



## **ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-R10-OW-2017-0369; FRL 9974-52-Region 10]**

### **Notification of Decision not to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska**

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

**ACTION:** Notice.

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**SUMMARY:** The United States Environmental Protection Agency (EPA) Administrator and Region 10 Regional Administrator are announcing the EPA's decision not to withdraw at this time the EPA Region 10 July 2014 Proposed Determination that was issued pursuant to Section 404(c) of the Clean Water Act and EPA's implementing regulations. Today's notice suspends the proceeding to withdraw the Proposed Determination and leaves that Determination in place pending further consideration by the Agency of information that is relevant to the protection of the world-class fisheries contained in the Bristol Bay watershed. The Agency intends at a future time to solicit public comment on what further steps, if any, the Agency should take under Section 404(c) to prevent unacceptable adverse effects to the watershed's abundant and valuable fishery resources in light of the permit application that has now been submitted to the U.S. Army Corps of Engineers.

#### **FOR FURTHER INFORMATION CONTACT:**

Visit [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay) or contact a Bristol Bay-specific phone line, (206) 553-0040, or email address, [r10bristolbay@epa.gov](mailto:r10bristolbay@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. General Information**

*A. How to Obtain a Copy of the Proposed Determination:* The July 2014 Proposed Determination is available via the Internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay).

*B. How to Obtain a Copy of the Settlement Agreement:* The May 11, 2017, settlement agreement is available via the Internet on the EPA Region 10 Bristol Bay site at [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay).

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

<https://www.regulations.gov/docket?D=EPA-R10-OW-2017-0369>.

### **II. Background**

On July 19, 2017, EPA Region 10 published in the **Federal Register** (82 FR 33123) a notice of a proposal to withdraw its July 2014 Proposed Determination under section 404(c) of the Clean Water Act (CWA) to restrict the use of certain waters in the South Fork Koktuli River, North Fork Koktuli River, and Upper Talarik Creek watersheds (located within the larger Bristol Bay watershed) as disposal sites for dredged or fill material associated with mining the Pebble deposit, a copper-, gold- and molybdenum-bearing ore body. A Proposed Determination is the second step in EPA's four-step CWA Section 404(c) review process of: 1) Initiation, 2) Proposed Determination, 3) Recommended Determination, and 4) Final Determination (40 CFR part 231).

The July 19, 2017 (82 FR 33123), notice opened a public comment period that closed on October 17, 2017. EPA held two public hearings in the Bristol Bay watershed during the week of

October 9, 2017. EPA also consulted with federally recognized tribal governments from the Bristol Bay region and Alaska Native Claims Settlement Act (ANCSA) Regional and Village Corporations with lands in the Bristol Bay watershed on the Agency's proposal to withdraw.

EPA agreed to initiate a process to propose to withdraw the 2014 Proposed Determination as part of a May 11, 2017, settlement agreement with the Pebble Limited Partnership (PLP), whose subsidiaries own the mineral claims to the Pebble deposit. The settlement agreement resolved all of PLP's outstanding lawsuits against EPA. Also under the terms of the settlement agreement, Region 10 may not forward a signed Recommended Determination, if such a decision is made, before either May 11, 2021, or until EPA provides public notice of a final Environmental Impact Statement (EIS) issued by the U.S. Army Corps of Engineers (Corps) on PLP's CWA Section 404 permit application regarding the Pebble deposit, whichever comes first. For a link to a copy of the settlement agreement, see Section I of this notice.

In its July 19, 2017, notice and during the concurrent tribal and ANCSA Corporation consultation periods, EPA defined the scope of the input it was seeking on its proposal to withdraw. Specifically, EPA sought public comment and tribal and ANCSA Corporation input on three reasons underlying its proposed withdrawal. EPA's reasons were that withdrawing the Proposed Determination now would:

1. Provide PLP with additional time to submit a section 404 permit application to the Corps,
2. Remove any uncertainty, real or perceived, about PLP's ability to submit a permit application and have that permit application reviewed, and
3. Allow the factual record regarding any forthcoming permit application to develop.

In addition to seeking comment on whether to withdraw the July 2014 Proposed Determination at this time for the reasons stated above, in the event that the final decision was to

withdraw the Proposed Determination, EPA also sought comment on whether the Administrator should review and reconsider the withdrawal decision consistent with 40 CFR 231.5(c).

