findings” despite the
3 “high likelihood” that a failure would occur. *Id.* at ES-6.

4 57. In the Proposed Determination, EPA found that loss of headwaters in
5 Bristol Bay would: “fundamentally alter surface and groundwater hydrology and, in
6 turn, the flow regimes of receiving—or formerly receiving—streams. Such alterations
7 would reduce the extent and frequency of stream connectivity to off-channel habitats,
8 as well as reduce groundwater inputs and their modifying influence on the thermal
9 regimes of downstream habitats These lost streams also would no longer support or
10 export macroinvertebrates, which are a critical food source for developing alevins,
11 juvenile salmon, juvenile northern pike, and all life stages of other salmonids and forage
12 fish.” Proposed Determination at 4-9.

13 58. EPA found that “[t]he greatest impacts would be at the [tailings storage
14 facility] location in the [North Fork Kuktuli] watershed. Coho salmon spawn or rear in
15 nearly 50% of the stream length within the [tailings storage facility] footprint.”
16 Proposed Determination at 4-4.

17 59. EPA recognized that the impacts would be far-reaching: “the coho salmon
18 streams that the Pebble 0.25 stage mine would eliminate or dewater likely play an
19 important role in the life cycle of that species in all three watersheds.” Proposed
20 Determination at 4-6.

1 60. EPA found that the 0.25 mine scenario would result in the elimination,
2 dewatering, or fragmenting of nearly 5 miles of streams with documented occurrence of
3 anadromous fish and approximately 19 miles of tributaries to anadromous fish streams.
4 Proposed Determination at 4-17. EPA found that this would be “an unprecedented
5 impact in Alaska” and the “effects of their loss would reverberate to downstream
6 habitats and affect species such as coho, Chinook, sockeye, and chum salmon.” *Id.*
7 at 4-19.
8

9 61. EPA concluded that the loss of these headwater tributaries could have
10 unacceptable adverse effects on fishery areas. Proposed Determination at 4-19.
11

12 62. EPA found that the 0.25 mine scenario would eliminate, dewater, or
13 fragment more than 1,200 acres of wetlands, lakes, and ponds, of which approximately
14 1,100 of those acres are contiguous with anadromous streams or their tributaries.
15 Proposed Determination at 4-20.
16

17 63. EPA found that the loss of these wetlands, lakes, and ponds would be “a
18 very large and unprecedented impact under the CWA Section 404 regulatory program
19 in Alaska.” Proposed Determination at 4-21.
20

21 64. EPA found that the 0.25 mine would consume large volumes of water
22 drawn from surface and groundwater sources. Proposed Determination at 4-22. The
23 Watershed Assessment calculated that the 0.25 mine would reduce flow in more than
24 45 miles of streams. *Id.* at 4-23. The adverse impacts from streamflow alteration “could
25 jeopardize the long-term sustainability of these fisheries.” *Id.* at 4-27. EPA found that
26

1 drawdown would alter stream flows by more than 20% in approximately 9 miles of
2 stream and that such a change could pose unacceptable adverse impacts to the salmon
3 fisheries of both the South and North Fork of the Koktuli. *Id.* at 4-28.

4 65. EPA found that “areas that do not support salmon for many years are not
5 likely to become productive again Both the 20-year life of the Pebble 0.25 stage
6 mine and the 40 years or more during which dewatering would persist are many times
7 longer than the 2- to 5-year life span of coho and Chinook salmon. Thus, as successive
8 year classes of salmon return and are unable to reach their natal spawning grounds and
9 produce fry, the cycle of spawning would be interrupted The substantial spatial and
10 temporal extent of stream habitat losses to the Pebble 0.25 stage mine suggest that these
11 losses would reduce the overall capacity and productivity of Chinook, and particularly
12 coho, salmon in the [South Fork Koktuli, North Fork Koktuli, and Upper Talarik Creek]
13 watersheds.” Proposed Determination at 4-7.

14 66. Based on the findings in the Proposed Determination and the Watershed
15 Assessment, EPA proposed restrictions on “the discharge of dredged or fill material
16 related to mining the Pebble deposit into waters of the United States within the potential
17 disposal site . . .” Proposed Determination at 5-1.

