VETO-ING THE VETO?: LIMITED OPTIONS REMAIN UNDER CLEAN WATER ACT SECTION 404(C) FOR EPA TO ALLOW DEVELOPMENT OF THE PEBBLE DEPOSIT

BY

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On July 21, 2014, the United States Environmental Protection Agency (EPA) took its first step under Clean Water Act (CWA) § 404(c) to protect the pristine Bristol Bay watershed in southwestern Alaska. It proposed to restrict the use of certain waters in the watershed for the disposal of dredged or fill material associated with mining a large ore deposit.

CWA § 404(c) gives EPA the authority to prohibit (in other words, "veto") an area as "a disposal site" under the act. The section specifies that this decision be made whenever EPA determines "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." Here, EPA recognized that the Bristol Bay watershed had "unparalleled ecological value, boasting salmon diversity and productivity unrivaled anywhere in North America" and thus protection was necessary.

However, on July 19, 2017, under the new Trump Administration, EPA signaled its intent not to move forward with the protection of Bristol Bay. Now an application for the development of the "Pebble Deposit" is pending. Naturally, a legal showdown concerning the proposed Pebble Mine is inevitable. Although in a surprising move in 2018, EPA temporarily suspended the proceeding to withdraw the 2014 CWA § 404(c) Proposed Determination, the fate of the Bristol Bay watershed remains in question because EPA further indicated that it "intends at a future time to solicit public comment on what further steps, if any, the Agency should take under § 404(c) . . . in light of the permit application [for the Pebble Mine] that has now been submitted to the U.S. Army Corps of Engineers."

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What steps can (and, arguably, must) EPA take in a future action involving CWA § 404(c) and the Pebble Project? And what if EPA again attempts to withdraw its 2014 Proposed Determination? This Article examines these key questions. It first explains that a court is unlikely to permit EPA to withdraw the 2014 Proposed Determination on the same basis that EPA proposed to withdraw it in 2017. Moreover, in light of the 2014 Proposed Determination, EPA's options are now limited with respect to allowing development of the Pebble Deposit. The article concludes that principles of administrative, constitutional, and environmental law demonstrate that it will be difficult for EPA to justify not finalizing its 2014 proposal to prohibit the disposal of mining waste into this sensitive area.

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I. INTRODUCTION

On July 21, 2014, the United States Environmental Protection Agency (EPA) took its first step to protect the pristine Bristol Bay watershed in southwestern Alaska.[1] It proposed to restrict the use of certain waters in the watershed for the disposal of dredged or fill material associated with mining a large ore body.[2] EPA indicated that this step was necessary based on "the high ecological and economic value of the Bristol Bay watershed and the assessed unacceptable environmental effects that would result from such mining."[3]

However, on July 19, 2017, EPA, under the new Trump Administration, signaled its intent not to move forward with the protection of Bristol Bay.[4] Specifically, EPA's new action requested comments on its plan to withdraw its 2014 proposed determination.[5] EPA explained that its rationale for withdrawing its previous determination was based on a legal settlement it reached with Pebble Limited Partnership (PLP), a mining company resolute in developing the area, as well as then-EPA Administrator Scott Pruitt's new "policy direction."[6] Administrator Pruitt's decision to settle the case had come on the heels of a private meeting with PLP's president.[7] Then, following the meeting and without consulting EPA's scientific staff who had been working on the issue for close to a decade, he directed EPA Regional Office 10 to withdraw its 2014 Proposed Determination, which sought to protect the area pursuant to § 404(c) of the Clean Water Act (CWA).[8]

CWA § 404(c) gives EPA the authority to prohibit (in other words, "veto") an area as "a disposal site" under the act.[9] The section specifies that such a decision be made "whenever" EPA determines "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."[10] Acting pursuant to this section, EPA proposed in 2014 to protect the Bristol Bay watershed, which EPA recognized as having "unparalleled ecological value,

1 *See generally* Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. 42,314 (July 21, 2014).

2 *Id.* at 42,315.

3 *Id.*

4 *See generally* Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123 (July 19, 2017).

5 *Id.* at 33,124.

6 *Id.* at 33,213–14.

7 Drew Griffin et al., *EPA Head Met with a Mining CEO—And Then Pushed Forward a Controversial Mining Project*, CNN, https://perma.cc/6K2W-DBLE (last updated Oct. 24, 2017).

8 Public Hearings: Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed Reg. 44,176 (proposed Sept. 21, 2017); *see also* Federal Water Pollution Control Act, 33 U.S.C. § 1344(c) (2012).

9 33 U.S.C. § 1344(c).

10 *Id.*

boasting salmon diversity and productivity unrivaled anywhere in North America."[11]

Unsurprisingly, local residents, as well as fishing, Alaskan Native, and environmental groups decried EPA's audacious step to retract its previously proposed protection.[12] On the other hand, PLP and other mining advocates applauded EPA's proposal to not move forward with the restriction.[13] They alleged that the constraint of such use violated due process and exceeded EPA's statutory authority.[14] And now an application for the development of the Pebble Deposit is pending.[15] Naturally, a legal showdown concerning the proposed "Pebble Mine" is inevitable and is certain to raise many statutory, regulatory, administrative, and constitutional law issues over the coming years.

