



Governor Mike Dunleavy
STATE OF ALASKA

September 6, 2022

Mr. Casey Sixkiller
Regional Administrator
Environmental Protection Agency - Region 10
Water Docket
Mail Code 2822T
Pennsylvania Avenue NW
Washington, DC 20460

Re: May 26, 2022 Proposed Determination of EPA Region 10 Pursuant to Section 404(c) of the CWA Pebble Deposit Area, Southwest Alaska (87 FR 39091); Dkt. # EPA-R10-OW-2022-0418

Dear Regional Administrator Sixkiller:

Thank you for the opportunity to comment on the May 26, 2022 Proposed Determination of E.P.A. Region 10 Pursuant to Section 404(c) of the Clean Water Act (“CWA”) for the Pebble Deposit in Southwest Alaska (“proposed veto”), which would use § 404(c) of the CWA to veto a proposed mining project and effectively impose a blanket prohibition on future mining within 309 square miles of primarily Alaska-owned land. This proposal is deeply concerning to Alaska.

The proposed veto injects EPA into the very heart of Alaska politics. Region 10 makes quintessential policy decisions about whether, how, and which resources Alaska can develop, and how to accommodate Alaskans’ many and diverse interests in so developing. It does this by positing a (false) choice between preserving Alaska’s fishery resources or allowing for development of the Pebble deposit.¹ Championing the importance of salmon in Bristol Bay, and the interests of some Alaska Natives, it selects the former.

¹ The Pebble deposit is the world’s largest undeveloped copper deposit. It is estimated to contain 6.5 billion tonnes of Measured and Indicated mineral resources, containing: 57 billion pounds of copper; 71 million ounces of gold; 3.4 billion pounds of molybdenum; 345 million ounces of silver; and 2.6 million kilograms of rhenium. In addition, it contains an estimated 4.5 billion tonnes of Inferred mineral resources, containing: 25 billion pounds of copper; 36 million ounces of gold; 2.2 billion pounds of molybdenum; 170 million ounces of silver; and 1.6 million kilograms of rhenium. IHS Markit, *Economic Contribution Assessment of the Proposed Pebble Project to the US National and State Economies* (February 2022) (“2022 IHS Markit Analysis”), at 3, 7, retrieved from https://northerndynastyminerals.com/site/assets/files/4289/ndm_economic_impact_of_the_pebble_project_-_february_20.pdf.

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In so selecting, Region 10 diminishes the importance of mineral resource development to Alaska and its people. It also disregards Alaska’s ability to—and history of—ensuring the protection of its own fishery resources through the State’s permitting system.

Ensuring Alaska’s ability to develop its resources was a key concern to the State and Congress during statehood negotiations. The centerpiece of the Alaska Statehood Act is the State’s right to select lands to be managed for the public’s benefit. To this end, Congress conferred upon Alaska all rights and title to the lands it selected and agreed that “[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct.”² These lands provide the revenues necessary to support state and local governments and to sustain Alaska’s economy, culture, and way of life.³

The lands containing the Pebble deposit were conveyed to Alaska subject to these same conditions, by way of the Cook Inlet Land Exchange. The mineral deposits that Region 10 would now close off for development, in other words, are precisely those that are Alaska’s to use “as the State legislature may direct.”

Both the mining and fishing industries are important to Alaska. In 2021, Alaska’s mining industry contributed approximately 10,800 jobs and \$985 million in annual wages to the Alaska economy.⁴ The proposed Pebble mine would contribute an estimated 6,166 jobs for Alaskans⁵ and generate \$2.8 billion to \$5.39 billion in State revenue.⁶ The importance of the fishing industry is well-documented in the proposed veto. Bristol Bay, too, is very important to Alaska, which is why Alaska has already taken so many steps—unacknowledged by Region 10—to protect the area.

² Alaska Statehood Act, 72 Stat. 339, Pub. Law 85–508, 85th Congress, H.R. 7999 (July 7, 1958) (“Statehood Act”), § 6(i); *see* S. Rep. No. 1028, 83rd Cong. 2d Sess. 6 (1954) (“[T]he State is given the right to select lands known or believed to be mineral in character”).

³ *See, e.g.*, Alaska Const. art. VIII, §§ 1, 2, 6; Alaska Stat. (“A.S.”) §§ 38.04.005–.015 (setting out the State’s land management policies); A.S. § 44.99.100(a) (declaring the State’s economic development policy: “To further the goals of a sound economy, stable employment, and a desirable quality of life, the legislature declares that the state has a commitment to foster the economy of Alaska through purposeful development of the state’s abundant natural resources and productive capacity.”); A.S. § 44.99.110 (declaring the State’s mineral policy to “further the economic development of the state, to maintain a sound economy and stable employment, and to encourage responsible economic development within the state for the benefit of present and future generations through the proper conservation and development of the abundant mineral resources within the state . . .”); *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987) (“The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state.”).

⁴ This figure considers direct, indirect, and inducted employment. *See* McKinley Research Group, LLP, *The Economic Benefits of Alaska’s Mining Industry (May 2022)*, at 3, retrieved from <https://www.mcdowellgroup.net/publications/>. These figures include workers engaged in production (metals, coal, and industrial materials), exploration activities, and mine development. This employment also includes self-employed miners (often found in placer mines). *Id.*

⁵ These numbers are estimated for the initial 4.5-year capital phase. *2022 IHS Markit Analysis* at 4.

⁶ *See infra* Section (2)(d)(ii) of the Alaska Section of this Letter for a discussion of costs.

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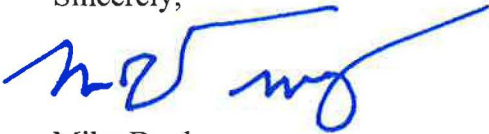
Whether, and how, Alaska develops Bristol Bay's mineral resources or its fishery resources—or both, responsibly—is Alaska's decision to make, considering the input of all stakeholders and working through the standard permitting process. EPA would instead choke off further discussion, usurping for itself this important decision affecting so many Alaskans.

This decision reflects poor judgment by Region 10. It is also legally indefensible. Among other foundational defects, Region 10 has made no threshold jurisdictional determination delineating WOTUS, and therefore has not established EPA's authority to act. Region 10 has failed to identify the "fisheries" to which its action purportedly applies, and therefore has not met § 404(c)'s statutory or regulatory prerequisites for acting. Region 10 inadequately considers the costs of its proposed veto, and improperly inflates its benefits. Region 10 relies on factors it may not legally consider. Throughout it all, Region 10 portrays Alaska Natives as a monolith, flattening their diverse viewpoints into a single narrative of unwavering support.

In the unlikely event of its validity, exercise of this veto would constitute a regulatory taking, for which compensation, in the billions, is due.

Accordingly, Alaska requests that Region 10 withdraw its proposed veto following the close of this comment period. Rest assured my Administration will stand up for the interests of Alaskans, Alaskan property owners, and Alaska's future.

Sincerely,



Mike Dunleavy
Governor

Enclosure: State of Alaska Comments to May 26, 2022 EPA Region 10 Proposed Decision

State of Alaska Comments

to

**May 26, 2022 Proposed Determination of EPA Region 10 Pursuant to Section 404(c) of the
CWA Pebble Deposit Area, Southwest Alaska (87 FR 39091)**

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INTRODUCTION

Thank you for the opportunity to comment on the May 26, 2022 Proposed Determination of E.P.A. Region 10, Pursuant to Section 404(c) of the Clean Water Act (“CWA”) for the Pebble Deposit in Southwest Alaska (“proposed veto”), which would use § 404(c) of the CWA to veto a proposed mining project and impose what amounts to a blanket prohibition on future mining within 309 square miles of primarily Alaska-owned land. This proposal is deeply concerning to the State. For a number of reasons, it should be withdrawn.

The proposed veto injects EPA into the very heart of Alaska politics. Region 10 makes quintessential policy decisions about whether, how, and which resources Alaska can develop, and how to accommodate Alaskans’ many and diverse interests in so developing. It does this by positing a (false) choice between preserving Alaska’s fishery resources or allowing for development of the Pebble deposit.¹ Championing the importance of salmon in Bristol Bay, and the interests of some Alaska Natives, it selects the former.

In so selecting, Region 10 diminishes the importance of mineral resource development to Alaska and its people. Ensuring Alaska’s ability to develop its resources was a key concern to the State and Congress during statehood negotiations. The centerpiece of the Alaska Statehood Act is the State’s right to select lands to be managed for the public’s benefit. To this end, Congress conferred upon Alaska all rights and title to the lands it selected and agreed that “[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct.”² These lands provide the revenues necessary to support state and local governments and to sustain Alaska’s economy, culture, and way of life.³

¹ The Pebble deposit is the world’s largest undeveloped copper deposit. It is estimated to contain 6.5 billion tonnes of Measured and Indicated mineral resources, containing: 57 billion pounds of copper; 71 million ounces of gold; 3.4 billion pounds of molybdenum; 345 million ounces of silver; and 2.6 million kilograms of rhenium. In addition, it contains an estimated 4.5 billion tonnes of Inferred mineral resources, containing: 25 billion pounds of copper; 36 million ounces of gold; 2.2 billion pounds of molybdenum; 170 million ounces of silver; and 1.6 million kilograms of rhenium. IHS Markit, *Economic Contribution Assessment of the Proposed Pebble Project to the US National and State Economies* (February 2022) (“2022 IHS Markit Analysis”), at 3, 7, retrieved from https://northerndynastyminerals.com/site/assets/files/4289/ndm_economic_impact_of_the_pebble_project_-_february_20.pdf.

² Alaska Statehood Act, 72 Stat. 339, Pub. Law 85–508, 85th Congress, H.R. 7999 (July 7, 1958) (“Statehood Act”), § 6(i); see S. Rep. No. 1028, 83rd Cong. 2d Sess. 6 (1954) (“[T]he State is given the right to select lands known or believed to be mineral in character”).

³ See, e.g., Alaska Const. art. VIII, §§ 1, 2, 6; Alaska Stat. (“A.S.”) §§ 38.04.005–.015 (setting out the State’s land management policies); A.S. § 44.99.100(a) (declaring the State’s economic development policy: “To further the goals of a sound economy, stable employment, and a desirable quality of life, the legislature declares that the state has a commitment to foster the economy of Alaska through purposeful development of the state’s abundant natural resources and productive capacity.”); A.S. § 44.99.110 (declaring the State’s mineral policy to “further the economic development of the state, to maintain a sound economy and stable employment, and to encourage responsible economic development within the state

The lands containing the Pebble deposit were conveyed to Alaska subject to these same conditions, by way of the Cook Inlet Land Exchange. The mineral deposits that Region 10 would now close off for development, in other words, are precisely those that are Alaska’s to use “as the State legislature may direct.”

Both the mining and fishing industries are important to Alaska. In 2021, Alaska’s mining industry contributed approximately 10,800 jobs and \$985 million in annual wages to the Alaska economy.⁴ The proposed Pebble mine would contribute an estimated 6,166 jobs for Alaskans⁵ and generate \$2.8 billion to \$5.39 billion in State revenue.⁶ The importance of the fishing industry is well-documented in the proposed veto. Bristol Bay, too, is very important to Alaska, which is why Alaska has already taken so many steps—unacknowledged by Region 10—to protect the area.

Whether, and how, Alaska develops Bristol Bay’s mineral resources or its fishery resources—or both, responsibly—is Alaska’s decision to make, considering the input of all stakeholders and working through the standard permitting process. EPA would instead choke off further discussion, usurping for itself this important decision that affects so many Alaskans.

This decision is unwise, and violative of Congress’ promises to the State. It is also legally indefensible. Among other foundational defects, Region 10 has made no threshold jurisdictional determination delineating WOTUS, and therefore has not established EPA’s authority to act. Region 10 has failed to identify the “fisheries” to which its action purportedly applies, and therefore has not met § 404(c)’s statutory or regulatory prerequisites for acting. Region 10 inadequately considers the costs of its proposed veto, and improperly inflates its benefits. Region 10 relies on factors it may not legally consider. Throughout it all, Region 10 portrays Alaska Natives as a monolith, flattening their diverse viewpoints into a single narrative of unwavering support.

In the unlikely event of its validity, exercise of this veto would constitute a regulatory taking, for which compensation, in the billions, is due.

Accordingly, Alaska requests that Region 10 withdraw its proposed veto following the close of this comment period.

BACKGROUND

1. Proposed Veto

Region 10’s veto proposes two distinct determinations: the Proposed Prohibition and the Proposed Restriction.

for the benefit of present and future generations through the proper conservation and development of the abundant mineral resources within the state . . .”); *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987) (“The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state.”).

⁴ This figure considers direct, indirect, and inducted employment. See McKinley Research Group, LLP, *The Economic Benefits of Alaska’s Mining Industry* (May 2022), at 3, retrieved from <https://www.mcdowellgroup.net/publications/>. These figures include workers engaged in production (metals, coal, and industrial materials), exploration activities, and mine development. This employment also includes self-employed miners (often found in placer mines). *Id.*

⁵ These numbers are estimated for the initial 4.5-year capital phase. *2022 IHS Markit Analysis* at 4.

⁶ See *infra* Section (2)(d)(ii) of the Alaska Section of this Letter for a discussion of costs.

Proposed Prohibition: Region 10 seeks to prohibit any discharge of “dredged or fill material for the construction and routine operation of the 2020 Mine Plan” in “the portion of the mine site footprint for the 2020 Mine Plan within the [South Fork Kuktuli] and [North Fork Kuktuli] watersheds,” which is a 13.1 square mile area (“Proposed Prohibition”).⁷ The Proposed Prohibition is based on “four independent unacceptability findings”: (1) “[t]he loss of approximately 8.5 miles (13.7 km) of documented anadromous fish streams”; (2) “[t]he loss of approximately 91.2 miles (146.8 km) of additional streams that support anadromous fish streams”; (3) “[t]he loss of approximately 2,113 acres (8.6 km²) of wetlands and other waters that support anadromous fish streams”; and (4) “[a]dverse impacts on at least 29 additional miles (46.7 km) of documented anadromous fish streams resulting from greater than 20% changes in average monthly streamflow.”⁸

Proposed Restriction: Region 10 would further “restrict” the “use of waters of the United States within the Defined Area for Restriction”—a 309 square mile area⁹—“for specification as disposal sites for the discharge of dredged or fill material for the construction and routine operation of any future plan to mine the Pebble deposit that would either individually or collectively result in adverse effects similar or greater in nature and magnitude” to the four unacceptability findings supporting the Proposed Prohibition (“Proposed Restriction”). The Proposed Restriction is based on the four unacceptability findings listed above as well as the “pristine condition and productivity of anadromous habitat throughout the [South Fork Kuktuli], [North Fork Kuktuli], and [Upper Talarik Creek] watersheds”; the “large amount of permanent loss of anadromous fish habitat”; the “degradation of additional downstream spawning and rearing habitat for coho, Chinook, and sockeye salmon due to the loss of ecological subsidies provided by the eliminated streams, wetlands, and other waters”; and the “resulting erosion of both habitat complexity and biocomplexity within the [South Fork Kuktuli], [North Fork Kuktuli], and [Upper Talarik Creek] watersheds, which are key to the abundance and stability of salmon populations within these watersheds.”¹⁰

The remainder of Region 10’s proposed veto is a confusion of additional information whose relevance to the two proposed determinations is not clearly articulated.

2. EPA’s § 404(c) Veto Power

Section 404(c) of the CWA, enacted in 1972, provides in full:

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he 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. Before

⁷ USEPA Proposed Determination of the U.S Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act, Pebble Deposit Area. Region 10, Seattle, WA 2022 (hereinafter “PD”), at ES-13.

⁸ PD at ES-12.

⁹ An area greater than the total land area of New York City, including all five of its boroughs.

¹⁰ PD at ES-12.

making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.¹¹

“Such materials” refers to “dredged or fill material.”¹² The Clean Water Act does not define “discharge” as a standalone term, but defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”¹³ “Point source” means “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”¹⁴ “Pollutant” includes “dredged spoil.”¹⁵

In its fifty years of existence, § 404(c) has been used to veto only 13 projects.¹⁶ These projects included 1800 acres of duck hunting grounds in South Carolina,¹⁷ a shopping mall in Massachusetts, warehouses in New Jersey,¹⁸ and dams in Virginia,¹⁹ Rhode Island, and Colorado.²⁰ The power has not been used to veto myriad others.

EPA’s justifications for these vetoes appear to have been made ad hoc, and follow no discernible criteria. Justifications have ranged from “generation of leachate,” to “toxicity,” to “adverse impacts on the American Alligator.” Sometimes EPA considers the availability of less environmentally damaging alternatives, sometimes not. Sometimes EPA takes compensatory mitigation into account, sometimes not.

Perhaps there is no pattern to be discerned. Washington, of course, is the State with the salmon most in need of saving.²¹

With this proposed veto, the entropy increases. Region 10 now seeks to veto a project proposed on State land—land that was conveyed to the State, by the federal government, precisely for this kind of development. Not stopping there, Region 10 would impose a blanket veto on all future, similar projects (yet to be conceived, much less permitted) over an area 23 times the size of the proposed project. One starts to wonder where the boundary lines are—or if they exist.

¹¹ 33 U.S.C. § 1344(c).

¹² 33 U.S.C. § 1344(a).

¹³ 33 U.S.C. § 1362(12).

¹⁴ 33 U.S.C. § 1362(14).

¹⁵ 33 U.S.C. § 1362(6).

¹⁶ See EPA, *Chronology of CWA Section 404(c) Actions*, retrieved from <https://www.epa.gov/cwa-404/chronology-cwa-section-404c-actions>.

¹⁷ Michael C. Blumm, *Vetoing Wetland Permits Under Section 404(c): A History of Inter-Federal Agency Controversy and Reform*, 33 U.C.L.A. J. Envtl. L. & Pol’y 215, 252 (2015) (discussing Jack Maybank site).

¹⁸ *Id.* at 263 (discussing Russo Development Corporation Site).

¹⁹ *Id.* at 273–78 (discussing James County Water Supply Dam).

²⁰ *Id.* at 279–81 (discussing Big River Dam); *id.* at 241 (discussing Two Forks Dam).

²¹ As Washington State explains its dire salmon situation: “We have damaged their habitat, hindered their migration, and polluted their waters. We’ve overfished, forced them to compete for limited resources, and made their journey home that much harder.” Washington State Recreation and Conservation Office, *Salmon and Orca Recovery: Problem*, retrieved from <https://rco.wa.gov/salmon-recovery/problem/>. The same cannot be said for Alaska.

ALASKA-SPECIFIC REASONS REQUIRING WITHDRAWAL OF THE PROPOSED DETERMINATION

The United States Supreme Court has recognized the “simple truth” that “Alaska’s unique conditions” mean that “Alaska is often the exception, not the rule.”²² Alaska’s exceptional nature created the need for a Statehood Act addressing Alaska’s unique needs. Congress’ intent with the Alaska Statehood Act was “to provide the new state with a solid economic foundation.”²³ To this end, Congress conferred upon the young state the right to select lands, and promised that these lands’ mineral deposits would be “subject to lease by the State as the State legislature may direct.”²⁴

The lands overlying the Pebble deposit were conveyed to Alaska by the federal government under a subsequent three-way land exchange that incorporated these crucial provisions. These lands are now subject to a State-created (legislature-directed) comprehensive land management plan that contemplates responsible mining of the Pebble deposit.

It is these lands that Region 10 would have EPA unilaterally shut down, in perpetuity.

1. **The centerpiece of the Alaska Statehood Act is the State’s right to select and manage lands, including the development of “mineral deposits in such lands” as “the State legislature may direct.”**

Alaska’s need for greater control over Alaska’s lands and resources became a coalescing force behind the statehood effort following World War II.²⁵ Opponents to statehood raised several compelling objections, including Alaska’s small population, narrow tax base, and the questionable financial means to govern itself.²⁶ To overcome these objections, advocates of statehood argued that Congress should convey significant lands to the new state in the hope that the lands would generate enough revenue for the State to govern itself.²⁷ As the Alaska Supreme Court explained, this argument won the day:

That Congress recognized the financial burden awaiting the new state is clear from its debates. It is equally clear that the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden. Congress, then, granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state’s government.²⁸

²² *Sturgeon v. Frost* (*Sturgeon I*), 577 U.S. 424, 440 (2016).