18 67. EPA received over 670,000 comments on the Proposed Determination
19 with 99% of those comments supporting the Determination.
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1 **C. EPA Considered Withdrawing the Proposed Determination Satisfying its**
2 **Obligations under a Settlement Agreement with PLP**

3 68. In May 2014, PLP sued EPA, challenging EPA's authority to utilize
4 Section 404(c) prior to PLP submitting a permit application. *See Pebble Ltd. P'ship v.*
5 *United States Env'tl. Prot. Agency*, 155 F. Supp. 3d 1000, 1004 (D. Alaska 2014), *aff'd*
6 *sub nom. Pebble Ltd. P'ship v. U.S. E.P.A.*, 604 F. App'x 623 (9th Cir. 2015). In
7 September 2014, PLP sued EPA, alleging that EPA created committees with scientists
8 and environmental groups opposed to the mine in violation of the Federal Advisory
9 Committee Act ("FACA"). *See Pebble Ltd. P'ship v. Env'tl. Prot. Agency*, 310 F.R.D.
10 575, 578 (D. Alaska 2015). In October 2014, PLP sued EPA over failures to comply
11 with the Freedom of Information Act ("FOIA"). *See Pebble Ltd. P'ship v. United States*
12 *Env'tl. Prot. Agency*, No. 3:14-CV-0199- HRH, 2016 WL 128088, at *1 (D. Alaska
13 Jan. 12, 2016).

14
15
16 69. The first case, challenging EPA's authority under 404(c), was resolved in
17 EPA's favor. The Ninth Circuit affirmed the district court's holding that EPA's
18 initiation of the 404(c) process did not constitute final agency action. *Pebble Ltd. P'ship*,
19 604 F. App'x at 625.

20
21 70. In May 2017, EPA and PLP settled the remaining litigation over
22 compliance with FACA and FOIA. Settlement Agreement between EPA and Pebble
23 Limited Partnership (May 11, 2017).
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1 71. Under the Settlement Agreement, EPA committed to “initiate a process to
2 propose to withdraw the Proposed Determination” Settlement Agreement at
3 ¶ III.A.5.

4 72. The settlement precluded EPA from proceeding under 404(c) with a
5 Recommended Determination until the notice of the final environmental impact
6 statement (EIS) regarding PLP’s permit application was published in the Federal
7 Register or 48 months from the effective date of the settlement, whichever was earlier
8 in time. Settlement Agreement, ¶ III.A.1. Neither triggering event has occurred yet. The
9 Corps anticipates releasing a final EIS in early 2020; the 48-month period from the
10 settlement date would expire in March 2021. *See* U.S. Army Corps of Engineers, Pebble
11 Project EIS, EIS Schedule, <https://pebbleprojecteis.com/schedule>.

12 73. The settlement allowed EPA to “use the Bristol Bay Watershed
13 Assessment without any limitation.” Settlement Agreement, ¶ III.A.3.

14 74. As required by the Settlement Agreement, EPA issued a proposal to
15 withdraw the Proposed Determination in July 2017 and requested public comments.
16 Proposal to Withdraw, 82 Fed. Reg. 33,123.

17 75. EPA gave three reasons to support the proposed withdrawal. First, it noted
18 that the “proposal reflects the Administrator’s decision to provide PLP with additional
19 time to submit a permit application and potentially allow the Army Corps permitting
20 process to initiate without having an open and unresolved Section 404(c) review.” 82
21 Fed. Reg. at 33,124. Second, EPA wanted to “remove any uncertainty, real or perceived,
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1 about PLP's ability to submit a permit application and have that permit application
2 reviewed." *Id.* Lastly, EPA asserted that withdrawing the Proposed Determination
3 would allow "the factual record regarding any forthcoming permit application to
4 develop" *Id.*

5
6 76. EPA acknowledged that a pending "Section 404(c) process did not prohibit
7 PLP from filing a permit application and the Army Corps could have processed such a
8 permit application while a Section 404(c) review was ongoing." 82 Fed. Reg. at 33,123.