On February 28, 2018, however, in a surprising move, EPA temporarily suspended the proceeding to withdraw the 2014 Proposed Determination, thereby leaving it in place.[16] But EPA further indicated that it "intends at a future time to solicit public comment on what further steps, if any, the Agency should take under § 404(c) . . . in light of the permit application [for the Pebble Mine] that has now been submitted to the U.S. Army Corps of Engineers."[17]

What steps can (and, arguably, must) EPA take in a future action involving CWA § 404(c) and the Pebble Mine? And what if EPA again attempts to withdraw its 2014 Proposed Determination? This Article examines these key questions. First, it briefly introduces the on-going dispute over the Pebble mineral deposit and explains the importance of the Bristol Bay watershed. Next, the Article explores CWA § 404(c)'s "veto" process. It then analyzes EPA's 2017 Proposal to Withdraw the 2014 Proposed Determination and assesses whether a future attempt to withdraw the 2014 Proposed Determination would be successful. Finally, it explores whether EPA can be compelled to move forward with its protection of the Bristol Bay watershed under CWA § 404(c).

The Article explains that a court is unlikely to permit EPA to withdraw the 2014 determination on the same basis that EPA proposed to withdraw it in 2017. Moreover, in light of the 2014 determination, EPA's options are now limited with respect to allowing development of the Pebble Deposit. The Article concludes by proposing that—notwithstanding the settlement agreement with PLP and EPA's new policy on its CWA § 404(c) authority—principles of administrative, constitutional, and environmental law support arguments that EPA can be compelled to continue the CWA § 404(c) process to prohibit the disposal of mining waste into this critically sensitive area.

11 Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. 42,314, 42,315 (July 21, 2014).

12 *See* Notification of Decision Not to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 83 Fed. Reg. 8,668 (Feb. 28, 2018).

13 *Id.*

14 *Id.*

15 *Id.*

16 *See id.*

17 *Id.*

II. THE BRISTOL BAY WATERSHED AND THE LEGAL FRAMEWORK FOR ITS PROTECTION UNDER THE CLEAN WATER ACT

This Part briefly introduces the Bristol Bay watershed to demonstrate the importance of the area. Next, it summarizes the legal framework under the CWA to protect its resources, including § 404(c). This will serve as a primer to a discussion in Part III of the proposed mining development of the Pebble Deposit and the proposed protection of the Bristol Bay watershed by EPA, and then an analysis in Part IV of the options that now remain for EPA with respect to the development of mineral resources in the watershed.

A. The Bristol Bay Watershed

Located in southwestern Alaska, the Bristol Bay region is approximately 40 million acres of land containing "myriad mountains, rivers, lakes, and wetlands"[18] that EPA regards as "a globally significant resource with outstanding value."[19] In turn, six distinct watersheds comprise the Bristol Bay watershed–the Togiak, Nushagak, Kvichak, Naknek, Egegik, and Ugashik River watersheds.[20] These areas have been described as a "unique sprawling, permeable, and porous network of creeks and streams"[21] that EPA has identified as being "of unparalleled ecological value, boasting salmon diversity and productivity unrivaled anywhere in North America."[22]

The watershed is home to "a largely pristine, intact ecosystem with outstanding ecological resources," including approximately thirty fish species, forty terrestrial mammal species, and 200 bird species.[23] Its importance as a watershed stems from its provision of "connected habitats—from headwaters to ocean—that support abundant, genetically diverse wild Pacific salmon populations . . . [which] in turn, maintain the productivity of the entire ecosystem, including numerous other fish and wildlife species."[24]

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18 Letter from Bristol Bay Native Corp. (BBNC) to EPA Adm'r Scott Pruitt & Acting Reg'l Adm'r Michelle Pirzadeh (Oct. 17, 2017), https://perma.cc/R2AG-M223.

19 Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. 42,314, 42,315 (July 21, 2014).

20 U.S. ENVTL. PROT. AGENCY, AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY, ALASKA: EXECUTIVE SUMMARY 3, 5 (2014) https://perma.cc/JM9G-AYS5 [hereinafter AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON].

21 Letter from BBNC to EPA Adm'r Scott Pruitt & Acting Reg'l Adm'r Michelle Pirzadeh, *supra* note 18 (citing Robert Moran, *Water-Related Impacts at the Pebble Mine*, PEBBLE SCI. (2007), https://perma.cc/SN89-EFL9).

22 Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. at 42,315.

23 U.S. ENVTL. PROT. AGENCY, PROPOSED DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 10 PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT: PEBBLE DEPOSIT AREA, SOUTHWEST ALASKA 3-1 (2014) [hereinafter PROPOSED DETERMINATION]; *see also* Michael C. Blumm & Elisabeth Mering, *Vetoing Wetland Permits under Section 404(c) of the Clean Water Act: A History of Inter-Federal Agency Controversy and Reform*, 33 UCLA J. ENVTL. L. & POL'Y 215, 296 (2015).