²³ *United States v. Atlantic Richfield Co.*, 435 F. Supp 1009, 1016 (D. Alaska 1977) (citing U.S. Code Congressional and Administrative News, 85th Cong., 2d Sess. (1958) Legislative History, p. 2933).

²⁴ Statehood Act, § 6(i); see S. Rep. No. 1028, 83rd Cong. 2d Sess. 6 (1954) (“[T]he State is given the right to select lands known or believed to be mineral in character[.]”).

²⁵ See *Sturgeon v. Frost* (*Sturgeon II*), 139 S. Ct. 1066, 1073–76 (2019) (recounting history); *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45, 47 (1962) (recounting long-running dispute between Alaska and federal government over fish traps); see generally Terrance Cole, *Fighting for the Forty-Ninth Star: C. W. Snedden and the Crusade for Alaska Statehood* (U. of Alaska Press, 2010) (“The quest for statehood in the 1950s was fueled by growing dissatisfaction with federal management of the territory.”).

²⁶ See *Trustees for Alaska v. State*, 736 P.2d 324, 335–36 (Alaska 1987) (recounting history).

²⁷ *Id.* at 336 (“The congressmen who favored statehood conceded that it would impose an additional financial burden on the territory, but they maintained that the Statehood Act sufficiently provided for Alaska’s financial well-being.”).

²⁸ *Id.* at 337.

Congress eventually agreed to admit Alaska into the Union on terms set out in the Statehood Act.²⁹ The Act's passage, however, did not complete the statehood process. Before Alaska could enter the Union, the Act had to be "ratified by the people."³⁰ Relying on the provisions and promises set forth in the Statehood Act, Alaskans ratified statehood on August 26, 1958.

The United States Supreme Court has characterized statehood land-grant provisions as a "solemn agreement" which in some ways may be analogized to a contract between private parties,³¹ and as "an unalterable condition of the admission, obligatory upon the United States."³² The centerpiece of this compact is the State's right to select lands and manage these lands for the public's benefit.³³ The Alaska Statehood Act expressly provided the State with the right to select over 103 million acres of federal land, along with the underlying mineral resources.³⁴ Congress allowed the State to select lands that would fund State government and provide economic benefits to State residents.³⁵ It also gave the State all right and title to the selected lands and provided that "mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct."³⁶ The conveyance of mineral rights was deemed so essential to the State's ability to provide for itself that, should the State convey the surface estate of selected lands, it was required to reserve all mineral rights or forfeit those rights back to the federal government.³⁷ The Statehood Act additionally required Alaska to satisfy the Secretary of the Interior that "the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest."³⁸ Following that, it was left to the new state to make the most of its selection options and to fully utilize these lands in order to satisfy the State's budgetary obligations and the needs of Alaskans.

The rights conferred under the Statehood Act remain essential to the State's continuing vitality and prosperity. For all States, but particularly for Alaska, the right to manage its lands is a foundational aspect of its sovereignty. These lands provide the revenues necessary to support state and local governments and sustain Alaska's economy, culture, and way of life.³⁹ In the words of the Statehood Act, these lands were to be used "[f]or the purposes of furthering the development of and expansion of communities"⁴⁰ as the State saw fit.

This commitment is reflected by Alaska's Constitution, which obliges the State to ensure that Alaska's lands and resources are managed to benefit its citizens and are developed and conserved in a

²⁹ *Id.*

³⁰ Statehood Act, § 8(b).

³¹ *Andrus v. Utah*, 446 U.S. 500, 507 (1980).

³² *Beecher v. Wetherby*, 95 U.S. 517, 523 (1877).

³³ See *Trustees for Alaska*, 736 P.2d at 335 ("The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state.").

³⁴ Statehood Act, § 6(a)–(b).

³⁵ *Trustees for Alaska*, 736 P.2d at 336–37.

³⁶ Statehood Act, § 6(i); see also, S. Rep. No. 1028, 83rd Cong. 2d Sess. 6 (1954) ("[T]he State is given the right to select lands known or believed to be mineral in character[.]").

³⁷ Statehood Act, § 6(i).

³⁸ Statehood Act, § 6(e).

³⁹ See, *supra* footnote 3.

⁴⁰ Statehood Act, § 6(a).

responsible manner.⁴¹ “During the formative stages of our state constitution,” the Alaska Supreme Court has emphasized, “considerable attention was focused on designing a system of local government to answer to the perceived unique needs of Alaska.”⁴²

An expansion of federal authority that impinges upon the State’s management and use of its own lands and resources restricts Alaska’s ability to provide for Alaskans. Importantly, the rights granted to the State of Alaska in the Statehood Act, and reflected in our Constitution, cannot be unilaterally diminished by any federal agency.⁴³

2. The federal government, via the Cook Inlet Land Exchange, expressly subjected the Pebble lands to the same conditions as lands selected under the Statehood Act.

Ownership of the lands underlying both the 2020 Mine Plan footprint (the subject of the Proposed Prohibition) and lands underlying the 309-square-mile area (the subject of the Proposed Restriction) is vested in Alaska pursuant to the 1976 Cook Inlet Land Exchange.⁴⁴ This was a three-way exchange of lands between the State, the federal government, and Cook Inlet Region, Inc. (“CIRI”).⁴⁵ Recognized as the “largest land exchange in American history,”⁴⁶ this was supposed to be a win⁴⁷-win⁴⁸-win⁴⁹ situation.

⁴¹ Alaska Const. art. VIII, § 1 (“It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.”); *id.* § 2 (“The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.”).

⁴² *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1119 (Alaska 1978).

⁴³ See *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009) (“[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event to suggest that subsequent events somehow can diminish what has already been bestowed” []). And that proposition applies *a fortiori* where virtually all of the State’s public lands . . . are at stake.”) (quoting, in part, *Idaho v. United States*, 533 U.S. 262, 284 (2001) (Rehnquist, C.J., dissenting)); see also *Alaska v. Abtina, Inc.*, 891 F.2d 1401, 1404, 1406 (9th Cir. 1989).

⁴⁴ *Terms and Consolidation for Land Consolidation and Management in the Cook Inlet Area* was enacted by Congress as Public Law No. 94-204, 89 Stat. 1145 (1976) (“Cook Inlet Land Exchange”). This was an amendment to the Alaska Native Claims Settlement Act (“ANCSA”) and was approved by the Alaska Legislature in 1976. See also Pub. L. No. 96-311, 94 Stat. 947 (time extension for selecting lands).

⁴⁵ CIRI is one of 12 land-based Alaska Native Regional Corporations created under ANCSA. The Cook Inlet Land Exchange was codified first in Public Law 94-204 on Jan. 2, 1976, and then in its clarified form in Public Law 94-456 on Oct. 4, 1976.

⁴⁶ H.R. 104-643, CONVEYANCES OF LANDS TO CERTAIN NATIVE VILLAGES UNDER THE ALASKA NATIVE CLAIMS SETTLEMENT ACT, Rpt. to accompany H.R. 2560, 104th Cong. 2d Sess. (June 27, 1996).

⁴⁷ The federal government was able to create Lake Clark National Park following the “Lake Clark Tradeout,” under which all previous village selections were removed from the heart of the proposed Lake Clark National Park, creating a public land ownership pattern which made the park’s establishment a realistic possibility. This required CIRI and the State of Alaska to give up claims to “certain prime lands” and commit to supporting the creation of Lake Clark National Park.

⁴⁸ The villages selected land along the coast of Cook Inlet valuable for its economic potential via oil-and-gas leasing. For the villages, the Cook Inlet Land Exchange was intended to remedy, or at least ameliorate, the “in-lieu” withdrawals that the villages within the Cook Inlet Region had been required to make following the passage of ANCSA. The withdrawals these villages had previously made were in-lieu of lands located near their traditional ancestral homes, which had been already accounted for at the time of ANCSA’s passage, including by the federal government’s withdrawals of land in the Cook Inlet region for Elmendorf Air Force Base, Fort Richardson, Chugach National Forest, and Kenai National Moose Range. See H.R. 104-643, CONVEYANCES OF LANDS TO CERTAIN NATIVE VILLAGES UNDER THE ALASKA NATIVE CLAIMS SETTLEMENT ACT, Rpt. to accompany H.R. 2560, 104th Cong. 2d Sess. (June 27, 1996).

⁴⁹ The State of Alaska, of course, obtained land with a valuable underlying mineral deposit.

Alaska’s benefit of the bargain was acquiring mineral-rich lands specifically for their mineral potential. These lands, which included the lands containing the Pebble deposit, were expressly accorded the same status as if originally selected under the Alaska Statehood Act,⁵⁰ making these lands’ “[m]ineral deposits . . . subject to lease by the State as the State legislature may direct.”⁵¹ In exchange, Alaska relinquished certain lands, which resulted in the creation of Lake Clark National Park—the federal government’s benefit of the bargain.

With this proposed veto, Region 10 would—unilaterally, without congressional review or consent—deprive Alaska of the benefit of this bargain.⁵² When a more recent, and more specific congressional action conflicts with an older, vaguer congressional enactment, the more recent and specific action controls.⁵³

3. The Bristol Bay Area Plan is a comprehensive management plan created at the direction of the Alaska State Legislature.

The Alaska State Legislature has directed the State to “adopt, maintain, and when appropriate, revise” regional land-use plans providing for the management of Alaska-owned lands.⁵⁴ In the development of these plans, all resource and land uses—including mining, fish and wildlife habitat, and recreation—are considered and evaluated.⁵⁵

Following the Cook Inlet Land Exchange, and pursuant to legislative directive, the State in 1984 issued its first Bristol Bay Area Plan (“Area Plan”), which outlined land use authorizations throughout the Bristol Bay region, including the Pebble deposit area. Following a careful balancing

⁵⁰ See Cook Inlet Land Exchange.

⁵¹ See Statehood Act, § 6(i).

⁵² This would have legal consequences, which Alaska will bring to the courts.

⁵³ The Cook Inlet Land Exchange was entered into after the enactment of the Clean Water Act. At the time of the Exchange Agreement, then, Congress was aware of EPA’s 404(c) power. This means that were the two to ever conflict—as they are now—the more recent, and more specific, action controls. *Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 948–49 (11th Cir. 2001) (“[I]f two statutes conflict, the more recent or more specific statute controls.”); see *S. Nat. Gas Co. v. Land, Cullman Cnty.*, 197 F.3d 1368, 1373 (11th Cir. 1999) (“more recent or specific statutes should prevail over older or more general ones” (quotation and citation omitted)); *United States v. Devall*, 704 F.2d 1513, 1518 (11th Cir.1983) (because the conflict between the Bankruptcy Code and the Social Security Act is apparent and cannot be reconciled without limiting one to accommodate the other, the later enacted statute must prevail over the earlier enacted, more general statute); *Hines v. United States*, 551 F.2d 717, 725 (6th Cir. 1977) (when the purposes of two statutes appear to be in conflict with each other, and there is no statutory language which makes any cross reference and the legislative history is silent as to the possible conflict, it is generally assumed that the later statute constitutes an amendment of the earlier one); *I.C.C. v. Southern Ry. Co.*, 543 F.2d 534, 539 (5th Cir.1976) (where there is conflict, the subsequent enactment governs).

⁵⁴ AS § 38.04.065 (entitled “Land Use Planning and Classification”); 11 Alaska Administrative Code (“AAC”) 55.010–.030 (providing that ADNR “shall, with local governmental and public involvement under AS 38.05.945, adopt, maintain, and, when appropriate, revise regional land use plans that provide for the use and management of State of Alaska-owned lands”). AS § 38.04.010, which articulates Alaska’s land and land-management policy, states that “in order to provide for maximum use of state land consistent with the public interest, it is the policy of the State of Alaska to plan and manage state-owned land to establish a balanced combination of land available for both public and private purposes. The choice of land best suited for public and private use shall be determined through the inventory, planning, and classification processes set out in AS 38.04.065 – 38.04.070.”

⁵⁵ AS § 38.04.065(b). The Alaska Administrative Code further identifies the components that must be included in area plans. See 11 AAC 55.030; e.g., 11 AAC 55.030(c)(6) (area plans must include “management guidelines and stated management intent, representing department policies to guide the actions of the department when making land use decisions, directing land management and ensuring compatibility among competing land uses”).

of land- and resource-use interests, the Area Plan specifically designated the area containing the Pebble deposit as open to mineral development—expressly denoting this as a “primary” use for the Pebble lands. The Area Plan’s 2005 update continued to recognize that all state lands within the region are open to mineral development unless they are subject to a mineral closing order.⁵⁶ The Area Plan’s 2013 revisions reaffirmed that:

- Exploration for locatable minerals is allowed on all state lands except those specifically closed to location.
- State land in the area is to be managed for a variety of multiple uses, including mineral exploration and development.
- While the majority of lands in the area are designated for general use, mineral exploration and development is expressly authorized for the Pebble lands.
- The general resource management intent for the Pebble area is to consider mineral exploration and development and to allow the State the discretion to make specific decisions as to how development may occur, through an authorization process.
- The 2013 Area Plan specifically identifies potential transportation corridors to service the Pebble deposit and emphasizes the need to keep these potential corridors open.

The State of Alaska has followed through on the promises it made at statehood: it is managing the Pebble deposit “[f]or the purposes of furthering the development of and expansion of communities”⁵⁷ to sustain Alaska’s economy, culture, and way of life.⁵⁸ And Alaska has delivered on the Secretary of Interior’s certification to Congress that Alaska had “adequate provisions” in place to manage its land:⁵⁹ in addition to the Area Plan, Alaska statutes expressly protect fisheries in Bristol Bay by requiring legislative findings before specified submerged land and shoreland in Bristol Bay may be entered, and before certain mining operations may occur.⁶⁰ Most of the streams in Bristol Bay are legislatively designated as fishery reserves.⁶¹ Legislative approval is required for certain large-scale mines in the area.⁶² State management of the Bristol Bay area is a multifaceted, and ongoing, process—continually subject to revision as Alaska’s circumstances and needs evolve.

Mining claims within the Pebble area have been staked and extensively explored under the State’s oversight and issuance of authorizations. The State makes final decisions on whether, where,

⁵⁶ The lands overlaying the Pebble deposit are not subject to a mineral closing order. The State plan for the area includes 19 mineral closing orders which prohibit new mineral entry in 64 anadromous streams plus 100 feet on either side of the designated streams.

⁵⁷ Statehood Act, § 6(a).

⁵⁸ See *supra* footnote 3.

⁵⁹ See *supra* Section 4 of the Alaska Section of this Comment Letter.

⁶⁰ AS §§ 38.05.140 & 38.05.142.

⁶¹ AS § 38.05.140(f) (“The submerged and shoreland lying north of 57 degrees, 30 minutes, North latitude and east of 159 degrees, 49 minutes, West longitude within the Bristol Bay drainage are designated as the Bristol Bay Fisheries Reserve.”).

⁶² AS § 38.05.142(a) (“In addition to permits and authorizations otherwise required by law, a final authorization must be obtained from the legislature for a large-scale metallic sulfide mining operation located within the watershed of the Bristol Bay Fisheries Reserve designated in AS 38.05.140(f). This authorization shall take the form of a duly enacted law finding that the proposed large-scale metallic sulfide mining operation will not constitute danger to the fishery within the Bristol Bay Fisheries Reserve.”).

and how mining should occur. Indeed, implementation of the Area Plan demonstrates Alaska's continued commitment to this path.

The Area Plan also took into account regional land use designations, which included extensive federal and state land conservation. For example, the nearby Lake Clark National Park and Preserve is one of thirteen National Park System units created or expanded by the Alaska National Interest Lands Conservation Act of 1980 ("ANILCA") (made possible by Alaska's participation in the Cook Inlet Land Exchange). As a unit of the National Park System, Lake Clark National Park and Preserve is administered to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." To achieve these objectives, the Lake Clark National Park and Preserve protects approximately 4 million acres of undisturbed public land; and contains approximately 2,470,000 acres of designated wilderness for management under the provisions of the Wilderness Act of 1964 and portions of three designated Wild and Scenic Rivers. In addition to the Lake Clark National Park and Preserve, the federal government has preserved a vast amount of land in or near the Bristol Bay area, including Katmai National Park and Preserve, the Togiak National Wildlife Refuge, the Becharof National Wildlife Refuge, and the Alaska Peninsula National Wildlife Refuge. The extent of these designations are reflected in a map included in the proposed veto, at ES-2, which illustrates the large extent of the areas already protected in the Bristol Bay region.⁶³ And, pursuant to the Area Plan, the State has issued mineral closing orders in the Bristol Bay region that prohibit mining on over 260,000 acres of additional state lands.

The State has undertaken considerable efforts on its own to preserve vast areas of the Bristol Bay region. For example, the State created the Wood-Tikchik State Park, which, at 1.6 million acres, is largest state park in the nation. The State has protected habitat and species through the creation of critical habitat areas, refuges, and it has passed laws and regulations to regulate activity on or near anadromous waters. More generally, the State regulates activities in all fish-bearing waters,⁶⁴ water withdrawals from any waterbody,⁶⁵ and discharges into waterbodies.⁶⁶

The State and federal government, in short, have prohibited mineral development over a significant portion of the Bristol Bay region. The State balanced these conservation designations by specifically selecting certain lands within the region for their mineral potential. After decades of study and public input, and three successive land management plans, the State made the deliberate and considered decision that mineral development is an acceptable land use of the Pebble lands.

This extensive work is utterly disregarded in Region 10's proposed veto.

4. Alaska is best positioned to protect its resources, including its fish, while permitting development to proceed responsibly.

⁶³ See PD at ES-2 (map, vast green areas depicting protected areas in the region).

⁶⁴ The Alaska Department of Fish & Game regulates activities in fish-bearing waters under AS §§ 16.05.871 and AS 16.05.841.

⁶⁵ AS §§ 46.15.010–.270 (Alaska Water Use Act).

⁶⁶ The Alaska Department of Environmental Conservation regulates discharges into waterbodies through the Alaska Pollutant Discharge Elimination System permitting program. 18 AAC 83.005–.990.

The United States Supreme Court has recognized Alaska’s fish resources as “an asset unique in its abundance in Alaska. . . . the management of which is a matter of great state concern.”⁶⁷

Alaska cares immensely about its fish resources. Enshrined in Alaska’s Constitution is a directive to manage replenishable natural resources, including fish, under a “sustained yield principle.”⁶⁸ This principle balances “maximum use of natural resources with their continued availability to future generations.”⁶⁹ The Alaska Department of Natural Resources (“ADNR”) ensures that any “use of water” is in the public interest.⁷⁰ This means that all ADNR water-use permitting decisions “must . . . specifically consider[] the impacts” of the proposed use “on water quality, navigation, and fish and wildlife.”⁷¹

The Alaska Department of Fish & Game (“ADF&G”) carries out Alaska’s constitutional responsibilities for ensuring the availability of a sustained yield of “fish . . . and all other replenishable resources” for future generations.⁷² ADF&G is statutorily required to protect the habitat of freshwater anadromous fish and to ensure their free passage through freshwater bodies. The Anadromous Fish Act, for example, requires that projects potentially altering or affecting the “natural flow or bed” of a specified anadromous waterbody⁷³ notify and obtain written approval from ADF&G before proceeding.⁷⁴ ADF&G regulations ensure that impacts to anadromous or resident fish waterbodies are mitigated,⁷⁵ and ADF&G staff—experts in the science of Alaska fish and fish habitats—are actively engaged in protecting Alaska fish habitat. All activities⁷⁶ conducted within or across any specified anadromous waterbody must be approved by the ADF&G Habitat Section—a specialized section of ADF&G staffed with habitat biologists who have extensive experience in conducting

⁶⁷ *Reetz v. Bozanic*, 397 U.S. 82, 87 (1970).

⁶⁸ Alaska Const. art. VIII, § 4.

⁶⁹ *West v. State*, 248 P.3d 689, 696 (Alaska 2010) (quoting *The Alaska Constitutional Convention, Proposed Constitution for the State of Alaska: A Report to the People of Alaska* (1956)).