9
10 77. In the notice for the Proposal to Withdraw, EPA limited its request for
11 comments to the reasons it offered for withdrawing the Proposed Determination. 82 Fed.
12 Reg. at 33,124.

13
14 78. EPA stated that it was not "soliciting comment on the proposed restrictions
15 or on science or technical information underlying the Proposed Determination." 82 Fed.
16 Reg. at 33,124.

17
18 79. On December 22, 2017, PLP submitted a Section 404 permit application to the
19 Corps. 84 Fed. Reg. at 45,750. On January 5, 2019 the Corps issued a public notice of PLP's
20 permit application and the Corps' determination that an EIS would be required for review of
21 the permit application. *Id.*

22
23 80. On January 31, 2018, in an internal EPA presentation for EPA's Office of
24 Federal Activities, EPA stated that the withdrawal was proposed based on policy
25 rationale and reiterated that EPA did not solicit comment on the proposed restrictions
26 or on science or technical information underlying the Proposed Determination.

1 **D. EPA Decided Not to Withdraw its 404(c) Proposed Determination Pending**
2 **Further Consideration of Substantive Information**

3 81. After receiving more than one million comments, with “[a]n
4 overwhelming majority express[ing] opposition to withdrawal of the Proposed
5 Determination,” EPA decided not to withdraw the Proposed Determination. Notification
6 of Decision Not To Withdraw Proposed Determination to Restrict the Use of an Area
7 as a Disposal Site; Pebble Deposit, Area, Southwest Alaska, 83 Fed. Reg. 8,668-8,671
8 (Feb. 28, 2018); *see also* EPA, EPA’s Work in the Bristol Bay Watershed, Presentation
9 for Office of Federal Activities, Jan. 31, 2018, at 16 (approximately 99% of the more
10 than one million comments opposed withdrawal).
11

12 82. Addressing the decision not to withdraw the Proposed Determination,
13 then-Administrator Scott Pruitt noted, “it is my judgment at this time that any mining
14 projects in the region likely pose a risk to the abundant natural resources that exist there.
15 Until we know the full extent of that risk, those natural resources and world-class
16 fisheries deserve the utmost protection. Today’s action allows EPA to get the
17 information needed to determine what specific impacts the proposed mining project will
18 have on those critical resources.” EPA, News Release, EPA Administrator Scott Pruitt
19 Suspends Withdrawal of Proposed Determination in Bristol Bay Watershed, Will Solicit
20 Additional Comments, Jan. 26, 2018.
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23 83. In its decision not to withdraw the Proposed Determination, EPA
24 recognized that because PLP had submitted its CWA permit application, “Region 10
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1 will not forward a signed Recommended Determination, if such a decision is made,
2 before either May 11, 2021, or public notice of a final EIS on PLP's Section 404 permit
3 application regarding the Pebble deposit, whichever comes first." 83 Fed. Reg. at 8,670.

4 84. Rejecting the rationale that the Proposed Determination should be
5 withdrawn in order to allow the "factual record for [the] Section 404 permit application
6 to develop," EPA concluded: "[T]hat the factual record regarding the permit application
7 can develop notwithstanding the Proposed Determination. EPA has discretion to
8 consider that factual record after it has been further developed before Region 10
9 determines whether to forward a signed Recommended Determination to EPA
10 Headquarters and, if such a decision is made, to determine the contents of such a
11 Recommended Determination. As such, this reason does not support withdrawal of the
12 Proposed Determination at this time." 83 Fed. Reg. at 8,670.

13 85. EPA's decision not to withdraw "leaves [the Proposed] Determination in
14 place pending consideration of any other information that is relevant to the protection
15 of the world-class fisheries contained in the Bristol Bay watershed in light of the permit
16 application that has now been submitted to the Corps." 83 Fed. Reg. at 8,670.

17 86. Further, EPA's decision not to withdraw the Proposed Determination
18 states that "[t]he Agency intends at a future time to solicit public comment on what
19 further steps, if any, the Agency should take under Section 404(c) to prevent
20 unacceptable adverse effects to the watershed's abundant and valuable fishery resources
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1 in light of the permit application that has now been submitted to the U.S. Army Corps
2 of Engineers.” 83 Fed. Reg. at 8,668.