### **III. Summary of Input from Public Comment, Tribal Consultation, and ANCSA Corporation Consultation Periods**

During the public comment period, EPA received more than one million public comments regarding its proposal to withdraw. An overwhelming majority of these commenters expressed opposition to withdrawal of the Proposed Determination. EPA also held two public hearings in the Bristol Bay watershed on the proposal to withdraw; approximately 200 people participated in the hearings. Of the 119 participants who testified, an overwhelming majority also expressed opposition to withdrawal of the Proposed Determination. Similarly, the vast majority of tribal governments and ANCSA Corporation shareholders who consulted with EPA expressed opposition to the proposed withdrawal. The public comments, transcripts from the public hearings, and summaries of the tribal and ANCSA Corporation consultations can be found in the docket for this effort; see Section I of this notice for information on how to access this docket.

#### *A. Comments opposing withdrawal that were within the scope of EPA's July 2017 notice*

A large number of commenters expressed opposition to the proposal to withdraw. Commenters stated that withdrawal of the Proposed Determination is not necessary to allow for PLP to submit its permit application because nothing in the regulations prevents PLP from submitting a permit application while a section 404(c) review is ongoing. Other commenters indicated that regardless of whether the Proposed Determination is withdrawn, other provisions of the settlement agreement pause EPA's section 404(c) review and provide PLP with additional time to submit its permit application and allow that permit application to be reviewed by the Corps. EPA received many comments noting that withdrawal of the Proposed Determination is

not necessary to ensure that the Corps' 404 permit and National Environmental Policy Act (NEPA) review processes proceed. The applicable regulations prevent the Corps from issuing a final permit decision for a project while a section 404(c) review is ongoing (33 CFR 323.6(b) and 40 CFR 231.3(a)(2)), but affirmatively provide that the Corps will continue to complete its administrative processing of PLP's permit application, including final coordination with EPA under 33 CFR part 325, while EPA's section 404(c) review is underway.

Commenters also stated that it is not necessary to withdraw the Proposed Determination in order to allow the factual record associated with a permit application from PLP to develop because nothing in the statute, its implementing regulations, or the Proposed Determination preclude PLP from submitting a permit application and the Corps from reviewing that application. In addition, some commenters stated that the Proposed Determination is supported by a sufficient factual record that does not need further development.

Commenters also noted that there is precedent for EPA leaving a Proposed Determination in place while it awaits additional project-related information and cited EPA's section 404(c) review process relating to the Pamo Dam project where EPA kept its Proposed Determination in place pending completion and review of additional information and analysis by the project proponent<sup>1</sup>. Commenters also noted that EPA's section 404(c) regulations allow it to extend the timeframes for section 404(c) decisions for "good cause" (40 CFR 231.8) and argued that EPA has good cause in this case to extend the specific time period at 40 CFR 231.5(a) for the Regional Administrator to decide whether to withdraw a Proposed Determination or prepare a Recommended Determination (which is the next step in the section 404(c) review process). Commenters also noted that when EPA first initiated its section 404(c) action in February 2014,

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<sup>1</sup> 54 FR. 30599 (July 21, 1989).

PLP told EPA that it supported pausing EPA's section 404(c) review process for "good cause" pursuant to 40 CFR 231.8 to allow time for it to submit its permit application and for that application to be reviewed.<sup>2</sup>

Commenters also asserted that EPA's July 2017 notice was inappropriately limited to process and policy arguments and did not adequately consider the underlying scientific and technical record in the July 2014 Proposed Determination.

*B. Comments supporting withdrawal that were within the scope of EPA's July 2017 notice*

Commenters in support of withdrawal of the Proposed Determination indicated that EPA preemptively issued its Proposed Determination before PLP submitted a permit application or the Corps initiated the NEPA review process. These commenters stated that this was an overreach by EPA and that it denied PLP due process. Commenters felt that the Section 404 permitting process should be allowed to proceed, which would allow future decisions to be made based on the permit application materials, related mitigation strategies, and NEPA review. Commenters stated that this would allow the Agency to examine all possible merits of a project, as well as potential environmental impacts, through an EIS. Commenters noted that the NEPA process considers the views of a much broader group of constituents, including the Secretary of the Interior, Fish and Wildlife Service, National Marine Fisheries Service, State Historic Preservation Office, and the Coast Guard.