⁷⁰ AS §§ 46.15.010–.270 (Alaska Water Use Act).

⁷¹ *Tulkisarmute Native Cmty. Council v. Heinz*, 898 P.2d 935, 950 (Alaska 1995) (citing AS § 46.15.080(b); 11 AAC 93.120(e)(2) & (g)). In making the public-interest determination, Alaska has codified considerations that are similar to those of a federal NEPA analysis. AS § 46.15.080(b). For every permit issued, ADNR must consider: (1) the benefit to the applicant resulting from the proposed appropriation; (2) the effect of the economic activity resulting from the proposed appropriation; (3) the effect on fish and game resources and on public recreational opportunities; (4) the effect on public health; (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation; (6) harm to other persons resulting from the proposed appropriation; (7) the intent and ability of the applicant to complete the appropriation; and (8) the effect upon access to navigable or public water. *Id.*

⁷² Alaska Const. art. VIII, § 4.

⁷³ Specified anadromous waterbodies are described in the “Catalog of Waters Important for the Spawning Rearing or Migration of Anadromous Fishes” (“Anadromous Waters Catalog”).

⁷⁴ AS §§ 16.05.871–.901. Failure to notify ADF&G and obtain proper approval is prosecutable as a misdemeanor. AS § 16.05.881.

⁷⁵ *E.g.*, 5 AAC 95.900 (imposing upon permittees a duty to mitigate “any adverse effect upon fish or wildlife, or their habitat[.]”); 5 AAC 95.902 (imposing strict liability upon anyone who fails to mitigate as required by 5 AAC 95.900).

⁷⁶ Including road crossings, gravel removal, mining, water withdrawals, the use of vehicles or equipment in the waterway, stream realignment or diversion, bank stabilization, and the placement, excavation, deposition, or removal of any material.

research and field surveys, reviewing plans, and working with permit applicants to ensure that proposed projects do not adversely impact fish habitat.⁷⁷

As the United States Supreme Court recognized, and Alaska law confirms, Alaska’s fish and fish habitat are a matter of great concern to Alaska. Alaska takes these responsibilities seriously: as a result, our protections are robust.

5. Region 10’s myopic focus on subsistence obscures other values held by Alaska’s rural and Native communities.

Region 10 justifies its proposed veto, in part, on the benefits that Region 10 believes the veto will provide for Alaska Natives.⁷⁸

The State of Alaska has been providing assistance to rural residents, many of whom are Alaska Natives, for decades. Alaska assists with addressing basic sanitation issues,⁷⁹ critical infrastructure needs,⁸⁰ and the destabilizing effects presented by globally rising temperatures.⁸¹ The State is presently involved in the preparation of a technical report analyzing the unmet needs of environmentally threatened Alaska Native Villages and formulating recommendations to assist in the protection of Alaska Native culture and communities.⁸² The State understands the complex and nuanced issues facing our rural, and Native, communities.

⁷⁷ In the Angoon Airport project, for example, ADF&G worked with Alaska’s Department of Transportation and Public Facilities to reroute a stream affected by the project in order to “protect the existing riparian habitat and general health of the stream” and “maintain fish passage.” ADF&G habitat biologists will oversee a stream alignment workplan specifying the “actual implementation, including timing engineering drawings, measures to avoid creating adverse effects during implementation, [and] construction,” and will jointly develop a monitoring plan with ADF&G.

⁷⁸ *E.g.*, PD at ES-1; 3-52; 3-56–3-57; 6-23.

⁷⁹ Alaska created the Village Safe Water Program to address water and sanitation challenges unique to our rural communities. Over 3,300 rural Alaskan homes lack running water and a flushing toilet, most of which are located in remote Alaska Native communities. See K. Mattos & T. Blanco-Quirogo, *Water Infrastructure Brief: Opportunities and challenges for washeterias in unpipied Alaska communities* (Aug. 2020), retrieved from <https://www.anthc.org/wp-content/uploads/2021/04/Washeteria-Technical-Brief.pdf>. Many of these households use honeybuckets—plastic-lined buckets that collect urine and feces—which are deposited into a sewage lagoon. These communities desire sustainable water and sanitation facilities. To meet these needs, Alaska works with rural communities to allocate and distribute funding for sanitation facilities, administer grants, and coordinate with the Alaska Native Tribal Health Consortium to manage water and sanitation projects. One product of this is the Alaska Water and Sewer Challenge—a collaboration with tribal, state, and federal agencies to fund research aimed at developing sustainable water and sewer systems for the rural sector. To be sustainable, these systems must be cost-effective: they must have a low capital investment and minimal operating costs. Research efforts are aimed at decentralizing water and wastewater treatment, while minimizing the use of water and maximizing its re-use. See Alaska Dep’t of Env’l Conserv., *Alaska Water & Sewer Challenge*, <https://dec.alaska.gov/water/water-sewer-challenge/>.

⁸⁰ 144 Alaska Native communities have reported some degree of infrastructure damage from erosion, flooding, permafrost thaw, or a combination of all three hazards. The permafrost underlying Noatak, for example, is thawing and destabilizing foundations beneath homes and underground water and sewer piping. There is presently a large crack in the floor of the water treatment plant, the foundation of which has settled approximately six inches on one side due to permafrost melt. If the facility fails, all residents will lose clean drinking water and piped sewer connection.

⁸¹ A family in Chefornek, for example, had to evacuate their home after a large pit developed from thawing permafrost beneath the house’s foundation. See AK Public Media, *Sinkhole Opens under Chefornek Home, Forcing Family to Evacuate*, (Jan. 25, 2021), retrieved from <https://alaskapublic.org/2021/01/25/sinkhole-opens-under-chefornek-home-forcing-family-to-evacuate/>. Many homes in Chefornek are threatened by erosion, flooding, or permafrost degradation.

⁸² This report, prepared by Alaska Native Tribal Health Consortium, Aleutian Pribilof Islands

Region 10 proposes to assist Alaska’s rural and Native communities by spotlighting their shared subsistence lifestyle, and assuming away other values.⁸³ In this way, Region 10 justifies its proposed veto as a measure taken to further the interests of Alaska’s rural and Native communities.

The State of Alaska respects the subsistence way of life practiced by many of its rural and Native communities, and has taken steps to help protect this lifestyle.⁸⁴ Alaska urges Region 10 to recognize the diversity of values that Alaska rural and Native communities may hold, in addition to preserving the subsistence way of life, and the ways that mining projects could further these values, and benefit these communities.

Mining projects in Alaska often create new jobs in remote areas where employment opportunities are otherwise limited. These jobs are fillable, in part, by Alaska Natives living in the region. For example, 52% of the year-round jobs at the Red Dog Mine were filled by shareholders of an Alaska Native Corporation, NANA⁸⁵; 47% of the seasonal and full-time employees and contractor hires at Upper Kobuk Minerals Project were filled by NANA shareholders; and 54% of jobs at the Donlin Gold mine were filled by Alaska Native shareholders or descendants, largely from the Calista Corporation region.⁸⁶ Given the lifespan of mines, jobs like these can support three generations of locals.

Large mining projects in remote areas can ensure the availability of education. Alaska schools have a minimum-enrollment requirement of 10 students. As people move from rural to urban areas—a growing trend, particularly as temperatures rise, permafrost thaws, and riverbanks erode—schools are at increased risk of shutting down for failure to meet the minimum-enrollment requirement. Economically stimulating an area with an industry that hires locals will keep locals, and families, around—helping to meet minimum-enrollment requirements, and keep schools open.

Additionally, a large mine can connect remote communities to the power grid. As a result of increased connectivity, the cost of living—exorbitantly high for remote Alaska communities⁸⁷—could be reduced.

Indeed, leadership of the community nearest to Pebble deposit, the Village of Iliamna, has spoken out in support of the project.⁸⁸ The President of the Iliamna Natives Limited (“INL”) explained:

Association, and Association of Village Council Presidents, is scheduled to be released around the time of the submission of this Comment Letter. Alaska Department of Commerce, Community, and Economic Development, Division of Community and Regional Affairs, is listed as a major contributor. Current community strategies involve protection in place, managed retreat, and, as a last resort, relocation.

⁸³ PD at 3-52–3-57; 4-27; 6-5–6-8; 6-11; 6-13–6-14; 6-15–6-19.

⁸⁴ E.g., AS § 16.05.258(b)(1)–(4) (entitled “Subsistence use and allocation of fish and game”); see *State v. Morry*, 836 P.2d 358, 365–66 (Alaska 1992) (explaining Alaska’s subsistence-preference laws).

⁸⁵ The name NANA derives from the predecessor organization Northwest Arctic Native Association.

⁸⁶ McKinley Research Group, *The Economics Benefits of Alaska’s Mining Industry* (May 2022), at 41.

⁸⁷ Fuel in the village of Noatak rose to \$16.00/gallon earlier this year. See Z. Hughes, *Fuel in the Alaska Village of Noatak was \$16 a Gallon. The Costs are More Than Just Money.*, retrieved from <https://www.adn.com/alaska-news/rural-alaska/2022/05/18/fuel-in-the-alaska-village-of-noatak-was-16-a-gallon-the-costs-are-more-than-just-money/>.

⁸⁸ See Isabelle Ross, KDLG Radio, *Iliamna Natives Ltd. reaches land deal with Pebble, citing potential for economic growth* (May 16, 2019), retrieved from <https://www.kdlg.org/pebble-mine/2019-05-16/iliamna-natives-ltd-reaches-land-deal-with-pebble-citing-potential-for-economic-growth>; Dylan Brown, *Unending mine fight strains Alaska villages*, EENews (Oct. 16,

INL sees the opportunities that Pebble could provide for Iliamna, and we want our community to grow and prosper with responsible development. INL will work with Pebble to make sure it is done responsibly, and we are looking forward to working together to make our shareholders and community a healthy place to aspire our dreams.⁸⁹

This perspective is absent from Region 10's proposed determination. Region 10 goes so far as to dismisses the value of employment for nearby communities, suggesting that increased employment might “reduce the time available for subsistence activities” which could “potentially decreas[e] harvest yields.”⁹⁰ But jobs are not the enemy of subsistence living: income may be used to purchase supplies required for subsistence and harvesting activities—snowmachines, all-terrain vehicles, guns, fishing nets, fuel, for example.⁹¹

The well-being of those in rural communities, predominately Alaska Natives, encompasses so much more than simply maintaining a subsistence lifestyle. If Region 10 seeks to assist Alaska Natives, then limiting their opportunities—job opportunities, educational benefits, and others resulting from the inflow of money into an area—may be counterproductive. Region 10 oversteps its role by assuming that subsistence is the only value held by Alaska Natives, and vetoing a project based, in part, on this erroneous assumption.

6. Region 10's proposed veto upends the State's careful and considered management of the Pebble area and is inconsistent with the Alaska-specific law and circumstances discussed above.

Not unlike a bull in a china shop, Region 10 would disregard the federal government's compacts with Alaska, unilaterally break the federal government's promises, rob Alaska Natives of

2019), retrieved from <https://www.eenews.net/articles/unending-mine-fight-strains-alaska-villages/> (Iliamna Natives Ltd. board member expressing support for Pebble mine).

⁸⁹ News Release, Northern Dynasty Minerals, Ltd., Northern Dynasty: Pebble Partnership, Iliamna Natives Limited Reach Right-Of-Way Agreement (May 15, 2019), retrieved from <https://northerndynastyminerals.com/news/news-releases/2019/northern-dynasty-pebble-partnership-iliamna-natives-limited-reach-right-of-way-agreement/>.

⁹⁰ PD at 6-24 (“[I]ncreased employment may also reduce the time available for subsistence activities, including the transfer of TEK and practices to family members, potentially decreasing harvest yields.”). Contrary to Region 10's assertion, the FEIS suggested that high paying jobs improve subsistence success:

The effect of income on subsistence success (i.e., subsistence production) is evident among households with unique demographic structures. The magnitude of the effect of income is such that in many communities, 30 percent of households produce 70 percent of the subsistence harvest. These “super households” are distinguished because they include multiple working-age males, tend to have high incomes, and often are involved in commercial fishing. These three factors support high-producing households to be able to combine subsistence activities with paid employment and to arrange considerable labor in flexible ways that maximize harvests of subsistence foods, which are then shared with other households in the community and region.

FEIS at 4403.

⁹¹ Gerlach, C., & Loring, P, *Rebuilding northern foodsheds, sustainable food systems, community well-being, and food security*, Int'l J. of Circumpolar Health (2013); Nuttall, M., Berkes, F., Forbes, B., Kofinas, G., Vlassova, T., & Wenzel, G., *Hunting, herding, fishing and gathering: indigenous peoples and renewable resource use in the Arctic*, Arctic Climate Impact Assessment, 649–90 (2005); Magdanz, J. S., Greenburg, J., Little, J., & Koster, D., *The Persistence of Subsistence: Wild Food Harvests in Rural Alaska*, 1983-2013 (2016).

their diversity, and usurp the State’s prerogative to decide, for itself, whether, when, how to develop its mineral resources. Apparently anticipating these arguments, Region 10 asserts without discussion or analysis that

[n]othing in the ASA [Alaska Statehood Act], CILEA [Cook Inlet Land Exchange Act], ANILCA, or ANCSA, nor any other relevant authority, precludes the application of a duly enacted federal law, including Section 404(c) of the CWA, nor does any such law serve as a barrier to EPA’s use of Section 404(c) of the CWA to prohibit or restrict discharges.⁹²

But courts will “hold unlawful . . . agency action” that is “not in accordance with law” or that is taken “without observance of procedure required by law[.]”⁹³ The Statehood Act and the Cook Inlet Land Exchange are binding compacts that limit the federal government’s ability to dictate land use policy in Alaska, specifically including the area encompassing the Pebble deposit.⁹⁴

Additionally, where statutes or laws appear to conflict, it is the specific provisions which control over the general.⁹⁵ The Ninth Circuit has recognized that “Congress views Alaska as unique and intends Alaska-specific laws to trump more general laws in some instances[.]”⁹⁶ The specificity of the Alaska Statehood Act and the Cook Inlet Land Exchange reflect a deliberative process that produced a considered result. These provisions and obligations control over § 404(c)—described by one district court judge as “garbled” and “awkwardly written and extremely unclear.”⁹⁷

For those reasons, Alaska believes Region 10’s proposed determination must be withdrawn.⁹⁸

LEGAL IMPEDIMENTS TO FINALIZATION OF THE PROPOSED DETERMINATION

“Administrative agencies are creatures of statute” and “accordingly possess only the authority” that Congress has lawfully provided.⁹⁹ Agencies must follow the law as written, hewing closely to the law and meticulously justifying their actions. They are never at liberty to expand their own power.¹⁰⁰

⁹² PD at 2-16.

⁹³ 5 U.S.C. § 704(A), (D).

⁹⁴ See *Texas v. New Mexico*, 482 U.S. 124, 128–29 (1987) (interstate compact when approved by Congress becomes a law of the United States, but also noting that “[a] Compact is, after all, a contract” subject to contractual interpretation and enforcement).

⁹⁵ *Hinck v. United States*, 550 U.S. 501, 506 (2007) (noting the “well-established principle” that “in most contexts, a precisely drawn, detailed statute pre-empts more general remedies”).

⁹⁶ *Wilderness Soc v. U.S. Fish & Wildlife Serv.*, 316 F.3d 913, 928 (9th Cir. 2003), *rev’d on other grounds*, *The Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003).

⁹⁷ *Mingo Logan Coal Co, Inc. v. EPA*, 850 F. Supp.2d 133, at 134 (2012), *rev’d*, 714 F.3d 608 (D.C. Cir. 2013).

⁹⁸ These same points support the broader argument that Region 10 impinges on the State’s traditional right to manage its own land and natural resources, in contravention of the principles of federalism that structure the United States Constitution, the Tenth Amendment, and the Clean Water Act. For all the reasons detailed above, Alaska also makes and preserves these arguments in this Letter.

⁹⁹ *N.F.I.B. v. Dep’t of Lab., Occ’l Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022).

¹⁰⁰ See *NRDC v. EPA*, 822 F.2d 104, 131 (D.C. Cir. 1987) (“[EPA]’s rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.”).

The proposed veto would do just that. Its voluminosity belies its shortfalls: it fails to define key terms and fails to tether its findings to the statutory and regulatory language. Its consideration of costs is heavily one-sided. Its findings are padded with information that, inexplicably, are disclaimed as a basis for its decision. It never made a Waters of the United States (“WOTUS”) delineation justifying its assertion of CWA jurisdiction. And the regulations it relies on—scarcely tested in the courts—are riddled with flaws.

Perhaps most egregiously, Region 10 threatens to confer upon itself precisely the type of “roving commission to achieve . . . [a] laudable goal” that EPA has previously been chastised for¹⁰¹—twice.¹⁰² “Commendable though [such] goals may be,”¹⁰³ they cannot justify unlawful action.

1. Region 10’s proposed veto is indefensible.

To produce a defensible decision, an agency “must examine the relevant data and articulate a satisfactory explanation for its action” which includes articulating “a ‘rational connection between the facts found and the choice made.’”¹⁰⁴

For the following reasons, Region 10’s proposed veto is indefensible.

a. Region 10 fails to define key terms.

“Because ‘administrative agencies may act only pursuant to authority delegated to them by Congress,’ an agency must ‘point to something’” that “‘gives it the authority’ to take the specific action at issue.”¹⁰⁵ “[C]onjecture” does not suffice.¹⁰⁶

To exercise a § 404(c) veto, the CWA requires EPA to establish that proposed “discharge[s]” “will have an unacceptable adverse effect on” one of four resources, including “shellfish beds and fishery areas (including spawning and breeding areas).”¹⁰⁷ The CWA does not define “unacceptable adverse effect” or “fishery areas.”¹⁰⁸ EPA’s regulations define an “unacceptable adverse effect” as an

[i]mpact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas.¹⁰⁹

¹⁰¹ *Michigan v. E.P.A.*, 268 F.3d 1075, 1084 (D.C. Cir. 2001).

¹⁰² *West Virginia v. EPA*, No. 20-1530, 2022 WL 2347278 (June 30, 2022).

¹⁰³ *Michigan v. E.P.A.*, 268 F.3d 1075, 1084 (D.C. Cir. 2001).

¹⁰⁴ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

¹⁰⁵ *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (internal quotation marks omitted).

¹⁰⁶ *Graphic Commc’ns Int’l Union, Loc. 554 v. Salem-Gravure Div. of World Color Press, Inc.*, 843 F.2d 1490, 1494 (D.C. Cir. 1988) (“[C]onjecture cannot substitute for a reasoned explanation[.]”).

¹⁰⁷ 33 U.S.C. § 1344(c). The parentheticals used in this definition, combined with the term “including,” indicate that the phrase “spawning and breeding areas” is a subset of “fishery areas.” In other words, only after defining “fishery areas” can Region 10 proceed to identify spawning and breeding sites within those areas.

¹⁰⁸ The Ninth Circuit in *Trout Unlimited v. Pirzadeh* considered only the question of “whether the EPA’s withdrawal of its [2014] proposed determination is reviewable” by the courts. 1 F.4th 738, 750 (9th Cir. 2021). None of the arguments advanced by this Letter were brought to, or addressed by, that court. *Id.*

¹⁰⁹ 40 C.F.R. § 231.2(e).

EPA’s regulations do not further define “fisheries” or “significant” for purposes of 231.2(e). Nor do EPA’s regulations separately define “fishery areas” as used in § 404(c).

Region 10’s proposed veto is expressly based “solely” on adverse effects to “fishery areas.”¹¹⁰ Stringing the statutory and regulatory text together, Region 10 must establish that a “discharge” of dredged or fill material into WOTUS “will have an unacceptable adverse impact on . . . fishery areas,” which means the discharge must have an “[i]mpact . . . which is likely to result in . . . significant loss of or damage to fisheries[.]”