3 87. Because EPA decided to leave the Proposed Determination in place, it
4 found “comments stating that EPA cannot withdraw a Proposed Determination without
5 considering the proposed restrictions or the science or technical information underlying
6 the Proposed Determination moot.” 83 Fed. Reg. at 8,670.

8 88. EPA’s decision not to withdraw also found “that there is good cause under
9 40 CFR 231.8 to extend the regulatory time frames in 40 CFR 231.5(a) in order to allow
10 for an additional public comment period and to align with the timeframes established in
11 the settlement agreement.” 83 Fed. Reg. at 8671.

13 **E. EPA General Counsel Reinitiates Process to Withdraw Proposed**
14 **Determination**

15 89. On June 26, 2019, EPA General Counsel Matthew Z. Leopold, acting
16 pursuant to a delegation of authority from the EPA Administrator, *see* 84 Fed. Reg. at
17 45,751, n.1, directed Region 10 to resume its consideration whether to withdraw the
18 2014 Proposed Determination. *See* Memorandum Re Resuming consideration of the
19 withdrawal of the July 2014 Proposed Determination to restrict use of the Pebble
20 Deposit Area as a disposal site, from Matthew Z. Leopold, General Counsel, U.S. EPA,
21 to Christopher Hladick, Regional Administrator, Reg. 10, U.S. EPA, undated, at 2–3.
22 Leopold asserted that the suspension of the withdrawal has created “confusion” and that
23 “lifting the suspension is appropriate.” *Id.*
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1 90. The June 26, 2019 EPA directions came from Leopold, rather than
2 Administrator Wheeler, because the Administrator formally recused himself pursuant
3 to Executive Order 13770. *See* EPA Memorandum from Administrator Wheeler,
4 Subject: Updated Recusal Statement, March 20, 2019, at 1.
5

6 **F. EPA Decision to Withdraw the Proposed Determination**

7 91. A month later, on July 30, 2019, EPA announced that it was withdrawing
8 its Proposed Determination. *See* EPA, News Release, EPA Withdraws Outdated,
9 Preemptive Proposed Determination to Restrict Use of the Pebble Deposit Area as a
10 Disposal Site, July 30, 2019, [https://www.epa.gov/newsreleases/epa-withdraws-
11 outdated-preemptive-proposed-determination-restrict-use-pebble-deposit](https://www.epa.gov/newsreleases/epa-withdraws-outdated-preemptive-proposed-determination-restrict-use-pebble-deposit).
12

13 EPA formally withdrew the Proposed Determination in a decision signed July 30, 2019,
14 and published in the Federal Register on August 30, 2019. 84 Fed. Reg. 45,749
15 (Aug. 30, 2019). EPA did not provide a new opportunity for public comment.
16

17 92. EPA’s decision to withdraw the Proposed Determination is a final agency
18 action. *See* 40 C.F.R. § 231.5(c)(1).
19

20 93. In its decision to withdraw the Proposed Determination, EPA
21 acknowledges that two of EPA’s rationales for withdrawal in 2017 to provide additional
22 time for PLP to submit a permit application and to allow for Corps review of that permit
23 application no longer apply.
24

25 94. Instead, EPA justifies its decision to withdraw based on “the need for any
26 final EPA 404(c) decision to be based on the entire record,” and the fact that “the

1 Proposed Determination which in its current form does not account for the full record
2 and does not grapple with differing conclusions ... should not serve as a basis for such
3 a decision.” 84 Fed. Reg. at 45,754. Second, EPA asserts that “there are other processes
4 available now, including the 404(q) MOA process, for EPA to resolve any issues with
5 the Corps as the record develops.” *Id.*
6

7 95. EPA also notes that “EPA is not seeking to resolve any conflicting
8 preliminary conclusions of the Agencies or conclusively address the merits of the
9 underlying technical issues.” 84 Fed. Reg. at 45,754. Further, EPA states that “EPA is
10 not basing its decision-making on technical consideration or judgments about whether
11 the mine proposal will ultimately be found to meet the requirements of the 404(b)(1)
12 Guidelines or results in ‘unacceptable adverse effects’ under CWA Section 404(c).” *Id.*
13 at 45,756.
14