Some commenters asserted that EPA does not have the authority to initiate the section 404(c) process or issue a Proposed Determination in the absence of a permit application. In addition, some commenters indicated that, in their view, withdrawing the Proposed Determination was

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<sup>2</sup> Letter from Tom Collier, CEO, PLP to Dennis McLerran, former EPA R10 Regional Administrator, (March 11, 2014).

necessary in order for the Corps to accept and review a permit application from PLP and conduct the NEPA review process.

Commenters also expressed a belief that the issuance of the Proposed Determination prevents the development of a full record by stifling the extensive permitting process that would be required to permit a mine of this scale, including local, state, and federal permits. They noted that the permit application will provide comprehensive, site-specific data and alternatives analysis, and that the process will ensure a rigorous review, including development of an EIS, and consideration of mitigation strategies. Several commenters stated that the fate of the project should not be decided without consideration of the full social, economic, and environmental impacts, which would occur during permit review.

Many of the other reasons offered by commenters in support of the withdrawal revolved around their policy view that EPA should not take a section 404(c) action in advance of the filing of a permit application because such an action would have negative repercussions for the business and investing community. Commenters noted that maintaining the integrity of the existing regulatory review process and ensuring due process for all projects is important to Alaska's economy for future investment in natural resource development.

*C. Comments received that were outside the scope of EPA's July 2017 notice*

EPA received comments regarding the specific scientific and technical record underlying the Proposed Determination and subsequent public process. Certain commenters expressed support for the analysis conducted as part of EPA's Bristol Bay Watershed Assessment (BBWA) completed in 2014 (for more information regarding the BBWA see: [www.epa.gov/bristolbay](http://www.epa.gov/bristolbay)), which these commenters indicated did not support withdrawal of the Proposed Determination. Other commenters argued that the BBWA was flawed and should not be a basis for agency

decision making. EPA also received comments relating to economic value of a potential mine and metals to be mined as a general matter and the potential value of the mine for the local and national economy.

EPA also received comments regarding the amount of public input relating to this issue as a general matter and the amount of resources that both EPA and stakeholders have expended on Bristol Bay-related issues associated with mining of the Pebble deposit. Comments also focused on the ecological, cultural, and economic value of Bristol Bay's fishery resources, and potential environmental, cultural, and economic harms to these and other resources associated with potential mining activity.

#### **IV. Recent Developments**

Since the close of the public comment, tribal consultation, and ANCSA Corporation consultation periods on October 17, 2017, there have been a number of other relevant developments. On December 22, 2017, PLP submitted a section 404 permit application to the Corps that proposes to develop a mine at the Pebble deposit. On January 5, 2018, the Corps issued a public notice that provides PLP's permit application to the public and states that an EIS will be required as part of its permit review process consistent with NEPA. The Corps also invited relevant federal and state agencies to be cooperating agencies on the development of this EIS.

Since PLP has now submitted its CWA Section 404 permit application to the Corps regarding the Pebble deposit, Region 10 will not forward a signed Recommended Determination, if such a decision is made, before either May 11, 2021, or public notice of a final EIS on PLP's Section 404 permit application regarding the Pebble deposit, whichever comes first.

## V. Conclusions

In making its decision regarding whether to withdraw the Proposed Determination at this time, EPA considered its relevant statutory authority, applicable regulations, and the input it received as part of the tribal consultation, ANCSA consultation, and public comment periods regarding the Agency's reasons for its proposing withdrawal as well as the recent developments.

- 1. Additional time to submit Section 404 permit application and initiate permit review.** As several commenters noted, PLP has had the ability as a legal matter to submit a permit application while a section 404(c) review is ongoing. In fact, PLP submitted its application on December 22, 2017, notwithstanding the pending section 404(c) review and existing Proposed Determination, and the Corps issued a public notice that provides PLP's permit application to the public and states that an EIS will be required as part of its permit review process consistent with NEPA. As a result, withdrawal of the Proposed Determination at this time is not necessary to provide PLP with additional time to submit a section 404 permit application to the Corps and potentially allow the Corps permitting process to initiate.
- 2. Remove uncertainty regarding PLP's ability to submit Section 404 permit application and have it reviewed.** As many commenters pointed out and as EPA noted in its proposal, the Corps' regulations allow it to accept, review, and process a permit application for a proposed project even if EPA has an ongoing section 404(c) review for that project. In addition, since PLP has now submitted its permit application to the Corps regarding the Pebble deposit and the Corps has initiated its permit review process and begun taking steps to initiate development of an EIS for this project, any potential uncertainty about PLP's ability to submit a permit