Region 10’s proposed veto never defines “fisheries” (or “fishery areas”) or “significant.” Without first defining these key terms, Region 10 cannot make the requisite showing of significant loss of or damage to fisheries.

i. “Fisheries” (or “fishery area”)

Region 10 fails to define “fisheries” as used in EPA’s regulation.¹¹¹ Each of Region 10’s four unacceptability findings are traced to effects on anadromous streams, streams supporting anadromous streams, and wetlands—not “fisheries.”

The closest Region 10 comes to defining this term is in a footnote, in which Region 10 states in full:

For the purpose of this proposed determination, anadromous fishery areas include anadromous fish streams.¹¹²

This statement provides no explanation of what a fishery is, justification for why fish streams are includable, or indication as to what extent fish streams (or other water bodies) are includable. Left entirely unaddressed is whether, how, and why supporting streams and wetlands or other water bodies are includable as “fisheries.”

Underscoring the inadequacy of Region 10’s definition is a comparison to that used in the Corps’ Final Environmental Impact Statement (“FEIS”),¹¹³ the § 404(b)(1) Guidelines, and a dictionary. The FEIS defines “commercial and recreational fisheries” as

[t]he Alaska Department of Fish and Game (ADF&G) Commercial Salmon Fishery Area T and Area H; ADF&G Commercial Shellfish Area H; Cook Inlet Management Area (for groundfish); and ADF&G Statewide Harvest Survey (SWHS) areas S, T, N, and P comprise the Environmental Impact Statement (EIS) analysis area for this resource.¹¹⁴

¹¹⁰ See PD at 4-12 (“[T]his proposed determination is based solely on adverse effects on anadromous fishery areas[.]”).

¹¹¹ Region 10/EPA have also provided no definition of “fishery area” as used in § 404(c). The most reasonable reading of EPA’s regulation is that “fishery areas” means “fisheries.”

¹¹² PD at 4-3.

¹¹³ “The Final Environmental Impact Statement is a thorough and painstaking piece of work which deals adequately indeed, comprehensively with all environmental consequences required by law to be considered.” *Env’t Def. Fund, Inc. v. Stamm*, 430 F. Supp. 664, 667 (N.D. Cal. 1977). The FEIS here was developed over several years, with input from multiple agencies and stakeholders.

¹¹⁴ FEIS at 3.6-1.

The § 404(b)(1) Guidelines state that “[r]ecreational and commercial fisheries consist of harvestable fish, crustaceans, shellfish, and other aquatic organisms used by man.”¹¹⁵ The Cambridge Dictionary defines fishery as “an area of water where fish are caught so they can be sold.”¹¹⁶ Region 10 could, but inexplicably¹¹⁷ has not, referenced or otherwise relied on these definitions.

Only after first clearly delineating an area may an agency study that area. Only after studying that area may an agency identify adverse effects that the area is susceptible to. Only after cataloguing these adverse effects may an agency assess their degree of severity, to determine whether they are significant enough to be unacceptable. Without first identifying fisheries, Region 10 cannot invoke a power predicated on unacceptable adverse effects to fisheries.

The remainder of the analysis changes based on which “fisheries” stand to be affected. If Region 10 considers all of Bristol Bay a “fishery,” then it must—per EPA’s own regulation—prove a “significant loss of damage to” *Bristol Bay* resulting from the proposed discharges. This will require a greater showing of loss than were “fisheries” defined more narrowly—as, for example, the seven shaded areas identified on the figure entitled *Approximate extents of popular Chinook and Sockeye salmon recreational fisheries in the Nushagak and Kvichak River watersheds* on page 3-59.¹¹⁸ If these seven shaded areas are the “fisheries,” Region 10 must prove a “significant loss of or damage to” one or more of those specified areas.¹¹⁹

ii. “Significant”

Region 10 also fails to define “significant.” Absent a definition incorporating objective standards, the term “significant” is a term of “subjective . . . judgment” which invites “unguided discretion.”¹²⁰ Unguided and unchecked discretion by agencies is “dangerous”—particularly when it allows agencies to do “whatever they wish”¹²¹ in the guise of science.

Without an objective definition of the term, EPA’s discretion has no apparent constraints. And the public has no yardstick to evaluate whether a project’s effects are adverse enough to rise to the level of “significant” and so are, for that reason, “unacceptable.”

b. Region 10 fails to justify the Proposed Prohibition of discharges within the mine site footprint.

¹¹⁵ 40 C.F.R. § 230.51(a).

¹¹⁶ *Fisbery*, Cambridge Online Dictionary, retrieved from <https://dictionary.cambridge.org/us/dictionary/english/fishery>.

¹¹⁷ Perhaps Region 10’s failure to rely on these definitions isn’t so inexplicable: were any of these definitions used, the veto would be unsupportable.

¹¹⁸ PD at 3-59.

¹¹⁹ Region 10 asserts that the removal of the anadromous streams as well as the input provided by other “streams and wetlands that support anadromous fish streams” would likely be attenuated by inputs from other streams and wetland complexes above the “fishery areas” identified in the shaded areas on page 3-59 of the Proposed Determination. If Region 10 intended this map to define the relevant “fishery areas,” Region 10 should have conducted an analysis to determine what the actual potential impacts might be to the shaded areas shown in that map.

¹²⁰ *Ohio River Valley Env’t Coal, Inc. v. Norton*, No. CIV.A. 3:04-0084, 2005 WL 2428159, at *3 (S.D.W. Va. Sept. 30, 2005), *amended*, No. CIV.A. 3:04-0084, 2005 WL 5188120 (S.D.W. Va. Nov. 22, 2005), *aff’d sub nom. Ohio River Valley Env’t Coal, Inc. v. Kempthorne*, 473 F.3d 94 (4th Cir. 2006).

¹²¹ *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 612–13 (S.D.N.Y. 2018).

“[W]here [an] agency’s reasoning is irrational, unclear, or not supported by the data it purports to interpret,” courts “must disapprove the agency’s action.”¹²²

In the FEIS, the Corps found that operations under the proposed mine plan “would not be expected to have a measurable effect on fish numbers or result in long-term changes to the health of the commercial fisheries in Bristol Bay[.]”¹²³

Region 10’s Proposed Prohibition—prohibiting the use of WOTUS within the proposed project’s 13.1 square mile footprint for specification as disposal sites—concludes just the opposite. For support, Region 10 presents “four independent unacceptability findings” outlined in Section 4 of the proposed veto. These are: (1) “[t]he loss of approximately 8.5 miles (13.7 km) of documented anadromous fish streams”; (2) “[t]he loss of approximately 91.2 miles (146.8 km) of additional streams that support anadromous fish streams”; (3) “[t]he loss of approximately 2,113 acres (8.6 km²) of wetlands and other waters that support anadromous fish streams”; and (4) “[a]dverse impacts on at least 29 additional miles (46.7 km) of documented anadromous fish streams resulting from greater than 20% changes in average monthly streamflow.”¹²⁴

None of these findings are—even nominally—tied to the seven shaded “fishery areas” or to any other identified “fisheries.” None elucidate a clear connection between a discharge, a WOTUS, and a fishery, as required. In terms of significance, none are appropriately contextualized.

i. Finding #1: “The loss of approximately 8.5 miles (13.7 km) of documented anadromous fish streams.”¹²⁵

Region 10 states that discharges of dredged or fill material associated with the 2020 Mine Plan would result in the permanent loss of approximately 8.5 miles of “streams with documented anadromous fish occurrence, specifically Coho and Chinook salmon.”¹²⁶ This, in turn, will result in general fish displacement, injury, and mortality.¹²⁷ These streams are generally ecologically valuable because of their interconnectivity with ponds and inundated wetlands—features generally which provide “excellent rearing habitat” and “important overwintering and flow velocity refugia for salmonids.”¹²⁸ Region 10 further states that the loss of 8.5 miles of anadromous fish streams from a single project is “unprecedented in the context of the CWA Section 404 regulatory program in Alaska.”¹²⁹ This justification is flawed in several respects.

First, Region 10 has failed to tie this finding to “fisheries.” No part of the 8.5 miles of stream loss occurs within, or within close proximity to, any of the seven fisheries identified by Region 10 on page 3-59. Effects from these losses are not tied to any fishery. Generalizations of scientifically recognized facts are insufficient.

¹²² *Nw. Coal. for Alternatives to Pesticides (NCAP) v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008).

¹²³ FEIS at 4.6-3.

¹²⁴ PD at ES-12.

¹²⁵ PD at 5-1.

¹²⁶ PD at 3-5, 4-4, 4-5.

¹²⁷ PD at 4-8.

¹²⁸ PD at 4-8.

¹²⁹ PD at 4-8.

Second, Region 10 has failed to prove “significance.” Contextualizing the 8.5-mile loss in the Nushagak and Kvichak River watersheds, which comprise two of the six major watersheds of the Bristol Bay area, provides a more appropriate perspective.¹³⁰ Region 10 indicates that these two watersheds alone “contain over 33,000 miles of streams.” In other words, using Region 10’s own numbers, the loss at issue in this finding is the loss of less than 0.03% of the total streams in the Nushagak and Kvichak watersheds. Measured against all *six* major watersheds comprising Bristol Bay, this finding is that less than 0.01% of the streams in Bristol Bay stand to be adversely affected by the proposed project. Given Region 10’s explicit statement that its proposed veto is based on “the unacceptable adverse effects on anadromous fishery areas in the Bristol Bay watershed”¹³¹—the Bristol Bay area (all 41,900 square miles of it) is the appropriate comparison when assessing significance. Under any definition of “significant,” surely, <0.01% does not suffice.¹³²

Importantly, Region 10 fails to acknowledge that Alaska’s Anadromous Fish Act¹³³ and Fish Passage Act¹³⁴ would require additional state permitting before individual components of the project could proceed. In the process of evaluating these permits, ADF&G habitat biologists would assess the streams anticipated to be affected, determine what protective or other measures could be implemented, and determine what mitigation is needed to offset negative impacts. Permitting, mitigation, and continued monitoring are all responsibilities of ADF&G under state permitting programs. As detailed in previously in this Letter,¹³⁵ this responsibility includes protecting anadromous fish habitat and providing free passage for all fish species. How ADF&G might mitigate this loss under these acts remains, at this time, unexplored. Region 10’s § 404(c) veto simply cuts off this valuable line of state protection.

Third, the notion that projects are subject to veto simply because, in Alaska, some aspect of the project has never been done before, is unjustified. This consideration is certainly not rooted in the statutory or regulatory text. If a loss is “significant” merely if it is unprecedented in Alaska, then a great deal many new projects in our young and underdeveloped State are vulnerable to veto.

The first finding cannot serve as the basis of a § 404(c) veto.

¹³⁰ PD at 3-1.

¹³¹ “Alaska’s Bristol Bay watershed is an area of unparalleled ecological value . . . The Bristol Bay watershed . . . support[s] a more than 4,000 year old subsistence-based way of life for Alaska Natives The Bristol Bay watershed supports the world’s largest runs of Sockeye Salmon . . . Bristol Bay’s Chinook Salmon runs are [] frequently at or near the world’s largest Bristol Bay is remarkable as one of the last places on Earth with such bountiful and sustainable harvests of wild salmon” (PD at ES-1.)

¹³² Additionally, Region 10 made at least one mistake in its calculations. In Table 4.2 on page 4-5, Region 10 incorrectly inputs the amount of Chinook salmon rearing habitat loss at 3.0 miles, when it should have been 2.24 miles. This figure relies on a misquote from Joe Geifer at Alaska Department of Fish & Game, suggesting that .76 of the 3.0 miles is appropriately classified as rearing habitat for Chinook. But as Mr. Geifer explained to Region 10 previously, and as the State again explains now, the .76 number relayed by Mr. Geifer represents an area where Chinook have been documented; the area is not a rearing habitat. If Region 10 miscalculated a figure once, it can do it again—given the volumes of information associated with this proposed veto, further mistakes may go uncaught.

¹³³ AS § 16.05.871.

¹³⁴ AS § 16.05.841.

¹³⁵ See *supra* Section 4 of the Alaska Section of this Letter.

ii. **Finding #2: “The loss of approximately 91.2 miles (146.8 km) of additional streams that support anadromous fish streams.”**¹³⁶

Region 10’s second finding is that an additional 91.2 miles of “streams that support anadromous fish streams” will be lost. Region 10 states that “streams that support anadromous fish streams” means

streams that do not currently have documented anadromous fish occurrence . . . [but] still support downstream anadromous fish streams.¹³⁷

Region 10 elaborates:

[a]lthough there is not currently documented anadromous fish occurrence in these streams, they may nonetheless be used by anadromous fish[.]¹³⁸

So, there is no science documenting stream use, but the potential for such use is what matters. And yet,

the potential for such use is not a basis for this proposed determination[.]¹³⁹

This confusing explanation fails to provide a concrete, workable definition of “streams that support anadromous fish streams.” Even if it did provide a workable definition, Region 10 seems to assert that the content of that definition “is not a basis for this proposed determination.”

Finding 2 only gets more confounding from there. Region 10’s reasoning is so opaque that Alaska’s experts at ADF&G cannot discern how Region 10 arrived at the 91.2-mile number. These do not appear to be catalogued fish streams.

As to how these streams qualify as “fisheries,” Region 10 has provided insufficient information to connect the dots between: (a) “streams that support anadromous fish streams”; (b) the 8.5 miles of actual anadromous streams; and (c) the fisheries sketched onto the map on page 3-59 (or another definition of “fishery”). None of the areas in (a), (b), or (c) appear to overlap.

Region 10’s undifferentiated reference to “stream miles” fails to distinguish between the functionality of the types of streams in this 91.2-mile stretch of streams. The function of each segment of stream may be substantially different, and more or less valuable, than the next segment of stream. To support its conclusion that these streams will be adversely affected by the mine’s discharges, Region 10’s findings must be tied to specific portions of actual streams.

Lastly, the second finding does not quantify or otherwise objectively measure what effects these 91.2 miles of “streams that support anadromous streams” have on the downstream anadromous habitat. It therefore is not demonstrably “significant” to downstream anadromous streams. Nor is this finding demonstrably “significant” to any of the shaded “fishery areas” identified in Region 10’s

¹³⁶ PD at 4-3.

¹³⁷ PD at 4-18 n.51.

¹³⁸ PD at 4-18 n.51.

¹³⁹ PD at 4-18 n.51.

map on page 2-59. Since these streams constitute <0.01% of all streams in Bristol Bay, they are demonstrably *insignificant* when placed in Region 10's preferred context.

The second finding cannot serve as the basis of a § 404(c) veto.

iii. Finding #3: “The loss of approximately 2,113 acres (8.6 km²) of wetlands and other waters that support anadromous fish streams.”¹⁴⁰

Region 10's third finding is the loss of 2,113 acres of “wetlands and other waters” expected to result from the proposed mine (before mitigation is taken into account).¹⁴¹ Region 10 justifies this finding on the basis that these wetlands and other waters provide “ecological subsidies to downstream anadromous fish streams.”¹⁴² In support, Region 10 generally explains that “*all* wetlands are important to the greater function and value of ecosystems and subsistence cultures they support”¹⁴³ before stating that changes in flow in the North Fork Koktuli river and Upper Talarik Creek resulting from mine operations “have the potential” to change the hydrologic connectivity of off-channel habitats and associated wetlands and further, that these changes “also can affect” nutrient availability, the downstream transport of invertebrates, and available habitat for benthic macroinvertebrate production.¹⁴⁴ Region 10 draws the general conclusion that these effects will “thereby adversely affect[] overall productivity of down gradient anadromous fish streams and streams that support anadromous fish streams.”¹⁴⁵

First, Region 10 fails to articulate the connection of these losses to a fishery. The “wetlands and other waters” are not within the shaded areas on page 3-59. They are not within the areas specified in the FEIS definition. Nor do they fall within the Guidelines or dictionary definitions, both of which require the presence of harvestable fish.

Second, Region 10 fails to explain why mitigation cannot be taken into account. The federal government has a system in place to mitigate wetland loss: compensatory mitigation. Region 10's cursory assessment of PLP's proposed compensatory mitigation plan,¹⁴⁶ and suggestion that it need not consider compensatory mitigation in the first place (but will do so gratuitously), inadequately addresses this issue.

Third, Region 10 asserts that loss of these wetlands and other waters “would result in loss of . . . habitat . . . to abutting and downstream waters” but admits that it has no data to support this statement:

[w]etlands that are contiguous with and adjacent to anadromous fish streams . . . have not yet been surveyed at spatial and temporal scales sufficient to document periodic use by salmon.¹⁴⁷

¹⁴⁰ PD at 4-3.

¹⁴¹ PD at 4-23.

¹⁴² PD at 4-23.

¹⁴³ PD at 4-23 (emphasis added).

¹⁴⁴ PD at 4-24.

¹⁴⁵ PD at 4-24.

¹⁴⁶ PD at 4-67.

¹⁴⁷ PD at 4-23, 4-26.

Region 10 is confident that the loss of these wetlands and other waters would result in loss of fish habitat even though the wetlands in question “have not yet been surveyed[.]” Clearly, then, Region 10 is making assumptions, not drawing scientifically sound conclusions. “The mere fact that an agency is operating in a field of its expertise,” of course, does not excuse the requirement that an agency’s reasoning be “rational, clear, and complete[.]”¹⁴⁸

Fourth, Region 10 has not demonstrated “significance.” Assuming Region 10’s estimation of 2,113 acres is accurate,¹⁴⁹ this amount constitutes 0.01% of the total acreage of the Nushagak and Kvichak watersheds,¹⁵⁰ and 0.008% of the total acreage of the Bristol Bay area.¹⁵¹ Region 10 has not appropriately contextualized the loss of 2,113 acres. Without appropriate contextualization, its degree of this loss’s effect on fisheries cannot be ascertained. Using Region 10’s preferred denominator, the entirety of Bristol Bay, this loss (0.008%) is demonstrably *insignificant*.

Fifth, the speculative nature of these finds fall far short of the “will” standard that § 404(c) requires.¹⁵²

The third finding cannot serve as the basis of a § 404(c) veto.

iv. Finding #4: “Adverse impacts on at least 29 additional miles (46.7 km) of documented anadromous fish streams resulting from greater than 20% changes in average monthly streamflow.”¹⁵³

Region 10’s fourth finding is based on changes in streamflow that it predicts will result from the proposed mine plan. Region 10 conducted an evaluation of the streams downstream from the proposed mine and concluded that the streamflow in 29 miles of downstream anadromous fish streams will be altered by 20% or more, as measured by the monthly averages. This is significant, Region 10 explains, because a 2012 study (Richter et al. 2012)¹⁵⁴ “found that regardless of geographic location, daily streamflow alterations of greater than 20 percent can cause major changes in the structure and function of streams.”¹⁵⁵

As a preliminary matter, Region 10’s approach to its fourth finding more closely approximates the type of reasoning required to justify an unacceptability finding. Unlike the first three findings, which make general statements about ill-defined areas of watersheds using vague and speculative terminology, Region 10’s fourth finding follows a methodology and relies on an evaluation of the

¹⁴⁸ *NCAP*, 544 F.3d at 1052.

¹⁴⁹ ADF&G has concerns with Region 10’s improper extraction of data points from those collected within the proposed mine’s footprint—which used a much finer scale than the National Hydrographic Dataset (“NHD”) scale, which uses a 1:63,360 or larger scale in Alaska—to areas outside of the footprint. This is improper because the data collected within the mine footprint is specific to the mine; extrapolating that data at that scale must be justified, which Region 10 fails to do. Use of data from the much coarser NHD would result in a lower percentage of wetlands and streams affected than the figures Region 10 calculates.

¹⁵⁰ Calculations based on data sourced from USGS National Map Viewer, retrieved from <https://apps.nationalmap.gov/viewer/> (June 19, 2022). All data rounded to whole numbers.

¹⁵¹ FEIS at 3.16-1.

¹⁵² See Section 3 of the Legal Impediments portion of this Letter for further explanation.

¹⁵³ See PD at § 4.2.4.

¹⁵⁴ Richter, B. D., M. M. Davis, C. Apse, and C. Konrad, *A presumptive standard for environmental flow protection*, River Research and Applications, 28:1312–1321 (2012) (“Richter et al (2012)”).

¹⁵⁵ PD at 4-29.

actual streams that it believes stand to be adversely affected. This finding thus provides the public with metrics to use and substance to critique.