15 96. In withdrawing the decision without any further public process, EPA
16 claims that “EPA has satisfied all of the procedural requirements for withdrawing a
17 proposed determination provided in [the 404(c) regulations].” 84 Fed. Reg. at 45,756.
18

19 97. EPA’s rationale for withdrawing the Proposed Determination is directly
20 contrary to the rationale EPA stated in its 2018 Suspension Decision *not to withdraw*
21 the Proposed Determination.
22

23 98. EPA’s 2018 decision not to withdraw the Proposed Determination
24 expressly states:
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1 As previously noted, the Corps has already initiated its permit review process
2 for PLP's application. Even if EPA leaves the Proposed Determination in place
3 at this time, EPA will provide PLP with nearly three and a half years (unless
4 a final EIS for the project is noticed sooner) to advance through the permit
5 review process before Region 10 could forward a signed Recommended
6 Determination to EPA Headquarters, if such a decision is made. Thus, in light
7 of EPA's forbearance from proceeding to the next step of the section 404(c)
8 process until a later time as described above, EPA concludes that the factual
9 record regarding the permit application can develop notwithstanding the
10 Proposed Determination. EPA has discretion to consider that factual record
11 after it has been further developed before Region 10 determines whether to
12 forward a signed Recommended Determination to EPA Headquarters and, if
13 such a decision is made, to determine the contents of such a Recommended
14 Determination. As such, this reason does not support withdrawal of the
15 Proposed Determination at this time.

16 83 Fed. Reg. at 8,670.

17 99. In withdrawing the Proposed Determination, EPA did not acknowledge or
18 explain its direct reversal in position from its 2018 decision to *not* withdraw the
19 Proposed Determination.
20

21 **G. PLP's Proposed Mine is Much Larger than the EPA-Reviewed 0.25 Mining
22 Scenario**

23 100. EPA based the Proposed Determination restrictions on the 0.25-billion-ton
24 mining scenario, which is the smallest mine scenario that the agency considered.
25 Proposed Determination at ES-5 to ES-6.
26

101. PLP's 404 permit application is for a 1.44 billion ton mine. 2018 Project
Description at 1.

102. The 0.25 mining scenario included a 20-year mining plan, extracting
31,100 tons of ore per day. Proposed Determination at 2-16. PLP's 2018 amended 404

1 permit application proposed a mine with a milling rate of 180,821 tons of ore per day.
2 2018 Project Description at 1. This is almost six times larger than the amount associated
3 with the smallest mining scenario that EPA reviewed and found posed unacceptable
4 adverse effects.

5
6 103. The 0.25 mining scenario included a total surface area (including the mine
7 pit, waste rock pile and tailings storage facility) of 4.09 square miles. Proposed
8 Determination at 2-16. The total footprint of PLP's proposed mine (Alternative 1 in the
9 draft EIS) is 12.6 square miles. Draft EIS at 2-120. This is approximately three times
10 larger than the smallest mining scenario that EPA reviewed and found posed
11 unacceptable adverse effects.
12

13 **H. EPA Has Expressed Significant Concerns as a Cooperating Agency in the**
14 **NEPA Review Process for PLP's Proposed Mine**

15 104. On July 1, 2019, during a concurrent public comment period on the Corps'
16 Public Notice of PLP's Section 404 permit application and the Corps' draft EIS for the
17 proposed project, EPA submitted comments under both the CWA and NEPA. Letter
18 from Regional Administrator Hladick to Colonel Borders, re Public Notice POA-2017-
19 0271 for a CWA Section 404 permit, July 1, 2019 ("EPA DEIS CWA Comments");
20 Letter from Regional Administrator Hladick to Shane McCoy, Program Manager, U.S.
21 Army Corps of Engineers, Alaska District, re U.S. Army Corps of Engineers' February
22 2019 Draft Environmental Impact Statement for the Pebble Project (CEQ Number
23
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1 20190018; EPA Region 10 Project Number 18-0002-COE), July 1, 2019 (“EPA DEIS
2 NEPA Comments”).