application and have that permit application reviewed by the Corps has been resolved. The Corps' regulations state that it will continue to complete its administrative processing of a permit application for a proposed project if EPA has an ongoing section 404(c) review for that project. While the Corps cannot issue a final decision on the permit application while a section 404(c) process remains open and unresolved (33 CFR 323.6(b)), in this case, such a decision is likely a number of years away. Therefore, this reason to withdraw the Proposed Determination at this time is no longer applicable.

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

Further, in light of recent developments and the framework outlined in the settlement agreement, many of the key concerns raised by those who supported withdrawal have already been resolved, even while the Proposed Determination remains in place. For example, concerns regarding EPA potentially finalizing its section 404(c) review in advance of PLP submitting a permit application, concerns that the Corps would not accept or process PLP's permit application with an open section 404(c) action, and concerns that PLP should be provided more time to advance through the Section 404 permit and NEPA review processes before EPA makes any decisions regarding potentially advancing its section 404(c) review are moot.

Given the relevant statutory authority, applicable regulations, recent developments, public comments, tribal input, and ANCSA Corporation input described above, the Agency has decided not to withdraw the 2014 Proposed Determination at this time. Today's notice suspends the proceeding to withdraw the Proposed Determination and leaves that Determination in place pending consideration of any other information that is relevant to the protection of the world-class fisheries contained in the Bristol Bay watershed in light of the permit application that has now been submitted to the Corps. As noted above, EPA also sought comment on whether the Administrator should review and reconsider the withdrawal decision consistent with 40 CFR 231.5(c) in the event that the final decision was to withdraw the Proposed Determination. Since today's decision is not to withdraw the Proposed Determination at this time, comments received on this issue do not need to be addressed.

EPA acknowledges the significant public interest on this issue and remains committed to listening to all stakeholders as the permitting process progresses. Neither this decision nor the previous settlement agreement guarantees or prejudices a particular outcome in the permitting

process or any particular EPA decision-making under section 404(c) or otherwise constrain EPA's discretion except as provided in the terms of the settlement agreement.

EPA received several comments stating that EPA cannot withdraw a Proposed Determination without considering the proposed restrictions or the science or technical information underlying the Proposed Determination. In light of EPA's decision not to withdraw the Proposed Determination, those comments are moot.

EPA also received comments that it has to withdraw the Proposed Determination because it does not have the statutory authority to initiate the section 404(c) process before a permit application has been filed with the Corps. To the contrary, EPA has the authority whenever it makes the requisite finding of unacceptable adverse effect. 33 U.S.C. § 1344(c); 40 CFR 231.1(a) & (c); *see also Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 613 (D.C. Cir. 2013). As such, EPA need not withdraw the Proposed Determination on the basis of a lack of statutory authority because EPA had authority to issue the Proposed Determination.

## **VI. Further Proceedings**

EPA's regulations at 40 CFR 231.5(a) provide a specific time period for the Regional Administrator to decide whether to withdraw a Proposed Determination or prepare a Recommended Determination. As explained above, the Agency has decided not to withdraw the Proposed Determination at this time and is suspending this withdrawal proceeding and leaving the Proposed Determination in place. As previously noted, however, under the terms of the May 2017 settlement agreement, Region 10 may not forward a signed Recommended Determination, if such a decision is made, before either May 11, 2021, or until public notice of a final EIS on PLP's CWA Section 404 permit application regarding the Pebble deposit, whichever comes first.

The Agency intends at a future time to solicit public comment on what further steps, if any, the Agency should take in the section 404(c) process in order to prevent unacceptable adverse effects to the watershed's world-class fisheries in light of the permit application that has now been submitted to the Corps. EPA will review and consider any other relevant information that becomes available during the interim. EPA has determined that there is good cause under 40 CFR 231.8 to extend the regulatory time frames in 40 CFR 231.5(a) in order to allow for an additional public comment period and to align with the timeframes established in the settlement agreement.

Dated: January 26, 2018.

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Chris Hladick,

Regional Administrator, EPA Region 10.

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