Region 10, however, has still failed. It has failed to tie the streamflow changes to a fishery, and has failed to explain the significance of these streamflow changes. As with the other three findings, properly contextualized, there is no demonstrable loss of or damage to any of the seven shaded areas identified in the map on page 3-59. Considered in the context of Bristol Bay, this loss constitutes <0.01% of all streams in the Bristol Bay region—an insignificant amount.

A closer look reveals numerous problems with Region 10's science. Region 10's analysis broadly "targets the entire aquatic ecosystem," rather than any identifiable "fisheries." Scientific studies supporting a 404(c) veto must be designed to produce data about the specific resources affected.

Region 10's premise—that streamflow alterations of greater than 20% cause major changes in the structure and function of streams so are therefore "significant" to the health of the rivers system—has two problems. First, the premise reflects a standard that appears to be a relatively novel one that is not widely accepted in the scientific community.¹⁵⁶ At minimum, Region 10 must justify why a percentage-based flow study model is trustworthy—as opposed to, for example, a model based on a minimum-flow threshold or a statistically based standard¹⁵⁷—and must address and rebut the critiques of its selected model in the scientific literature. Region 10's failure to vet this methodology undermines the credibility of its conclusions.

Second, Region 10 fails to fully and accurately replicate the standard before purporting to apply it. The authors of the study that introduced the 20% standard have explained that this standard "is intended for application only where detailed scientific assessments of environmental flow needs cannot be undertaken in the near term."¹⁵⁸ This is because, the study authors explain, "[t]he allowable degree of alteration from the natural condition can differ from one point to another along the same river." Notably, other estimates of permissible alterations are as high as 50%.¹⁵⁹ Region 10 still has ample time to follow the authors' recommendation, and develop a detailed scientific assessment of flow needs tailored to each stream that may be affected, considering that the Corps *denied* the § 404 permit at issue, so there is no time pressure to act quickly. Region 10 has simply lifted the 20% standard from one study and, without explanation, asserted that this standard should govern its assessment of downstream effects of the streams at issue here. This crude methodology falls far short of what is required to justify a § 404(c) veto, which must be predicated on findings that adverse effects "will" be caused by discharges into WOTUS from point sources associated with a project.

¹⁵⁶ Another peer-reviewed scientific article, published by Pahl-Wostl et al (2013) after the Richter et al. 2012 study, explains that "the field [of environmental flows study] is characterized by a limited transferability of insights, due to the prevalence of specific case-study analyses and a lack of research on the governance of environmental flows[.]" Claudia Pahl-Wostl et al., *Environmental flows and water governance: managing sustainable water uses*, Current Op. in Env'l Sustainability, 5:3-4, 341–51 (2013) ("Pahl-Wostl (2013)"). Pahl-Wostl et al. "identify a clear need for a more systematic approach to the determination of environmental flow requirements" than those currently existing, including in the 2012 Richter article, which is cited.

¹⁵⁷ See Richtner et al. (2012).

¹⁵⁸ Richter et al. (2012).

¹⁵⁹ Richter et al. (2012) (citing Smakhtin et al. (2004)).

Notably, Region 10 has failed to address the FEIS's determination that any alteration in flows would be negligible below the confluence with the North Fork Koktuli and South Fork Koktuli rivers.¹⁶⁰ This is important because the closest shaded area identified on page 3-59 (a fisheries map) is about 25 miles downstream from that point.

If Region 10 is concerned with streamflow alterations based on discharges, the appropriate avenue to address this is through the permitting process, and working with ADF&G. Shutting down the entire project in perpetuity is not the solution.

The fourth finding cannot serve as the basis of a § 404(c) veto.

v. Conclusion

Considered alone or collectively, Region 10's four "unacceptability findings" fail to establish a "rational connection between the facts found and the choice made[.]" as required by the Supreme Court to create a valid determination.¹⁶¹ These four findings needed to be especially strong to overcome the Corps' finding in the FEIS that operations under the proposed mine plan "would not be expected to have a measurable effect on fish numbers or result in long-term changes to the health of the commercial fisheries in Bristol Bay[.]"¹⁶² Region 10 does not meaningfully address this finding, much less prove it inaccurate. Notably, EPA was a cooperating agency in the FEIS, and presumably concurred with the conclusions therein.

c. Region 10 fails to justify its Proposed Restriction over 309 square miles of primarily Alaska-owned land.

In addition to vetoing the project, Region 10 seeks to veto all future projects over an area 23 times the size of the proposed project which involves discharges with effects "similar or greater in nature and magnitude to the adverse effects of the May 2020 Plan."

Agency action is "irrational" when the agency fails to "provide[] a coherent and reasonable explanation of its exercise of discretion[.]"¹⁶³ The Proposed Restriction is highly irrational.

First, "similar or greater in nature and magnitude" to the effects of the proposed mine is not a workable standard.¹⁶⁴ No actual notice is provided to potential permittees as to what is prohibited.

Second, the Proposed Restriction is grossly disproportionate to Region 10's four findings. Each finding is (in theory) specific to the proposed mine at issue, which has a footprint of 13.1 square miles. Even if these findings were sound, they could not provide a basis for vetoing the specification

¹⁶⁰ FEIS at 4.6-3.

¹⁶¹ See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

¹⁶² FEIS at 4.6-3.

¹⁶³ *Atl. Diving Supply, Inc. v. United States*, 107 Fed. Cl. 244, 252 (2012) (citing *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001)).

¹⁶⁴ If a permittee were to reduce the potential loss of streams by one foot, for example, is that project not prohibited? What if a permittee reduces the loss of streams by one foot, but gains an acre in wetlands loss? If the permittee were to follow a different schedule for its discharges of treated water, resulting in effects different in kind than those Region 10 believes would result under the proposed plan, how might the permittee determine whether these different effects are "similar or greater in nature and magnitude" than those of this mine plan?

of any other WOTUS beyond those in the mine footprint, much less all lands within a 309 square mile area. Region 10 did not account for all the factors in climate, geography, and hydrology in different areas of the watershed; differences in individual permits; or future technology developments.

Third, the Proposed Restriction's area was drawn based on the location of mining claims.¹⁶⁵ No authority allows Region 10 to lock down land or water based on the location of mining claims. EPA's CWA authority is limited to WOTUS, and EPA's § 404(c) authority must be based on effects of discharges into WOTUS on "fisheries"/"fishery areas" and three other resources—mine claims are neither mentioned nor implied.

Fourth, legislative history indicates that EPA's veto authority is limited to vetoing the issuance of a specific permit. The Senate justified its considered compromise to place the § 404 program under the jurisdiction of the Corps but give EPA a veto on the basis that all decisions will be made based on a single permit application:

Thus, the Conferees agreed that the Administrator . . . should have a veto over the selection of the site for dredge spoil disposal and over any specific spoil to be disposed of in any selected site. *The decision is not duplicative or cumbersome because the permit application transmitted to the Administrator for review will set forth both the site to be used and the content of the matter of the spoil to be disposed.* The Conferees expect the Administrator to be expeditious in his determination as to whether a site is acceptable or if specific spoil material can be disposed of at such a site.¹⁶⁶

EPA's veto may, at most, only be exercised only following its review of a specific "permit application" that has been "transmitted" and contains information about the "material to be disposed of" and the "specific spoil to be disposed of in a site." EPA has not received the future permit applications that

¹⁶⁵ PD at 5-3. The proposed restriction contradicts the statements of Regional Administrator Casey Sixkiller, who stated that this proposed veto "does not apply to any other mine deposits" or projects elsewhere in Alaska. See EPA Press Release, <https://www.epa.gov/newsreleases/epa-proposes-protect-bristol-bays-salmon-fishery-subsistence-fishing-alaska-natives-0>. This statement misleads the public as to the scope of this proposed veto, and the precedent it sets.

¹⁶⁶ *Senate Consideration of the Report of the Conference Committee*, s. 2770, 93rd Cong. 1st Sess. Oct. 4, 1972, reprinted in *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 177 (emphasis added). Other portions of the Conference Report on H.R. 11896 and S. 2770 indicate this same understanding:

... **Prior to the issuance of any permit** to dispose of spoil, the Administrator must determine **that the material to be disposed of** will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas **in the specified site**. Should the Administrator so determine, no permit shall issue.

...the Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination as to the environmental implications of either **the site to be selected or the specific spoil to be disposed of in a site**. Thus, the Conferees agreed that the Administrator of the Environmental Protection Agency should have **the veto over the selection of the site** for dredged spoil disposal and over **any specific spoil to be disposed of in any selected site**.

its Proposed Restriction, locking down 309 square miles, preemptively vetoes. Such a sweeping power has never been understood to be conferred by § 404(c).

Fifth, EPA *itself* has recognized that this power was not intended to be exercisable “in advance of permit requests.” In 1985, EPA proposed that Congress make “404(c) . . . a much more effective device” by allowing EPA to use it “in advance of permit requests” which would “mov[e] the program from a reactive to a proactive one”¹⁶⁷—revealing EPA’s understanding that EPA may *not*, as the law was written then and remains so now, use its veto “in advance of permit requests.”

Sixth, Region 10’s proposal to preclude development over a 309-square-mile area of state land amounts to a zoning ordinance. But “zoning . . . issues are traditional state law matters that implicate important state interests.”¹⁶⁸ This incursion into traditional state power violates the federalism principles enshrined in the U.S. Constitution as well as the Tenth Amendment, which “reserve[s]” “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, . . . to the States respectively, or to the people.”¹⁶⁹

Given that the 2020 Mine Plan calls for developing only a small portion of the entire deposit, it is likely—in fact, virtually certain—that any future economically viable mining plan would be deemed by Region 10 to have effects similar or greater in nature and magnitude to those deemed to result from the 2020 Mine Plan.¹⁷⁰ The implications of the Proposed Restriction are staggering: if EPA may shut down areas of land (potentially containing, but not proven to contain, WOTUS)

¹⁶⁷ Oversight Hearings on Section 404 of the Clean Water Act: Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, 99th Cong. 41 (1985) (statement of Josephine Cooper, Assistant Administrator for External Affairs, EPA):

We believe that 404(c) could be a much more effective device to designate certain areas as unsuitable for dredged or fill material discharge when used in advance of permit requests.

Therefore, we have been looking carefully at the potential of advanced designation of areas in which disposal of dredged and fill material would not be permitted. This concept is based upon a recognition that some wetlands are more threatened, have higher societal or are rarer, and require an extra measure of protection.

If we can make even a few of those determinations in advance, with the appropriate State and local participation and cooperation, we will do a much better job of forestalling or precluding delay and controversy in the regulated community.

We are in the initial stages of exploring that concept in a number of specific areas.

Wetlands priorities. As I have already indicated in my remarks on advanced designation, we do see opportunities for moving the program from a reactive to a proactive one. In this regard, we think it is particularly important to give special attention to high value wetlands which are threatened by or experiencing significant losses. . .

¹⁶⁸ *Hansen v. City of Superior, Neb.*, No. 4:13CV3098, 2013 WL 4500694, at *2 (D. Neb. 2013).

¹⁶⁹ U.S. Const. Amend. X.

¹⁷⁰ If, as EPA’s Cost Analysis suggests, the 2020 mine plan is not economically viable, then the 2020 mine plan is the floor of economic viability, not a ceiling, and any development necessarily will be of greater magnitude than the 2020 mine plan. See *Consideration of Potential Costs Regarding the Clean Water Act Section 404(c) Proposed Determination for the Pebble Deposit Area, Southwest Alaska* (EPA 2022) (“*EPA Costs Analysis*”) (reflecting EPA’s uncertainty about whether even the 2020 mine plan is economically viable).

whenever it deems effects to aquatic resources generally unacceptable (whenever it pleases), EPA has just aggregated to itself a stunning power. EPA could grind development to a halt in much of Alaska—a wet state with over 174 million acres of wetlands that remain in a largely undeveloped state. There is nothing to indicate that EPA would not willing and able to exercise this same power nationwide.

d. Region 10 fails to adequately consider costs and benefits as a basis for its proposed determination.

Region 10 solicits comments on how it considered costs in reaching its proposed determination, including whether it considered all appropriate costs.¹⁷¹ On this point, Region 10 is not even close.

The assessment of the costs associated with Region 10's proposal to prohibit and restrict activities in all WOTUS associated with the Pebble deposit is contained wholly within a document that is referred to in the proposed veto ("*EPA Costs Analysis*?"),¹⁷² but which is found only among the documents in the docket at www.regulations.gov supporting the proposed veto.¹⁷³ That is the first indication of how little Region 10 values cost issues in the present proceeding.

The *EPA Cost Analysis* starts by flatly stating that the agency does not believe it is required to consider costs at all (including benefits of a foregone project) in making its § 404(c) decision.¹⁷⁴ Nevertheless, EPA in the balance of the *EPA Cost Analysis* does purport to provide an analysis of costs and benefits of the proposed veto.

Region 10 is incorrect as a matter of law that costs do not need to be considered. Moreover, the limited analysis it does provide is flawed because (among other reasons) it does not consider adverse impacts to the State of Alaska that would result from the proposed veto, in terms of significant lost revenue resulting from foreclosing any development of the massive Pebble deposit.

i. Region 10 is required to consider the costs as well as the benefits of its proposed veto.

Neither § 404(c) nor its implementing regulations¹⁷⁵ specifically provide that EPA must weigh the costs of its proposed actions when making veto decisions under § 404(c). But this does not mean that Region 10 is free to ignore costs in a § 404(c) determination: agencies are required to engage in reasoned decisionmaking when taking action, and their decisions must be based on a consideration of all relevant factors.¹⁷⁶ This consideration must include costs unless such consideration is prohibited by the controlling statutory text.

Michigan v. EPA is instructive. There, the United States Supreme Court invalidated an EPA decision that regulation of power plants under the Clean Air Act's hazardous air pollutant program was "appropriate and necessary" on the grounds that the agency gave no consideration whatsoever to

¹⁷¹ PD at 7-2.

¹⁷² PD at 6-25.

¹⁷³ PD at 6-25; *EPA Cost Analysis*.

¹⁷⁴ *EPA Cost Analysis*, at 4.

¹⁷⁵ 40 C.F.R. § 231.

¹⁷⁶ See *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (citations omitted).

the costs of its action before making the decision. The Court rejected arguments that because the statutory provision in question (42 U.S.C. § 7412(n)(1)(A)) did not specifically mention costs, the agency could not consider costs in making its decision. The Court reasoned that use of the very broad term “appropriate” was meant to require the agency to consider multiple relevant factors, including but not limited to costs.¹⁷⁷

The Court went on to note that only where a statute requires EPA to make a decision based on specific factors that clearly do not include cost is the agency is entitled to ignore cost when making that decision.¹⁷⁸ In the absence of such language, however, an agency must weigh the costs and the benefits of its proposed action in order to engage in reasoned decisionmaking and to avoid acting in an arbitrary and capricious manner in violation of the Administrative Procedure Act.¹⁷⁹

The District of Columbia Circuit’s 2016 decision *Mingo Logan Coal Co. v. EPA* is the only post-*Michigan* case to address consideration of costs in the § 404(c) veto context. *Mingo Logan* involved a retroactive veto (*i.e.*, EPA issuing a veto years after a § 404 permit had been issued). Among other challenges, the permittee asserted that EPA had not considered the economic costs of the veto in making its decision. A split D.C. Circuit panel rejected the challenge, but did so on procedural grounds, concluding that the permittee had not adequately raised the cost issue in the veto process, and had not presented the agency with cost information to consider when making its decision. Importantly, however, both the majority and the dissent agreed that costs *were* a relevant consideration. The majority stated: “we do *not* hold that the EPA is generally exempt from considering costs in evaluating whether to withdraw a previously approved disposal site under section 404(c) . . . we hold only that it is not expected to balance costs never presented to it.”¹⁸⁰

In dissent, then-Judge Kavanaugh disagreed that the cost issue had not been adequately raised by the permittee. He went on to opine that *Michigan* meant that EPA must consider costs when acting under § 404(c): “In order to act reasonably, EPA must consider costs before exercising its [§] 404(c) authority to veto or revoke a permit.”¹⁸¹ He noted that the term “unacceptable” in § 404(c), like the phrase “appropriate and necessary” at issue in *Michigan*, is “capacious[.]”¹⁸² Rather than foreclosing a consideration of costs, Kavanaugh argued that this term necessitated a balancing of costs and benefits.¹⁸³ In his view, by ignoring costs, EPA had inappropriately focused on a single benefit

¹⁷⁷ *Id.* at 2709.

¹⁷⁸ *Id.*

¹⁷⁹ 5 U.S.C. § 706(2)(a). *See also Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 733 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (“[A]bsent a congressional directive to disregard costs, common administrative practice and common sense require an agency to consider the costs and benefits of its proposed actions, and to reasonably decide and explain whether the benefits outweigh the costs.”). As discussed below, although Judge Kavanaugh was writing in dissent in this case, which involved a retroactive § 404(c) veto, the majority did not disagree with the contention that EPA is required to consider costs when making its § 404(c) decision.

¹⁸⁰ *See* 829 F.3d at 730 (italics in original).

¹⁸¹ *See id.* at 735.

¹⁸² *Id.* at 734.

¹⁸³ *Id.*; *see also id.* at 735 (“Section 404(c)’s text—in particular the word ‘unacceptable’—contemplates that costs must be considered”). Another statutory standard that has been held to require consideration of costs even though the statute does not specifically mention costs is the phrase “reasonably available.” *American Waterways Operators v. Wheeler*, 507 F.Supp.3d 47, 59–63 (D.D.C. 2020) (concluding that CWA § 312(f)(3), which requires EPA to determine that facilities for the disposal of sewage from vessels are “reasonably available” before a marine “no discharge zone” can be declared,

(prevention of adverse effect on animals) and completely ignored countervailing costs to humans that would result from the revocation.¹⁸⁴ Among the costs he identified as relevant were lost tax revenue to the State of West Virginia.¹⁸⁵

As noted above, the *Mingo Logan* panel majority did not reach a different conclusion as to the need to consider costs when making § 404(c) veto decisions; rather, they simply ruled that the cost argument had been waived. In fact, the majority specifically expressed general agreement with the principle that costs were required to be considered: “Indeed, we do not quibble with [then-Judge Kavanaugh’s] general premise—and that of the many legal luminaries he cites—that an agency should generally weigh the costs of its actions against its benefits.”¹⁸⁶

Thus, in the only reported decision addressing the issue in the context of a § 404(c) veto, there was consensus that EPA should consider all available information on the costs of a potential veto before making its final decision. To do otherwise would be to act in an arbitrary and capricious manner. Therefore, Region 10 must consider costs here. It has some flexibility in the manner in which it does so, in the absence of specific cost language in § 404(c), but to ignore costs entirely, as Region 10 suggests it may do, is impermissible.

ii. Region 10’s Cost Analysis Document fails to consider costs and improperly considers ancillary benefits.

Region 10’s costs analysis has several flaws. Chief among them is the failure to acknowledge, much less consider, the costs that foreclosing development of the Pebble deposit would have on the State of Alaska.

1. Costs to Alaska

As discussed elsewhere in this Letter,¹⁸⁷ Region 10’s proposed veto, if finalized, would likely effect a regulatory taking. Even if it does not rise to that level, Region 10 must consider the costs to the State that would result from finalization of the proposed veto.

Mining is a significant contributor to Alaska’s economy. In 2021, considering direct, indirect and induced employment, Alaska’s mining industry contributed approximately 10,800 jobs and \$985 million in wages to the state economy.¹⁸⁸

As detailed earlier in this Letter,¹⁸⁹ the State obtained title to the lands containing the Pebble deposit as part of the Cook Inlet Land Exchange in the 1970s. The area was selected by the State specifically because of the presence of valuable mineral deposits, and the area has been designated for

requires EPA to consider the cost of compliance in making its determination because the phrase “reasonably available” is the type of language that naturally and traditionally includes consideration of costs).

¹⁸⁴ *Id.* at 733.

¹⁸⁵ *Id.* at 731.

¹⁸⁶ *Id.* at 723.

¹⁸⁷ See Takings Section of this Comment Letter.