3 105. EPA’s DEIS CWA Comments found: “the values of the potentially
4 affected aquatic resources in this case are among the highest evaluated under CWA
5 Section 404 and support important commercial, sport, and subsistence fisheries for
6 salmon and other fishes . . . The EPA has concerns regarding the extent and magnitude
7 of the substantial proposed impacts to streams, wetlands, and other aquatic resources
8 that may result, particularly in light of the important role these resources play in
9 supporting the region’s valuable fishery resources.” EPA DEIS CWA Comments at 3.
10
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12 106. EPA’s DEIS CWA Comments stated that “the nature and extent of the
13 proposed discharges acknowledged in the DEIS reflect some of the most highly
14 significant and complex discharge activities with the potential for serious adverse
15 impact contemplated by the Guidelines. For these reasons, the level of information,
16 evaluation, and documentation necessary for this project to demonstrate compliance
17 with the Guidelines is significant.” EPA DEIS CWA Comments at 9.
18

19 107. EPA’s DEIS CWA Comments concluded that “[o]ur review finds that the
20 [Public Notice], DEIS, and supporting documents do not contain sufficient information
21 to address the factual determinations required by 40 C.F.R. § 230.11 and to make a
22 reasonable judgment that the proposed discharges will comply with the [404(b)(1)]
23 Guidelines under 40 C.F.R. § 230.12.6.” EPA DEIS CWA Comments at 12. EPA also
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1 noted that the DEIS “likely underestimates the extent, magnitude, and permanence of
2 the adverse effects” *Id.*

3 **I. EPA Review under 404(q)**
4

5 108. In EPA’s DEIS CWA Comments, EPA also provided notice to the Corps,
6 under Section 404(q) of the CWA: “Pursuant to the field level procedures outlined in
7 Part IV, paragraph 3(a) of the 1992 Memorandum of Agreement (MOA) between EPA
8 and the Department of the Army regarding CWA Section 404(q), Region 10 finds that
9 this project as described in the [Public Notice] may have substantial and unacceptable
10 adverse impacts on fisheries resources in the project area watersheds, which are aquatic
11 resources of national importance.” EPA DEIS CWA Comments at 3 and 55.
12

13 109. EPA further stated: “The EPA recognizes that the standard set out in the
14 MOA is similar to the Section 404(c) standard. However, Region 10’s decision to utilize
15 the coordination procedures under the MOA is not a decision regarding its Section
16 404(c) action and should not be interpreted as such. The EPA has not made a decision
17 regarding whether to withdraw the 2014 Proposed Determination or leave it in place.
18 Region 10 is coordinating under the MOA at this time to ensure that the EPA can
19 continue to work with the Corps to address concerns raised during the permitting
20 process.” EPA DEIS CWA Comments at 55.
21

22 110. Pursuant to the MOA, once a letter is sent under paragraph 3(a), the
23 Regional Administrator has 25 calendar days after the end of the public comment period
24 to notify the District Engineer by letter that “the discharge will have a substantial and
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1 unacceptable impact on aquatic resources of national importance.” *See* 1992 MOA at
2 Part IV, 3(b).

3 111. On July 25, 2019, EPA sent a letter to the Corps requesting an extension
4 of the timeline provided in the MOA. Letter from Matthew Z. Leopold, EPA General
5 Counsel, to the Hon. R.D. James, Assistant Secretary of the Army, July 25, 2019
6 (“Leopold 7/25/19 Letter”), at 2. EPA identified that “[u]nder the current timeline
7 provided in the MOA, EPA would need to make a decision about whether to send a
8 letter under paragraph 3(b) on or before July 26, 2019.” *Id.*