¹⁸⁸ See McKinley Research Group, LLC, *The Economic Benefits of Alaska’s Mining Industry* (May 2022), at 3, retrieved from <https://www.mcdowellgroup.net/wp-content/uploads/2022/06/economic-benefits-of-alaskas-mining-industry-may-2022.pdf>.

¹⁸⁹ See *supra* Section 2 of the Alaska Section of this Letter.

mineral development, consistent with the language in Article 8 of the Alaska constitution encouraging development of the State's natural resources.¹⁹⁰ As also detailed in this Letter,¹⁹¹ the State has been committed since acquiring the land to responsible development of the Pebble deposit.

Region 10's proposed veto would preclude not only the currently proposed 2020 Mine Plan, but also any future development of the Pebble deposit, by preventing any future mining in a 309 square mile area overlying the deposit if that development would have effects similar in nature and magnitude to the 2020 Mine Plan.¹⁹² Given that the 2020 Mine Plan calls for developing only a small portion of the entire deposit, it is likely—in fact, virtually certain—that any future economically viable mining plan would be deemed by Region 10 to have effects similar or greater in nature and magnitude to those deemed to result from the 2020 Mine Plan.¹⁹³ It is clear, therefore, that the proposed restriction is intended to foreclose any development of the Pebble deposit, in perpetuity. Yet the *EPA Cost Analysis* contains only a single passing reference to the costs to the State resulting from foreclosing development of the Pebble deposit, and does so only in the context of the possibility that some benefits of the 2020 Mine Plan might flow to Alaska Natives.¹⁹⁴ No consideration whatsoever is given to losses to State revenues generally, which are used for the benefit of all Alaskans.

Development of the Pebble deposit would lead to revenue for the State and for local communities. This revenue would be derived from mining license taxes, corporate income taxes, and royalty payments (because the deposit is located on State lands). The FEIS contains estimates of these revenue.¹⁹⁵ This information was readily available to Region 10, which was a cooperating agency on the FEIS, but inexplicably is not mentioned in the *EPA Cost Analysis*.

The FEIS estimated that development under the 2020 Mine Plan could generate \$25 million in state taxes during the construction phase, and \$64 million in corporate income taxes during the operations phase. The FEIS also estimated annual State revenues of \$41 million in mining license taxes, and \$20 million in royalty payments,¹⁹⁶ during the operations phase. Assuming a 5-year operations phase and a 20-year production phase, that amounts to a total estimate of roughly \$2.63

¹⁹⁰ See *supra* Sections 1–3 of the Alaska Section of this Letter.

¹⁹¹ See *supra* Section 4 of the Alaska Section of this Letter.

¹⁹² PD § 5.2.

¹⁹³ If, as the *EPA Cost Analysis* suggests, the 2020 mine plan is not economically viable, then the 2020 mine plan is the floor of economic viability, not a ceiling, and any development necessarily will be of greater magnitude than the 2020 mine plan. See *Consideration of Potential Costs Regarding the Clean Water Act Section 404(c) Proposed Determination for the Pebble Deposit Area, Southwest Alaska* (EPA 2022) (“*EPA Costs Analysis*”) (reflecting EPA’s uncertainty about whether even the 2020 mine plan is economically viable).

¹⁹⁴ “The costs of the 2020 Mine Plan as presented in Section 6.1 would produce increased economic outcomes for the State of Alaska, a portion of which would accrue to Alaska Natives, Tribes and ANCs in the Bristol Bay region.” *EPA Cost Analysis*, at 50.

¹⁹⁵ These estimates are based on a 2013 IHS study, adjusted to reflect the 2020 Mine Plan because the 2013 study predated the development of that plan. IHS, *The Economic and Employment Contributions of a Conceptual Pebble Mine to the Alaska and United States Economies* (May 2013), retrieved from <https://www.northerndynastyminerals.com/site/assets/files/4333/study.pdf>

¹⁹⁶ For minerals produced on state land, Alaska charges a royalty of 3% of net income. See AS § 38.05.212(b)(1). A portion of mineral royalties and mineral lease rentals are directed to the Alaska Permanent Fund, which invests the money and pays dividends on its earnings to Alaska residents. See AS § 37.13.010(a). In 2021, the dividend payment was \$1114. See <https://pfd.alaska.gov/>.

billion in 2011 dollars in lost revenue to the State as a result of vetoing the 2020 Mine Plan.¹⁹⁷ Locally, the Lake and Peninsula Borough was estimated to receive \$23.8 million annually in severance taxes.¹⁹⁸

A recent report by IHS Markit (the *2022 IHS Markit Analysis*)¹⁹⁹ contains revised estimates: \$29.6 million in Alaska state taxes annually in the 5 year construction phase; \$24.7 million in Alaska state taxes annually in production years 1–5; \$72.6 million in Alaska state taxes annually in production years 6–20; \$37.8 million in extraction taxes and royalties in production years 1–5; and \$85.9 million in extraction taxes and royalties in production years 6 through 20.²⁰⁰ The total revenue for the State in this forecast is approximately \$2.83 billion. This is revenue that the veto would prevent the State from ever realizing.

The *2022 IHS Markit Analysis* also analyzed expansion options that were developed during the § 404 permitting process. One of these scenarios involves increased production beginning in production year 5 (from 180,000 tons per day to 270,000 tons per day) plus the addition of a separate gold recovery plant. This scenario represents the highest level of production of the scenarios analyzed. In this scenario, the potential tax revenues to Alaska in the construction phase are the same as noted in the previous paragraph, but potential State revenues from a 20 year production period are greater: \$29.5 million in Alaska state taxes annually in production years 1–5; \$151.7 million in Alaska state taxes annually in production years 6–20; \$44.8 million in extraction taxes and royalties in production years 1–5; and \$173 million in extraction taxes and royalties in production years 6–20.²⁰¹ The total revenue for the State in this forecast (and thus the revenue lost due to the potential veto) is approximately \$5.39 billion. Although more speculative because plans are less developed for the expansion scenarios than for the 2020 Mine Plan, this analysis provides a sense of the upper bound of potential lost revenue to the State of Alaska over a 25 year mine development window (5 years of construction and 20 years of production).

The *2022 IHS Markit Analysis* thus suggests that lost revenue to the State of Alaska resulting from Region 10's proposed veto ranges from \$2.8 billion to \$5.39 billion. Notably, even the expansion scenarios considered in the *2022 IHS Markit Analysis* do not involve full development of the very large Pebble deposit. Given Region 10's intent to completely foreclose its development, the upper bound of lost revenue to the State ultimately exceeds \$5.39 billion.

Region 10's failure to consider lost revenue to the State of Alaska that would result from the proposed veto is the failure to consider an important factor in evaluating the costs of its proposed action, in violation of *Michigan v. EPA*.

¹⁹⁷ FEIS at 4.3-11. Presumably, state taxes would be paid from the \$31.7 billion in estimated revenue identified on p. 50 of the *EPA Cost Analysis*—the revenue is not additive. However, any valid cost analysis must acknowledge that the State and its residents will be significantly adversely affected by forever foreclosing development of the Pebble deposit.

¹⁹⁸ *IHS Markit Analysis*, at 18.

¹⁹⁹ IHS Markit, *Economic Contribution Assessment of the Proposed Pebble Project to the US National and State Economies* (February 2022),
retrieved from
https://northerndynastyminerals.com/site/assets/files/4289/ndm_economic_impact_of_the_pebble_project_-_february_20.pdf.

²⁰⁰ See *2022 IHS Markit Analysis*, at 4.

²⁰¹ See *2022 IHS Markit Analysis*, at 4.

2. *Improper Scale of Benefits Estimation*

Section 5 of the *EPA Cost Analysis* identifies the benefits of EPA’s proposed veto in terms of protecting fisheries, recreational uses, cultural resources and other resources. These benefits, however, are improperly inflated: Region 10’s analysis fails to identify the impacts to these resources both with and without the mining project. For example, in discussing commercial fisheries, Region 10 states that the commercial salmon fishery generates 15,000 jobs and roughly \$2 billion in annual revenue, approximately half of which is in Alaska. However, Region 10 provides no indication of how much that revenue or job base would be impacted by the 2020 Mine Plan. Surely Region 10 does not believe that all the fish in Bristol Bay would be wiped out by the proposed activities, which would occur within a very small portion of the Bristol Bay area’s anadromous fish streams. Such a conclusion would be shocking, particularly in light of the FEIS, in which Region 10 participated, which concluded that under normal operations, the alternatives considered in the document (including the 2020 Mine Plan) “would not be expected to have a measurable effect on fish numbers or result in long-term changes to the health of the commercial fisheries in Bristol Bay,” and that effects on recreational fishing would be modest.²⁰²

To truly weigh the costs and benefits of its proposed veto, Region 10 must attempt to assess how much the fisheries in Bristol Bay would be impacted were the mine to be authorized. Region 10 cannot simply point to the economic value of the entire fishery as a benefit of a veto.

Dodging this issue, Region 10 ties the Proposed Prohibition and Restriction to several smaller watersheds (South Fork Koktuli, North Fork Koktuli, and Upper Talarik Creek).²⁰³ Of course the impacts of the 2020 Mine Plan operation would be proportionally larger when compared to the waters in these smaller watersheds. But Region 10 never identifies the scope of benefits specific even to these smaller watersheds. Instead, it consistently refers to the economic value of the entire Bristol Bay area. Again, because the mine would not eliminate the *entire* Bristol Bay area, or its fish, Region 10’s approach grossly overstates the benefits of the proposed veto.²⁰⁴

3. *Consideration of Ancillary Benefits*

In *Michigan*, the Supreme Court left open the question of whether “ancillary” benefits could be considered when an agency conducts a required analysis of the costs and benefits of a proposed action.²⁰⁵ Ancillary benefits are benefits incidental to the stated purpose of the action. In *Michigan*, ancillary benefits included regulation and reduction of hazardous air pollutant emissions. As noted above, *Michigan* involved EPA’s decision to regulate power plants under the Clean Air Act’s hazardous air pollutant program. Ancillary benefits identified by the Agency were tied to reduced emissions of particulate matter and sulfur dioxide, which are not hazardous air pollutants.²⁰⁶

²⁰² FEIS, at 4.6-3.

²⁰³ *E.g.*, PD at ES-11.

²⁰⁴ Every point raised in this section applies equally to the benefits of protecting other resources identified and analyzed in the *EPA Cost Analysis*, but because the proposed veto is based entirely on the perceived impact to fisheries, that is the most salient resource to which this Letter applies.

²⁰⁵ *See Michigan*, 135 S.Ct. at 2711 (“Even if the Agency could have considered ancillary benefits when deciding whether regulation is appropriate and necessary—a point we need not address—it plainly did not do so here.”).

²⁰⁶ *See id.* at 2706.

Region 10 here similarly identifies purported incidental benefits. It has clearly stated that the proposed veto (both the prohibition and the restriction) is based solely on effects on anadromous fishery areas, and not on other resources identified in CWA § 404(c) as potential grounds for a veto.²⁰⁷ Nevertheless, Region 10 puts on a show-and-tell of potential benefits to numerous other resources, including: recreational uses; cultural resources; ecosystem values; health and safety; quality of life; non-use value; environmental justice; and risks from potential dam failures and spills.²⁰⁸

If Region 10 is going to identify ancillary benefits, it must also identify ancillary costs. Ancillary costs include all the benefits that a mine could bring to the area, socially, culturally, and otherwise. Because Region 10 inadequately considered the costs and benefits of its proposed veto, the proposed veto should be withdrawn.

e. The compensatory mitigation requirements are impossible to satisfy.

Region 10, relying on the Corps' evaluation, rejects PLP's compensatory mitigation plan without articulating what degree or type of mitigation would be sufficient. Region 10 goes so far as to proclaim that "known compensation measures are unlikely to adequately mitigate effects . . . to an acceptable level." In so doing, Region 10 not only hides the goalposts in the fog; it dismantles them entirely. Rejecting a permittee's proposed mitigation measures without specifying what might suffice is precisely the kind of arbitrary action that the APA prohibits.

The Corps and EPA have repeatedly acknowledged that compensatory mitigation requirements must be applied flexibly in Alaska because, as a state dominated by pristine wetlands, opportunities for compensatory mitigation in and adjacent to a project area are frequently limited or nonexistent. Region 10's proposed veto, however, turns this policy on its head. This raises significant concerns for future development of any kind in our wetlands-rich State.

For almost 30 years, the Corps and the EPA have recognized that wetlands mitigation in Alaska presents unique complexities. Based on this recognition, EPA and the Corps have developed Alaska-specific guidance for mitigation sequencing under Section 404. Region 10, however, makes no mention of this guidance in the proposed veto. Nor does Region 10 mention the 1994 *Alaska Wetlands Initiative*,²⁰⁹ a report prepared by EPA and the Corps which "emphasize[d] that compensatory mitigation is only required when appropriate and practicable"²¹⁰ and concluded that "due to climatological and physiographic conditions in Alaska, compensatory mitigation is often not practicable."²¹¹ This silence on the Alaska-specific guidance raises serious questions about the EPA's

²⁰⁷ PD at 1-2, 4-1, 5-1, & 5-2.

²⁰⁸ *EPA Cost Analysis*, at 25-44. Of these additional resources, only recreation (specifically, "recreational areas") could form the basis of a § 404(c) veto.

²⁰⁹ To further understand how to best apply the Guidelines in Alaska, the agencies convened a detailed study—the *Alaska Wetlands Initiative*—with a broad range of stakeholders, including the State. The *Alaska Wetlands Initiative* resulted in several policy refinements and goals, the most relevant of which was the intent to issue a "written statement that recognizes the flexibility to consider circumstances in Alaska in implementing alternatives analyses and compensatory mitigation requirements under the Section 404 regulatory program," which was intended to provide "greater predictability to the Section 404 program." The statement was attached to the Summary Report, and "recognize[d] that . . . restoring, enhancing, or creating wetlands through compensatory mitigation may not be practicable due to limited availability of sites or technical or logistical issues."

²¹⁰ *Alaska Wetlands Initiative*, at 12.

²¹¹ *Id.* at 15.

continued commitment to applying mitigation requirements in Alaska in an appropriate and reasonable manner.

Wetlands mitigation in Alaska is fundamentally different than in the lower 48 states because of the sheer quantity of pristine wetlands in Alaska. Alaska holds more wetlands (approximately 175,000,000 acres of wetlands, comprising about 43% of the surface area of the State) than the rest of the Nation combined (103,000,000 acres, comprising about 5% of the surface area). EPA and the Corps have long recognized that the goal of achieving “no net loss” of wetlands acreage may not be met on an individual permit basis, and “may not be practicable in areas where wetlands are abundant.”²¹² EPA and the Corps expressly noted that Alaska posed specific mitigation complexities in their January 1992 joint guidance emphasizing that compensatory mitigation may not be required in areas where “it may not be practicable to restore or create wetlands.”²¹³

Recently, the agencies reiterated their understanding that mitigation in Alaska is unique with an updated Memorandum of Agreement (“2018 MOA”) on mitigation sequencing.²¹⁴ The 2018 MOA repeats the agencies’ continuing acknowledgement that “[r]estoring, enhancing, or establishing wetlands for compensatory mitigation may not be practicable due to limited availability of sites and/or technical logistical limitations.”²¹⁵ It also reiterated four important points regarding compensatory mitigation that are relevant here:

- “Compensatory mitigation options over a larger watershed scale may be appropriate given that compensation options are frequently limited at a smaller watershed scale.”
- “Where a large proportion of the land is under public ownership, compensatory mitigation opportunities may be available on public land.”
- “Out-of-kind compensatory mitigation may be appropriate when it better serves the aquatic resource needs of the watershed.”
- “[C]ompensatory mitigation provided through preservation should be, to the extent appropriate and practicable, conducted in conjunction with aquatic resource restoration, establishment, and/or enhancement activities,” but “[t]his requirement may be waived by the Corps in cases where preservation has been identified as a high priority using a watershed approach.”²¹⁶

In sum, the 2018 MOA requires a thoughtful balance between environmental conservation and the practical considerations associated with resource development in Alaska in recognition of the

²¹² *Alaska Wetlands Initiative*, at 1; see Memorandum of Agreement Between the EPA and the DOA Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990), at 5 n.7 (recognizing that “there are certain areas where, due to hydrological conditions, the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands”).

²¹³ *Alaska Wetlands Initiative*, at 1–2.

²¹⁴ Memorandum of Agreement Between the DPE and EPA Concerning Mitigation Sequence for Wetlands in Alaska under Section 404 of the Clean Water Act (June 15, 2018) (*2018 MOU*).

²¹⁵ *Id.* at 2.

²¹⁶ *2018 MOU* at 4–8.

reality that the pristine nature of much of the state significantly limits the opportunities for compensatory mitigation.

Despite the patent relevance of the 1992 MOA, the 1994 *Alaska Wetlands Initiative*, and the 2018 MOA to the fundamental structure of PLP’s mitigation plan, the Corps appeared to ignore the guidance. Indeed, the Corps’ Permit Denial, its supporting Attachment B2 (Evaluation of the Discharge of Dredge and Fill Material In Accordance with 404(B)(1) Guidelines (40 C.F.R. Section 230, Subparts B through H)), and its November 9, 2020 Memorandum for the Record: Compliance Review of Final Report, Pebble Project Compensatory Mitigation Plan in accordance with 33 C.F.R. 332, POA-2017-00271 (“Compliance Review”), all fail to identify the 2018 MOA as relevant guidance. It appears that the Corps made its decision as if the 2018 MOA, and its recognition of the unique mitigation challenges raised by Alaska’s abundant and largely pristine wetlands, simply did not exist.

Region 10 now compounds the problem. Because in-kind, in-watershed compensatory mitigation is simply not available, and because that appears to be the only mitigation that Region 10 would accept, Region 10 is not only rejecting PLP’s specific mitigation plan for the same improper reasons that the Corps did, but rejecting *any* mitigation plan.

The Corps’ and Region 10’s refusal to apply the flexibility provided under the 2018 MOA, and instead to impose impossible compensatory mitigation on the Pebble project, sets a dangerous precedent whose reach extends beyond this veto action. Region 10 signals that development will not be approved because mitigation requirements are simply unachievable—even on state lands that were specifically designated for mineral development. This new, more stringent standard reverses decades of work by the State, the Corps, and EPA to ensure a reasonable path forward for future development projects in Alaska.

f. Region 10 “relie[s] on factors which Congress has not intended it to consider[.]”

Agency action is arbitrary and capricious if the agency “relie[s] on factors which Congress has not intended it to consider[.]”²¹⁷ A veto under § 404(c) must be based on effects from “discharge[s]” of dredged or fill material from point sources into WOTUS associated with the proposed project.²¹⁸

In Section 6 (“Other Concerns and Considerations”) and throughout its proposed veto, Region 10 discusses a slew of effects that do not result from the discharge of dredged or fill material from a point source into a WOTUS. Region 10 states that several of these do not serve as bases for its proposed veto,²¹⁹ but fails to explain why such considerations are included in a publication whose very purpose is to provide the public with notice of EPA’s proposed decision and the bases underlying it. For purposes of this Letter, Alaska has no option but to assume Region 10 relied on these additional considerations and address them as such.

i. Expanded Mine Scenario

²¹⁷ *State Farm*, 463 U.S. at 43.

²¹⁸ 33 U.S.C. § 1344(c), (a) (referent for “such materials”).

²¹⁹ PD at 6-6 (“This proposed determination does not consider impacts from potential accidents and failures as a basis for its findings[.]”).

Consideration of the Expanded Mine Scenario is inappropriate. Region 10 admits that “[t]he Expanded Mine Scenario is not part of the 2020 Mine Plan, has not otherwise been proposed, and would require additional and separate permitting[.]”²²⁰ That is correct. There is a process: proposed developments must obtain all the necessary permits before construction, and satisfy all permitting agencies that the project will comply with applicable law and adequately protect the environment. The only project that stands to be vetoed here is the project that PLP has requested a permit for: the proposed mine. A hypothetical expansion of the mine in the future cannot inform the issue of whether EPA can or may veto the proposed mine.

If Region 10 is going to consider costs of the Expanded Mine Scenario, it must also consider its benefits. As previously detailed,²²¹ the mine’s expansion could generate as much as \$5.39 billion in revenue to the State, to be used for the benefit of all Alaskans. Jobs and infrastructure would be created. Ignoring these benefits and presenting only the costs is inappropriate.

ii. Secondary and Indirect Effects Resulting from Project Aspects Other Than Discharges

Region 10’s proposed veto considers the “secondary” or “indirect” effects of fugitive dust and other effects of nondischarge activities.²²² Although the Corps may have the power to consider secondary and indirect effects in the permitting process, EPA does not enjoy the same power in making veto decisions. EPA’s power is limited to assessing whether discharges of dredged and fill material from point sources will have unacceptable adverse effects on specified resources including fisheries. Region 10’s consideration of effects resulting from other aspects of the proposed mine plan exceed the lawful scope of its determination.

Region 10’s proposal also contains extensive discussion of the effects of discharges on groundwater, the regulation of which falls squarely within States’ purview.²²³ Alaska does an excellent job of protecting its groundwater.²²⁴ Region 10’s intrusion into this sphere of traditional state authority is neither wanted nor warranted.

iii. Risk of Spills and Accidents

Region 10 warns of dire consequences that would befall were a major spill or accident to occur. However, Region 10 has not established that accidents and spills are “discharges” as required by § 404(c), so may not lawfully consider this factor as a basis for its decision.

²²⁰ PD at 4-53.

²²¹ See *supra* Section 1(d) of the Legal Section of this Letter.

²²² PD at 4-3.

²²³ See *Coldani v. Hamm*, No. CVS07 660RRB EFB, 2007 WL 2345016, at *8 (E.D. Cal. Aug. 16, 2007) (stating that “an allegation of groundwater pollution coupled with an assertion of a general hydrological connection between all waters, is insufficient to come within the purview of the CWA[.]”).

²²⁴ Alaska’s Department of Environment Conservation (“ADEC”) has broad regulatory authority to protect State waters. AS § 46.03.020 (powers of ADEC). The Alaska legislature has authorized ADEC to adopt all regulations “necessary . . . for . . . control, prevention, and abatement of air, water, or land or subsurface land pollution[.]” AS § 46.03.020(10)(A)&(C). ADEC’s authority extends to requiring “the owner or operator of a facility to undertake monitoring, sampling, and reporting activities described in 33 U.S.C. 1318 (sec. 308, Clean Water Act)” for waters. AS 46.03.020(14). This authority extends over all waters within Alaska, including WOTUS. ADEC has been aggressive in exercising this authority to protect Alaska’s waters.

First, Region 10 has not pointed to a single catastrophic mine failure in Alaska. Nor can it: thanks to our robust laws, excellent management, and close scrutiny of the industry, Alaska has never experienced such a failure. Nor is Alaska likely to, given all the safeguards the State has in place.

Second, it is erroneous to equate spills reported in Alaska to environmental harm. Alaska has a *very* stringent reporting policy (requiring all spills to be reported—even if the spilled amounts are minimal, and even if the spills occur into a contained area) and ADEC staff does an excellent job of ensuring spills are promptly and fully cleaned up.²²⁵ To the extent the Earthworks April 2022 report suggests otherwise, it is seriously misleading.

Third, catastrophic spills are utterly speculative and do not rise to the level of something that reasonably “will” be expected to have an unacceptable adverse effect, as required by § 404(c).

Lastly, the Corps has found that a catastrophic failure has a “very remote” probability of occurring with this proposed project.²²⁶ As mentioned, Alaska’s management of its mines is better than most, and should serve as a model for the Nation. Region 10 has failed to establish that the likelihood of a catastrophic failure occurring is anything more than “very remote.”

iv. Previous Commenter Approval or Disapproval

Region 10 goes out of its way to note that “[a]pproximately 99 percent of commenters expressed opposition to the withdrawal of the 2014 Proposed Determination.”²²⁷ But a 404(c) veto should be based on science, reason, and the limits imposed by Congress—not a comment head count.

v. Importance of Bristol Bay

Section 3 of the proposed veto trumpets the importance of Bristol Bay, a 41,900 square mile area.²²⁸ EPA’s press releases chime in:²²⁹ the Administrator himself espouses “[t]he Bristol Bay watershed”²³⁰ as a “shining example of how our nation’s waters are essential to healthy communities, vibrant ecosystems, and a thriving economy.”²³¹ If EPA’s rhetoric is to be believed, this veto is about saving Bristol Bay—from Alaskans.

²²⁵ The Prepared Prevention and Response and Contaminated Sites Programs of the Spill Prevention and Response Division of ADEC coordinates response and cleanup activities.

²²⁶ PD at 6-12.

²²⁷ PD at 2-11.

²²⁸ FEIS at 3.16-1.

²²⁹ “If finalized, EPA’s Section 404(c) determination would help protect the Bristol Bay watershed’s rivers, streams, and wetlands that support the world’s largest sockeye salmon fishery and a subsistence-based way of life that has sustained Alaska Native communities for millennia.” See May 25, 2022 Press Release, available at <https://www.epa.gov/newsreleases/epa-proposes-protect-bristol-bays-salmon-fishery-subsistence-fishing-alaska-natives-0>.

²³⁰ Notably, Bristol Bay is not technically considered a watershed. Alaska watersheds are coded by United States Geological Survey, at https://water.usgs.gov/GIS/new_huc_rdb.txt. There is no listing for “Bristol Bay” in the HUC coding. The “newer HUC” coding lists Southwest Alaska as “1903” as the 4-digit HUC. The two 6-digit HUCs are Kvichak-Port Heiden (190302) and Nushagak (190303).

²³¹ EPA.gov Press Releases, *EPA Proposes to Protect Bristol Bay’s Salmon Fishery, Subsistence Fishing for Alaska Natives* (May 25, 2022), retrieved from <https://www.epa.gov/newsreleases/epa-proposes-protect-bristol-bays-salmon-fishery-subsistence-fishing-alaska-natives>.

Region 10 has not identified what in § 404(c)'s statutory text or implementing regulations allows a veto based on a broader area's "importance." Were an area's importance a legitimate factor for Region 10 to consider, Region 10 should have also vetoed the expansion of Washington's SeaTac airport, which was approved by the Corps in 2002. This expansion negatively impacted three watersheds (Miller Creek, Walker Creek, and Des Moines Creek) and three fish-bearing creeks that were classified as Class AA water of the state—the highest and most protective category for Washington state waters.²³² Washington, of course, is the State with the salmon most in need of saving.²³³ Failing to veto that project, but attempting to veto this project, is inexplicable. Or, rather, it is explainable only by an impermissible factor: favoring certain types of development over others.

Alaska agrees that the Bristol Bay area is important. It is important for its development potential *and* for its fishery resources. It is important for its beauty, its majesty, its magic. And it is important to all Alaskans. This is why Alaska law provides ample protection over the land and streams in the Bristol Bay area.²³⁴ Indeed, most of the streams in the Bristol Bay area are legislatively designated as fishery reserves.²³⁵ Region 10 disregards this all. Alaska understands better than anyone the importance of Bristol Bay: it is Alaska, not EPA, who is charged with its management and protection.

vi. Additional Factors

Region 10 discusses several additional factors that may not lawfully be considered because they are not effects of discharges from point sources into WOTUS. These include the "cultural stability" of Native populations;²³⁶ "behavioral disorders" potentially resulting from the mine;²³⁷ "mental health degradation" resulting from the mine;²³⁸ "dietary" considerations, including the mine's effect on "processed simple carbohydrates and saturated fats"²³⁹ and the intake of "protein and certain nutrients" by locals;²⁴⁰ "tension and discord" that could be "provoked" among natives by the mine;²⁴¹ "stress and anxiety";²⁴² "language"²⁴³ including "defin[ition of] a 'wealthy person'";²⁴⁴ "spirituality";²⁴⁵

²³² See *Airport Communities Coalition v. USACE*, 2003 WL 25760707 (W.D. Wash. 2003).

²³³ As Washington State explains its dire salmon situation: "We have damaged their habitat, hindered their migration, and polluted their waters. We've overfished, forced them to compete for limited resources, and made their journey home that much harder." Washington State Recreation and Conservation Office, *Salmon and Orca Recovery: Problem*, retrieved from <https://rco.wa.gov/salmon-recovery/problem/>. The same cannot be said for Alaska.

²³⁴ See *supra* Section 5(c)(i)–(iii) (detailing protections).

²³⁵ AS § 38.05.140(f).

²³⁶ PD at 6-18.

²³⁷ PD at 6-18.

²³⁸ PD at 6-18.

²³⁹ PD at 6-18.

²⁴⁰ PD at 6-24.

²⁴¹ PD at 6-18.

²⁴² PD at 6-19.

²⁴³ PD at 6-19.

²⁴⁴ PD at 6-23.

²⁴⁵ PD at 6-19.

“social relations”;²⁴⁶ “family cohesion”;²⁴⁷ “rituals”;²⁴⁸ “folklore”;²⁴⁹ “equitable fishing opportunities”;²⁵⁰ and “people with disabilities,”²⁵¹ among others.

These factors are not listed in the statutory text of § 404(c), or EPA’s implementing regulations. EPA’s environmental engineers, trained as they are, simply lack the expertise to opine on spirituality, diets, or mental health. The Supreme Court recently chastised OSHA for its involvement in matters far less afield than these.²⁵²

vii. Conclusion

To the extent the proposed determination relies on any of the factors discussed above, it is invalid because those factors are not properly considered under § 404(c).

2. The proposed veto violates the Clean Water Act.

a. EPA’s Clean Water Act authority, which extends only over WOTUS, must be predicated on an Approved Jurisdictional Determination.

In order to “deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site” under § 404(c), EPA is required to identify the WOTUS subject to such determination. This requires Region 10 to prepare an Approved Jurisdictional Determination (“AJD”) prior to initiating the procedures.²⁵³ Region 10 has failed to do so. As such, its proposed veto must be withdrawn.

Section 404(c) is clear that in exercising its veto authority, EPA must identify a “defined area” within which the discharges will be prohibited. It is equally clear from the text of the statute that, in referring to a defined area, such area must consist of navigable waters as that term is defined in the Act, *i.e.*, WOTUS. This follows from the fact that the Corps has the authority to issue “permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”²⁵⁴ The § 404(c) authority is to authority to withdraw or prohibit such sites from specification, *i.e.*, to block the issuance of a § 404 permit. Moreover, § 404(c) refers to the unacceptable effects of a “discharge into such area” and the term “discharge” means addition of pollutants to navigable waters (*i.e.*, WOTUS). So the “area” in question must be WOTUS.

Region 10’s own paraphrasing of § 404(c) in the proposed veto indicates that Region 10 understands that any defined area must be WOTUS:

²⁴⁶ PD at 6-19.

²⁴⁷ PD at 6-20.

²⁴⁸ PD at 6-20.

²⁴⁹ PD at 6-20.

²⁵⁰ PD at 6-21.

²⁵¹ PD at 6-24.

²⁵² *NFIB v. Dep. of Lab., OSHA*, 142 S. Ct. 661 (2022) (per curiam) (concluding that the “lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the [vaccine] mandate extends beyond [OSHA]’s legitimate reach”).

²⁵³ Had an AJD or other jurisdictional determination been completed, Alaska, as landowner, could have challenged it.

²⁵⁴ 33 U.S.C. § 1344(a).

Section 404(c) of the CWA authorizes [EPA] to (1) prohibit or withdraw the specification of *any defined area in waters of the United States* as a disposal site, and (2) restrict, deny, or withdraw the use of *any defined area in waters of the United States* for specification as a disposal site²⁵⁵

It follows, then, that if EPA is identifying the defined area for purposes of a veto, it must determine whether such area actually constitutes WOTUS.

Region 10 has failed to do this.

In the executive summary of its proposed veto, Region 10 indicates that it is relying on the FEIS and ROD for the findings that the 2020 Mine Plan would result in discharges to WOTUS:

As demonstrated in the FEIS and ROD, construction and routine operation of the mine proposed in the 2020 Mine Plan would result in the 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.²⁵⁶

But neither the FEIS nor the ROD reference a final jurisdictional determination. Instead, these two documents rest on a Preliminary Jurisdictional Determination (“Preliminary JD” or “PJD”) prepared by the Corps. The FEIS makes clear that its references to WOTUS are based on the Corps Preliminary JD, which is included as Appendix J to the FEIS.²⁵⁷ The Corps’ ROD, of course, relies on the FEIS; but it does not make any independent reference to the PJD or any other formal determination of jurisdiction.

This is fatal to the proposed veto.²⁵⁸ A Preliminary JD is not a determination of jurisdiction. According to Corps regulations, Preliminary JDs are “written indications that there *may* be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel. Preliminary JDs are advisory in nature and may not be appealed.”²⁵⁹ A Corps Regulatory Guidance Letter provides further explanation:

When the Corps provides a PJD, or authorizes an activity through a general or individual permit relying on a PJD, the Corps is making no legally binding determination of any type regarding whether jurisdiction exists over the particular aquatic resource in question.²⁶⁰

²⁵⁵ PD at ES-3 (emphasis added.)

²⁵⁶ PD at ES-3.

²⁵⁷ FEIS, Ch. 3.1, n.1 (“Note that in Chapter 3 and Chapter 4 [of the FEIS], waters of the US (WOUS) as defined under the Clean Water Act and determined to be jurisdictional under US Army Corps of Engineers (USACE) authority (see Appendix J for the Preliminary Jurisdictional Determination from USACE) are discussed collectively with wetlands and other waters; all WOUS, wetlands, or other waters are together termed “wetlands and other waters.”).

²⁵⁸ While relying on a preliminary jurisdictional determination (“PJD”) prepared by a consultant is standard practice in issuing § 404 permits, doing so is insufficient in the context of a § 404(c) veto. EPA’s authority must be clearly delineated, so that EPA may carry its burden of demonstrating that it has the power to act pursuant to § 404(c).

²⁵⁹ 33 C.F.R. § 331.2 (emphasis added.)

²⁶⁰ U.S. Army Corps of Engineers, Regulatory Guidance Letter (“RGL”) 16-01 at p. 3 (Oct. 2016) (emphasis added).

According to the Corps, a PJD’s “preliminary” finding that there “may” be WOTUS is emphatically “no legally binding determination of any type.” This stands in stark contrast to an AJD. The Corps regulations define an AJD as:

a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel.

The regulations go on to state that AJDs are

[a] definitive, official determination that there are, or that there are not, jurisdictional aquatic resources on a parcel and the identification of the geographic limits of jurisdictional aquatic resources on a parcel can only be made by means of an AJD.²⁶¹

Here, no AJD was prepared by the Corps, and EPA has not made any independent determination of jurisdiction. “Because ‘administrative agencies may act only pursuant to authority delegated to them by Congress,’ an agency must ‘point to something’ that “‘gives it the authority’ to take the specific action at issue.”²⁶² Here, EPA cannot make a determination of a “defined area” of WOTUS for purposes of § 404(c) without affirmatively determining what waters within that defined area are, in fact, subject to Clean Water Act jurisdiction.

In addition to rendering its action baseless, Region 10’s failure to make a jurisdictional determination chills the use of all waters encompassed within the prohibited and restricted areas; not just the (undelineated) WOTUS.

Moreover, the jurisdictional determination must occur at the outset of the process. The statutory language requires that a § 404(c) determination be made through notice and comment. Agencies must establish their jurisdiction to act before they act. It follows, then, that the public notice of a proposed § 404(c) determination must be based on a determination that EPA has jurisdiction in the first place. EPA regulations support this conclusion: they require the identification of the “defined area” at the commencement of the process. Under those regulations, the Regional Administrator may initiate § 404(c) proceedings if he or she “has reason to believe after evaluating the information available to him [or her] . . . that an ‘unacceptable adverse effect’ could result from the specification or use for specification of a *defined area* for the disposal of dredged or fill material, he [or she] may initiate the following actions”²⁶³ The public notice of the proposed determination must identify the “location of the existing, proposed or potential disposal site, and a summary of its characteristics”²⁶⁴ The Regional Administrator cannot possibly identify the location of the disposal site subject to the potential veto if he or she has not evaluated the agency’s jurisdiction over the site in question.

Thus, for Region 10 to proceed, it must withdraw this proposed veto and perform a formal jurisdictional determination over the aquatic resources within: (1) the Pebble Mine Plan, (2) those additional acreages identified in the proposed § 404(c) determination for potential mine expansion,

²⁶¹ RGL 16-01, at p. 2.

²⁶² *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (internal quotation marks omitted).

²⁶³ 40 C.F.R. § 231.3(a) (emphasis added).

²⁶⁴ *Id.* § 231(b)(2).

and (3) the 309 square mile area it seeks to restrict.²⁶⁵ If Region 10 does not do so, it has not accurately determined a defined area subject to the § 404(c) veto authority, and it has not fully informed the public, including the State of Alaska as the land owner, whether it, in fact, has jurisdiction over the aquatic resources. Without having prepared an AJD covering all the areas in question, EPA may not proceed.

b. Region 10 disregards cooperative federalism.

The CWA “envisions ‘cooperative federalism’ in the management of the nation’s water resources.”²⁶⁶ It “anticipates a partnership between the States and the Federal Government.”²⁶⁷ In this partnership, the federal government plays a supportive role: the CWA expressly “recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources”²⁶⁸ Much of the Supreme Court’s CWA jurisprudence has been dedicated to protecting the carefully crafted balance of federal and state interests.²⁶⁹

“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal–state balance.”²⁷⁰ The Supreme Court has further recognized “land use” as “a function traditionally performed by local governments.”²⁷¹ To abide by Supreme Court caselaw, Region 10 must interpret § 404(c) in a manner that avoids “intrusion into traditional state authority” and reinforces Congress’ role as the federal representative of states’ interests.²⁷²

Region 10’s proposal to veto the entire project and shut down 309 square miles for development fails to do this. Region 10 envisions a “partnership” that is not cooperative—it is combative. And it usurps the States’ roles under the CWA.

The Corps’ abrupt cessation of communication about the project with ADEC and ADNR prior to the issuance of its November 2020 ROD underscores this problem. At the time, ADEC was preparing Alaska’s § 401 certification. ADNR, as land manager, depends on this communication to fully understand the Corps’ compensatory mitigation requirements and the extent to which they require restrictions on state-owned lands beyond the currently leased areas. ADEC also requested to participate in the 404(b)(1) discussion, and was denied. The Corps denied Alaska’s request to participate in PLP’s appeal of the Corps’ denial of the § 404 permit. Walling Alaska off from such an important and consequential project does not reflect the type of partnership envisioned by the CWA

²⁶⁵ The State incorporates its February 7, 2022 Comment Letter to EPA’s proposed definition of WOTUS for guidance to Region 10 in making these determinations.

²⁶⁶ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 502 (2d Cir. 2017) (citing *New York v. United States*, 505 U.S. 144, 167 (1992) (referring to the Act as an example of “cooperative federalism”)).

²⁶⁷ *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 (1992).

²⁶⁸ 33 U.S.C. § 1251(b).

²⁶⁹ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) (“We ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority. . . . The phrase ‘the waters of the United States’ hardly qualifies.”); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (discussing whether the executive branch’s interpretation of the Clean Water Act “alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power”).

²⁷⁰ *United States v. Bass*, 404 U.S. 336, 349 (1971).

²⁷¹ See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

²⁷² *Rapanos*, 547 U.S. at 738.

and enforced by the Supreme Court. This treatment also squanders valuable, and limited, government resources by requiring agencies on either side to duplicate work.

c. The timing of this veto raises concerns that must be addressed.

i. Issuing a veto following the Corps' denial of a permit is inconsistent with the purpose of § 404(c).