9
10
11 112. In the July 25, 2019 letter, EPA stated: “Given the significance of the
12 project, substantive issues raised in EPA’s comment letters on the Alaska District’s
13 DEIS and 404 [Public Notice] as well as the number of other comments received by the
14 District which the Corps must devote resources to considering, EPA recognizes that it
15 is not practicable for the Corps to engage in the activities described above in the 25
16 calendar days contemplated by MOA. As a result, we request your acknowledgement
17 that under the particular circumstances here, fulfilling each of our agency’s roles under
18 the statute, regulations and MOA warrants taking more time for additional engagement
19 in the 404(q) process.” Leopold 7/25/19 Letter at 2. EPA requested that the EPA and
20 the Corps “extend the deadline described in paragraph 3(b) beyond the 25 days
21 contemplated in 404(q) MOA for this project.” *Id.* Specifically, EPA sought “an
22 extension of the deadline to send a letter under paragraph 3(b) of the 404(q) MOA to 30
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1 days after the Corps provides EPA with the preliminary drafts of decision documents,
2 draft permit and Record of Decision, for its consideration.” *Id.*

3 113. On July 26, 2019, Assistant Secretary of the Army R.D. James replied to
4 EPA’s request for an extension. *See* Letter from R.D. James, Assistant Secretary of the
5 Army, to Matthew Z. Leopold, EPA General Counsel, July 26, 2019 (“James 7/26/19
6 Letter”). The Corps agreed to an extension on a much shorter timeframe of ninety
7 calendar days and prior to completion of draft decision documents. *Id.*

8
9 114. The Corps anticipates issuing a Record of Decision in the summer of 2020.
10 *See* U.S. Army Corps of Engineers, Pebble Project EIS, EIS Schedule,
11 <https://pebbleprojecteis.com/schedule>.

12 13 **VI. FIRST CLAIM**

14 **A. EPA’s Withdrawal Decision Is Not Supported by the Record and EPA** 15 **Failed to Acknowledge and Explain Its Reversal**

16 **(Violation of 33 U.S.C. § 1251 et seq. and 5 U.S.C. § 706)**

17
18 115. Plaintiffs re-allege and incorporate by reference the allegations made in all
19 preceding paragraphs.

20 116. EPA stated that it decided to withdraw the Proposed Determination
21 because (1) “there is new information that has been generated since 2014,” and
22 (2) “there are other processes, including the 404(q) MOA process, for EPA to resolve
23 any issues with the Corps as the record develops.” 84 Fed. Reg. at 45,753–45,754.
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1 117. Neither new information, nor the 404(q) process, support EPA's decision
2 to withdraw the Proposed Determination. EPA failed to articulate a rational connection
3 between the facts found and the decision made, rendering its decision to withdraw
4 arbitrary and capricious.

5
6 118. Under EPA's regulations implementing 404(c), the record includes all
7 information obtained during the 404(c) process, including the administrative record for
8 any 404 permit developed by the Corps. *See* 40 C.F.R. § 231.5(e).

9
10 119. Because all information obtained by EPA and the Corps since EPA issued
11 its Proposed Determination is part of the 404(c) record, it is properly before EPA when
12 making a decision to withdraw or finalize the Proposed Determination. Consequently,
13 new information cannot be a basis for EPA's decision to withdraw the Proposed
14 Determination.

15
16 120. Nothing under the CWA, EPA's implementing regulations or guidance
17 precludes EPA from maintaining the Proposed Determination while the 404(q) process
18 moves forward and both EPA and the Corps evaluate the proposed project.

19
20 121. In its 2018 decision *not to withdraw* the Proposed Determination, EPA
21 found that good cause existed to leave the Proposed Determination in place pending
22 completion of the 404 permit review under the CWA and the associated environmental
23 review of the proposed project under NEPA.

1 122. Because the 404(c) process can be suspended for good cause pending
2 review of the permit and analysis pursuant to NEPA, EPA’s decision to withdraw
3 because there is a 404(q) process underway is arbitrary.

4 123. EPA’s 2018 decision *not to withdraw* the Proposed Determination was an
5 agency policy position, made after public notice and comment and published in the
6 Federal Register.