As EPA itself has recognized, “one of the basic functions of § 404(c) is to police the application of the 404(b)(1) guidelines.”²⁷³

Section 404(c) was enacted as a compromise between two proposals: a House proposal for a § 404 program wholly administered by the Corps and a Senate proposal for a 404 program wholly administered by EPA.²⁷⁴ By giving the Corps jurisdiction to administer the § 404 permitting program, but EPA a veto power over permitting decisions, Congress compromised. That compromise made perfect sense, given the agencies' differing core missions: the Corps' is to protect navigation, while EPA's is to protect the environment. By giving EPA a limited veto power over permitting decisions, Congress envisioned EPA acting as an environmental “check” on the Corps' exercise of its navigability power.²⁷⁵

When a permit has been denied, of course, there is nothing to “check”—or, using EPA's own terminology, there is nothing to “police.” The power Region 10 now asserts—the power to halt a project at any stage,²⁷⁶ even after a permit has been denied—is entirely inconsistent with §404(c) oversight purpose. Such a power injects only additional uncertainty and unpredictability into the permitting process.²⁷⁷

ii. EPA's departure from its policy against issuing a § 404(c) veto while the permit process remains ongoing is unacknowledged and unexplained.

²⁷³ 44 FR 58078.

²⁷⁴ The House proposed veto gave the Corps the ability to override any prohibition of an area for disposal by the EPA upon a finding of no other economically feasible options. H.R. 11896, 92nd Cong. § 404 (1972); SB 2770, 92nd Cong. § 402(m) (1971).

²⁷⁵ Env'tl. Policy Div., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Vol. 2 1389 (Comm. on Public Works 1973) (“If we eliminate those two checks by the only agency [the EPA] we have to evaluate environmental damages... it means releasing [the Corps] from all control.”). This statement was made by Senator Muskie, the chief sponsor of the CWA, on the senate floor.

²⁷⁶ Region 10 cites *Mingo Logan Coal Co. v. EPA*, for the proposition that EPA may exercise its veto power “whenever” it alone deems it necessary. 714 F.3d 608, 612–13 (D.C. Cir. 2013) (*Mingo Logan 2013*). But the *Mingo Logan 2013* court is readily distinguishable. No court has held that EPA has the broad, unconstrained power to preemptively prohibit development on an area of land 23 times the size of the proposed project's footprint.

²⁷⁷ EPA's veto of this project would set precedent. If EPA has authority to veto this project before a permit decision has been made, it can veto any project before a permit decision has been made. This injects uncertainty into the regulatory process. Increased uncertainty creates increased financial risk. This veto is likely to have the effect of deterring investment in other projects requiring § 404 permits. See David Sunding, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal* (May 30, 2011). The fallout from decreased domestic and foreign investment would be significant: the Corps processes approximately 60,000 permits a year, and billions of investment dollars per year depend on these permits. 4 FR 45749 (Aug. 30, 2019). Region 10's proposed veto undermines the legitimacy and predictability of the § 404 permitting process, and in so doing, generates untenable regulatory uncertainty.

Region 10 would veto a project whose permit-appeal process with the Corps has yet to be completed as well as countless projects whose permitting processes have yet to begin. This action departs from EPA’s prior position that the 404(c) veto is “reactive”²⁷⁸ in nature and should be used only as a “tool of last resort”²⁷⁹ after the permitting process has been “exhausted.”²⁸⁰ Because Region 10’s proposed veto would depart from this, a “detailed justification” is needed.²⁸¹ None was given.

EPA reiterated this position twice^{282, 283} in 2019, explaining that “other processes are available and better-suited for EPA to resolve issues with the Corps as the record develops” and specifically provided, by way of example, “the well-understood elevation process under CWA section 404(q) and the NEPA process.”²⁸⁴

EPA’s reasoning was sound: a veto should be based “upon *all* information”²⁸⁵ generated throughout the permitting process. Here, EPA does not have the benefit of Alaska’s Department of Fish & Game state permitting decisions, and the mitigation that our own Fish & Game experts would require to protect our fish and fish habitat; Alaska’s CWA § 401 certification, and additional measures the State would take to protect water quality; or an approved compensatory mitigation plan, which would inform EPA’s assessment of the proposed project’s net effects.

²⁷⁸ Oversight Hearings on Section 404 of the Clean Water Act: Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, 99th Cong. 41 (1985) (statement of Josephine Cooper, Assistant Administrator for External Affairs, EPA):

We believe that 404(c) could be a much more effective device to designate certain areas as unsuitable for dredged or fill material discharge when used in advance of permit requests. . . .
As I have already indicated in my remarks on advanced designation, we do see opportunities for moving the program from a **reactive** to a proactive one. In this regard, we think it is particularly important to give special attention to high value wetlands which are threatened by or experiencing significant losses. . .

²⁷⁹ 44 FR 58080.

²⁸⁰ A comment published with EPA’s regulations recognize that “the section 404 referral process will normally be exhausted” before a § 404(c) veto is considered: “In cases involving a proposed disposal site for which a permit application is pending, it is anticipated that the procedures of the section 404 referral process will normally be exhausted prior to any final decision of whether to initiate a 404(c) proceeding.” See 40 C.F.R. § 231.3(a)(2) (emphasis added).

²⁸¹ An agency must provide a “more detailed justification” for a change in position if the agency’s prior position “engendered serious reliance interests.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); see also *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 742 (1996). “In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox*, 556 U.S. at 515–16.

²⁸² In 2019, EPA explained its decision to withdraw its 2014 proposed veto of the Pebble project in part by the fact that “there are other processes available now, including the 404(q) MOU process, for EPA to resolve any issues with the Corps as the record develops. EPA believes these processes should be exhausted prior to EPA deciding, based upon all information that has and will be further developed, to use its section 404(c) authority.” *Bristol Bay Econ. Dev. Corp. v. Hladick*, 454 F. Supp. 3d 892, 898 (D. Alaska 2020), *aff’d in part, rev’d in part and remanded sub nom. Trout Unlimited v. Pirzadeh*, 1 F.4th 738 (9th Cir. 2021) (emphasis added).

²⁸³ In a press release issued July 30, 2019, EPA explained that the decision to withdraw the previous proposed Pebble mine veto “restores the proper process for 404(c) determinations, eliminating a preemptive veto of a hypothetical mine and focusing EPA’s environmental review on an actual project before the Agency[.]” EPA Press Release, *EPA Withdraws Outdated, Preemptive Proposed Determination to Restrict Use of the Pebble Deposit Area as a Disposal Site* (July 30, 2019), retrieved from <https://www.epa.gov/newsreleases/epa-withdraws-outdated-preemptive-proposed-determination-restrict-use-pebble-deposit>.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

“An agency may not . . . depart from a prior policy sub silentio or simply disregard rules that are still on the books.”²⁸⁶ Region 10 has provided no explanation for this change. Any attempt to cure this defect by providing such explanation in a finalized determination will come too late, because the public will not have had an opportunity to comment on it.

3. As applied, EPA’s § 404(c) regulations are invalid.

Because opportunities have been scarce for challenging EPA’s § 404(c) regulations, their infirmities have yet to face judicial scrutiny.

When Congress enacts a law, courts and agencies “are obliged to give effect, if possible, to every word Congress used.”²⁸⁷ In enacting § 404(c), Congress required proof that an unacceptable adverse effect “will” result. Section 404(c) reads:

The Administrator is authorized to prohibit the specification . . . whenever he determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect” on certain resources.²⁸⁸

EPA’s regulations, by contrast, require that proposed determinations establish only that there is “reason to believe” an unacceptable adverse effect “could” result:

If the Regional Administrator has reason to believe after evaluating the information available to him, including any record developed under the section 404 referral process specified in 33 CFR 323.5(b), that an “unacceptable adverse effect” could result from the specification or use for specification of a defined area for the disposal of dredged or fill material, he may . . . publish notice of a proposed determination[.]”²⁸⁹

EPA’s regulations allow Region 10’s proposed veto to make the lower finding that an unacceptable adverse effect “could” result from discharges into fishery areas—not that such effects “will” result, as required by the statutory text. “Could” findings are what the public comments on. In other words, where Congress required a high degree of certainty that unacceptable adverse effects “will” occur, EPA believes “could” finding are all the public needs to evaluate its proposed action. Raising the standard to “would be likely to have an unacceptable adverse effect,” as the regulations anticipate for the recommended determination,²⁹⁰ does not compensate for this failure. It must be “will.” As the Supreme Court has emphasized, “an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”²⁹¹

²⁸⁶ *Fox Television Stations, Inc.*, 556 U.S. at 515 (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)); see *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion) (“Whatever the ground for the [agency’s] departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency’s action and so may judge the consistency of that action with the agency’s mandate.”); *W. States Petroleum Ass’n v. EPA*, 87 F.3d 280, 284 (9th Cir.1996) (stating that an agency “must clearly set forth the ground for its departure from prior norms”).

²⁸⁷ *Carvieri v. Salazar*, 555 U.S. 379, 391 (2009) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

²⁸⁸ 33 U.S.C. § 1344(c).

²⁸⁹ 40 C.F.R. § 231.3(a).

²⁹⁰ 40 C.F.R. § 231.5(a).

²⁹¹ *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014).

4. As applied, § 404(c) violates the major questions doctrine.

If Congress “wishes to assign to an agency decisions of vast economic and political significance[,]” the U.S. Supreme Court “expect[s] Congress to speak clearly.”²⁹² This tenet responds to “the danger posed by the growing power of the administrative state”²⁹³ by ensuring that top-level, political decisions are made by elected officials, not appointed agency officers.²⁹⁴ To that end, the major questions doctrine provides that an agency must “point to ‘clear congressional authorization’” in the “extraordinary case[]” where the agency claims the power to make decisions of vast “economic and political significance.”²⁹⁵

Recognizing that “[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body[,]”²⁹⁶ the major questions doctrine polices economically significant agency action premised on vague statutory grants of power.²⁹⁷

This veto, if finalized, would present the courts with an opportunity to employ the doctrine to further limit EPA’s power. Region 10’s proposal to shut down areas of land and water to development in perpetuity—depriving a state of billions in lost revenue, jobs for its citizens, and the right to make land-use decisions on its own land about whether, how, and which of its resources it ought to develop—reflects a stunning aggregation of power. Region 10 conjures this power from six words—“unacceptable adverse effects on . . . fishery areas.”²⁹⁸

But “Congress . . . does not, one might say, hide elephants in mouseholes.”²⁹⁹ Granting EPA a power of such vast political and economic significance when it finds “unacceptable adverse effects on . . . fishery areas” falls far short of the clear statement rule to which courts hold Congress when delegating such a power. In an extraordinary case like this, “something more than a merely plausible

²⁹² *UARG*, 573 U.S. at 324 (cleaned up).

²⁹³ *City of Arlington v. FCC*, 569 U.S. 290, 315 (Roberts, C.J., dissenting).

²⁹⁴ *West Virginia v. EPA*, No. 20-1530, 2022 WL 2347278, at *20 (June 30, 2022) (Gorsuch, J., concurring).

²⁹⁵ *West Virginia v. EPA*, No. 20-1530, 2022 WL 2347278, at **11, 13 (June 30, 2022).

²⁹⁶ *Id.* at *18.

²⁹⁷ Four decades ago, a plurality of the Court found it “unreasonable to assume” that Congress delegated “unprecedented power over American industry” to OSHA without “a clear [textual] mandate.” *Indus. Union Dept., AFLCIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality op.). Last summer, the Court found it “strained credulity” to believe that statutory ambiguity empowered the Centers for Disease Control and Prevention to impose a nationwide eviction moratorium. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S.Ct. 2485, 2486 (2021). Similar cases were issued in the decades in between. See *King v. Burwell*, 576 U.S. 473, 486 (2015) (IRS lacked authority without an “express[]” delegation to determine applicability of Affordable Care Act tax credits that involved billions in spending and affected millions of people); *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006) (Attorney General lacked authority from “oblique” statutory provision to criminalize assisted suicide); *FDA v. Brown & Williamson*, 529 U.S. 120, 160 (2000) (FDA lacked authority to regulate cigarettes because delegation on a matter of “such economic and political significance” would not occur “in so cryptic a fashion”); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (FCC lacked authority to excuse non-dominant long-distance carriers from rate-filing requirements, as “a subtle [statutory] device” did not establish that Congress left “determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion”). In January of this year, the Supreme Court concluded that a lone statutory subsection of the Occupational Safety and Health Act did not clearly authorize OSHA’s COVID-vaccine mandate. *NFIB v. Dep. of Lab., OSHA*, 142 S. Ct. 661 (2022) (per curiam). Just this June, the Supreme Court held that Congress’ grant of power to EPA to regulate “systems” did not clearly authorize the Clean Power Plan rule. *West Virginia*, No. 20-1530, at *18.

²⁹⁸ 33 U.S.C. § 1344(c).

²⁹⁹ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

textual basis for the agency action is necessary.”³⁰⁰ Alaska is “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”³⁰¹ Region 10’s attempt to pull an Alaska-sized power out of a mouse-sized hole risks folding in the face of judicial scrutiny.³⁰²

5. The proposed veto violates the Alaska Statehood Compact, ANILCA, and ANCSA.

The land grant provisions of the Alaska Statehood Compact are contractual in nature.³⁰³ Section 6(i)—“Mineral land grants”—provides that “the grants of mineral lands to the State of Alaska . . . are . . . granted . . . with the right to prospect for, mine, and remove the same.”³⁰⁴ The same section further provides that “[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct[.]”³⁰⁵ The Pebble lands are subject to this provision.³⁰⁶ If EPA violates this provision, it has breached the Alaska Statehood Compact. The remedy for such a breach is specific performance or damages. Specific performance would effectively undo the 404(c) action; damages would number in the billions. If finalized, the State will sue for both.

The proposed veto violates ANILCA. Enacted in 1980, ANILCA “provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people[.]”³⁰⁷ With the passage of ANILCA, the need in Alaska “for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.”³⁰⁸ ANILCA, in other words, sets aside some lands for conservation but left others open for development. Under ANILCA’s “no more clause,” an executive branch withdrawal of more than 5,000 acres requires congressional approval.³⁰⁹ Finalization of this proposed veto effectively withdraws more than 5,000 acres, creating a new national conservation area, without congressional approval. This violates ANILCA’s “no more clause.”

The proposed veto violates ANCSA. The Cook Inlet Exchange was enacted as an amendment to ANCSA. EPA violates the Cook Inlet Land Exchange, and thus ANCSA, by preventing the State

³⁰⁰ *West Virginia*, No. 20-1530, at *13.

³⁰¹ *Brown & Williamson*, 529 U.S. at 160.

³⁰² For similar reasons articulated in this section, § 404(c), as applied here, is vulnerable to a void-for-vagueness challenge. “[U]nacceptable adverse effects,” § 404(c)’s operative phrase, is so vague as to provide no notice to regulated parties of what projects will be vetoed. See *Lane v. Salazar*, 911 F.3d 942, 950 (9th Cir. 2018) (discussing void-for-vagueness challenges). “Unacceptable” is not further defined by statute. The term “adverse,” alone, does not function as any limit at all in the § 404 context, where virtually every project requiring a § 404 permit will have an adverse effect on the environment. One court reviewed § 404(c)’s “garbled language” and opined that “it is undeniable” that § 404(c) “is awkwardly written and extremely unclear.” *Mingo Logan Coal Co., Inc. v. EPA*, 850 F. Supp.2d 133, at 134 (2012), *rev’d*, 714 F.3d 608 (D.C. Cir. 2013). The court noted that “the parentheticals[.]” in particular, “are so poorly written that it is difficult to ascertain what it is they are supposed to modify.” *Id.* at 140.

³⁰³ *Alaska v. United States*, 35 Fed. Cl. 685, 698 (1996), *aff’d*, 119 F. 3d 16 (Fed. Cir. 1997) (citing *United States v. Morrison*, 240 U.S. 192, 201 (1915) (“land grant provision of Statehood Act was a compact”).

³⁰⁴ Statehood Act § 6(i).

³⁰⁵ *Id.*

³⁰⁶ *Cook Inlet Land Exchange*.

³⁰⁷ 16 U.S.C. § 3101(d).

³⁰⁸ *Id.*

³⁰⁹ 16 U.S.C. § 3213.

from using the lands transferred to it very purpose they were transferred for—mineral development. Additionally, the Ninth Circuit has held that ANCSA’s provisions were intended to promote economic development, village expansion, and subsistence, and that “[o]f these potential uses, Congress clearly expected economic development would be the most significant.”³¹⁰ By precluding development at the Pebble Deposit, Region 10 prevents Alaska Natives from the economic benefits that would inure to them from development of the Pebble Deposit.³¹¹

FINALIZATION REQUIRES COMPENSATION

Region 10’s veto, if finalized, would leave no economically viable use of these lands, requiring federal compensation to Alaska.

The Fifth Amendment of the U.S. Constitution forbids the taking of private property for public use without just compensation. The Supreme Court has recognized that this constitutional guarantee prevents the government from “unfairly singl[ing] out the property owner to bear a burden that should be borne by the public as a whole.”³¹² The Supreme Court has held that the denial of a § 404 permit, when the permit denial results in no viable uses for the property, can rise to the level of a taking.³¹³ Such a denial constitutes a taking where: (1) the property owner had a reasonable investment-backed expectation that it could develop the property, and (2) the permit denial deprived the property owner of most of the use of its property.³¹⁴

The CWA, the Statehood Act, and the Cook Inlet Land Exchange have all given the State an investment-backed expectation in the lands surrounding the Pebble project. This expectation—arising as it does from the federal government’s actions—could not be more reasonable. Alaska selected and specifically designated this land for mineral development. Region 10’s proposed veto, however, would entirely preclude mineral development in the area. The State, therefore, is now left with no economically viable use of these lands. For this reason alone, the proposed veto should be withdrawn.

Should EPA indeed adopt a § 404(c) determination that effectively withdraws 309 square miles of State-owned land from mineral development, the United States must provide the State with

³¹⁰ *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 996 (9th Cir. 1994); *see also Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 731 (9th Cir. 1978); *City of Angoon v. Marsb*, 749 F.2d 1413, 1418 (9th Cir. 1984).

³¹¹ *E.g.*, News Release, Northern Dynasty Minerals, Ltd., Northern Dynasty: Pebble Partnership, Iliamna Natives Limited Reach Right-Of-Way Agreement (May 15, 2019), retrieved from <https://northerndynastyminerals.com/news/news-releases/2019/northern-dynasty-pebble-partnership-iliamna-natives-limited-reach-right-of-way-agreement/> (PLP granting Iliamna Natives “preferred contractor” status for Pebble-related contracts located on Iliamna lands).

³¹² *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978).

³¹³ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) (observing that when a § 404 permit “is denied and the effect of the denial is to prevent ‘economically viable’ use of the land in question can it be said that a taking has occurred”); *see also United Affiliates Corp. v. United States*, 143 Fed. Cl. 257, 266–67 (2019) (recognizing regulatory takings claim of both landowner and mineral rights lessee arising from CWA § 404 permit denial); *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1329 (Fed. Cir. 2012) (“denial of a section 404 permit could amount to a taking of a cognizable property right as it deprives the landowner of a right inherent in land ownership”).

³¹⁴ The Federal Circuit has recognized “that the denial of a section 404 permit could amount to a taking of a cognizable property right as it deprives the landowner of a right inherent in the land ownership[.]” *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012). *See also Penn Cent. Transp. Co.*, 438 U.S. at 124 (“The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.”).

appropriate compensation. Based solely on the estimates contained within the FEIS, the Pebble Deposit is worth billions of dollars, and the State will seek to be compensated in an amount that reflects the true value of the mineral deposit.

CONCLUSION

For the foregoing reasons, Alaska respectfully requests that Region 10 withdraw its proposed veto following the close of this comment period.

Respectfully submitted,



Jason W. Brune
COMMISSIONER
Alaska Department of Environmental
Conservation
P.O. Box 111800
Juneau, Alaska 99811



Douglas Vincent-Lang
COMMISSIONER
Alaska Department of Fish & Game
P.O. Box 115526
1255 W. 8th Street
Juneau, AK 99811-5526



Akis Gialopsos
COMMISSIONER
Alaska Department of Natural Resources
550 W. 7th Ave, Suite 1360
Anchorage, AK 99501-3557



Treg R. Taylor
ATTORNEY GENERAL
Alaska Department of Law
1031 West 4th Avenue, Suite 200
Anchorage, AK 99501-1994