7 124. In withdrawing its Proposed Determination, the EPA failed to
8 acknowledge and explain the reversal of its conclusions in its prior 2018 decision *not to*
9 *withdraw* the Proposed Determination, specifically (a) that good cause existed to extend
10 regulatory timelines; (b) that the Proposed Determination did not impede development
11 of the factual record associated with permit review, and that EPA has the discretion to
12 consider that factual record, and thus development of the factual record did not support
13 withdrawal of the Proposed Determination; and (c) that EPA would address substantive
14 issues underlying the Proposed Determination before making a final 404(c) decision.
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18 125. In withdrawing its Proposed Determination, the EPA also failed to
19 acknowledge and explain its reversal of the conclusion made three weeks before in
20 EPA’s DEIS Comments that Pebble Mine’s proposed discharges were “highly
21 significant and complex discharge activities with the potential for serious adverse
22 impact contemplated by the [404(b)(1)] Guidelines.” EPA DEIS CWA Comments at 3.
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1 126. For the reasons identified above, EPA's decision to withdraw the Proposed
2 Determination is arbitrary, capricious, an abuse of discretion, or otherwise not in
3 accordance with law. 5 U.S.C. § 706.

4 127. The EPA's failure to provide a reasoned explanation for its reversal in
5 agency position is arbitrary, capricious, an abuse of discretion, or otherwise not in
6 accordance with law. 5 U.S.C. § 706.

8 VII. SECOND CLAIM

9 A. EPA Improperly Relied on Factors which Congress Has Not Intended It to 10 Consider and Failed to Consider Relevant Key Factors

11 (Violation of 33 U.S.C. § 1251 et seq. and 5 U.S.C. § 706)

12 128. Plaintiffs re-allege and incorporate by reference the allegations made in all
13 preceding paragraphs.

14 129. EPA failed to consider the substantive findings it made in support of its
15 Proposed Determination when it withdrew the Proposed Determination.

16 130. EPA also failed to consider the findings made in EPA's DEIS CWA
17 Comments, that "the [Public Notice] DEIS, and supporting documents do not contain
18 sufficient information to address the factual determinations required by 40 C.F.R.
19 § 230.11 and to make a reasonable judgment that the proposed discharges will comply
20 with the [404(b)(1)] Guidelines under 40 C.F.R. § 230.12." EPA DEIS CWA
21 Comments at 12.
22
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1 131. EPA’s decision to withdraw the Proposed Determination fails to
2 acknowledge, or consider, the project’s compliance with the 404(b)(1) Guidelines.

3 132. EPA’s decision to withdraw the Proposed Determination fails to
4 acknowledge, or consider, the fact that it has found that the project may have substantial
5 unacceptable adverse impacts.
6

7 133. EPA unlawfully precluded science and technical information from its
8 decision to withdraw when it issued its July 19, 2017 public notice, stating that it was
9 “not soliciting comment on the proposed restrictions or science or technical information
10 underlying the Proposed Determination.” 82 Fed. Reg. at 33,124; *see also* 84 Fed. Reg.
11 at 45,756.
12

13 134. EPA unlawfully precluded science and technical information from its
14 decision to withdraw when it stated in its August 30, 2019 public notice that such
15 information “remains outside the bounds of EPA’s basis for its decision.” 84 Fed. Reg.
16 at 45,756.
17

18 135. Because compliance with the 404(b)(1) Guidelines and whether the project
19 poses unacceptable adverse impacts are important and key aspects of 404(c) review,
20 EPA’s failure to consider these aspects when withdrawing the Proposed Determination
21 is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
22 5 U.S.C. § 706.
23

24 **VIII. REQUEST FOR RELIEF**

25 WHEREFORE, Plaintiffs request that the Court grant the following relief:
26

1 A. Declare that EPA's withdrawal of the Proposed Determination is arbitrary,
2 capricious, an abuse of discretion, and not in accordance with law, in violation of the
3 CWA and the APA;

4 B. Vacate and set aside EPA's withdrawal of the Proposed Determination;

5 C. Enter appropriate injunctive relief;

6 D. Award Plaintiffs all reasonable costs and attorney's fees as authorized by
7 law; and
8

9 E. Award Plaintiffs such other relief as this Court deems just and proper.
10

11 DATED this 8th day of October, 2019.

12
13 SUMMIT LAW GROUP PLLC
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15 *Development Corporation, Bristol Bay Native*
16 *Association, Inc. and Bristol Bay Reserve*
17 *Association*

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10 By: *s/ Scott Kendall*
11 Scott Kendall (AK Bar. No. 0405019)