24 Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. at 42,315.

EPA's scientific assessment in 2014 concluded that the watershed "supports the largest sockeye salmon fishery in the world"[25] where "[f]or generations upon generations tens of millions of salmon reliably return to Bristol Bay, year after year."[26] Annually, Bristol Bay hosts "the world's largest runs of sockeye salmon, producing approximately half of the world's sockeye salmon."[27] As EPA concluded, this salmon population is "the most abundant and diverse populations of this species remaining in the United States."[28] Likewise, its Chinook salmon runs are also close to the world's most abundant, and the area is also home to substantial coho, chum, and pink salmon populations.[29]

Significantly, Bristol Bay's salmon populations are wholly-wild, making it "one of the last places on Earth with such bountiful and sustainable harvests of wild salmon."[30] EPA estimates that approximately "70% of the sockeye and large numbers of the coho, Chinook, pink, and chum salmon are harvested in commercial, subsistence, and recreational fisheries before they can return to their natal lakes and streams to spawn."[31] The economic value of the salmon resources are therefore significant, generating "approximately $480 million in direct economic expenditures and provided employment for over 14,000 full- and part-time workers."[32]

The Bristol Bay region is also "home to 25 federally recognized tribal governments . . . who have maintained a salmon-based culture and subsistence-based way of life for at least 4,000 years."[33] But the area also contains valuable mineral resources, and—absent adequate protection by state and federal laws—the "potential for large-scale mining activities in the watershed has raised concerns about the impact of mining on the sustainability of Bristol Bay's world-class commercial, recreational, and subsistence fisheries."[34]

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25 AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON, *supra* note 20, at 1.

26 Letter from BBNC to EPA Adm'r Scott Pruitt & Acting Reg'l Adm'r Michelle Pirzadeh, *supra* note 18.

27 Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. at 42,315; *see also EPA Proposes Restrictions on the Pebble Project*, TR. FOR ALASKA (July 18, 2014), https://perma.cc/9XAR-N6TK; Liz Judge, *Everything You Need to Know About the Pebble Mine*, EARTHJUSTICE (July 21, 2014), https://perma.cc/9LJH-NBF4.

28 Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. at 42,315.

29 Letter from BBNC to EPA Adm'r Scott Pruitt & Acting Reg'l Adm'r Michelle Pirzadeh, *supra* note 18; *see also Pink Salmon*, ALASKA DEP'T FISH & GAME, https://perma.cc/9E3A-FMBP (last visited Nov. 25, 2018).

30 Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. at 42,315 ("One of the main factors leading to the success of this fishery is the fact that its aquatic habitats are untouched and pristine, unlike the waters that support many other fisheries.").

31 *Id.* at 42,315.

32 *Id.*

33 AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON, *supra* note 20, at ES-1.

34 *Id.*

B. The Clean Water Act

Congress enacted the CWA with the objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[35] To achieve this goal, CWA § 311(a) makes unlawful "the discharge of any pollutant by any person" except in compliance with the act.[36] Of central importance here is the CWA § 404, which allows the United States Army Corps of Engineers (Corps) to issue permits for the "discharge of dredged or fill material" into the nations' navigable waters.[37]

Because mining development, like the proposed project in the Bristol Bay watershed, would require discharge of such materials into waters of the United States, the applicant must seek a CWA § 404 permit.[38] For example, as one commentator observed, the "development of the mine [in the Bristol Bay watershed] will likely require stream diversion channels, about nine linear miles of dams and embankments, and other activities necessary for the development of open pit and underground mining, including dewatering the mines by pumping and relocating groundwater."[39]

When reviewing whether to grant a CWA § 404 permit, the Corps looks to the so-called "404(b)(1) Guidelines" that were promulgated by the EPA.[40] These regulations "provide substantive environmental criteria that the Corps must use to evaluate permit applications," and, in turn, the Corps has established procedures for reviewing CWA § 404 permit applications.[41]

This is not to say, however, that the EPA does not have a role in the § 404 process. In fact, EPA has "two important oversight roles concerning the Corps' permit program."[42] Not only does it, as mentioned above, participate in developing the CWA 404(b)(1) Guidelines, but Congress also vested EPA with the authority under CWA § 404(c) "to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and [] is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site,

35 CWA, 33 U.S.C. § 1251(a) (2012) (congressional declaration of goals and policy).

36 33 U.S.C. § 1311(a).

37 33 U.S.C. § 1344(a).

38 *See id.*

39 David A. Wilkinson, *Using Section 404(c) of the Clean Water Act to Prohibit the Unacceptable Environmental Impacts of the Proposed Pebble Mine*, 2 SEATTLE J. ENVTL. L. 181, 194 (2012); Blumm & Mering, *supra* note 23, at 218–19 (observing that "the 404 program has been controversial since its inception in 1972" in part because "requiring federal permits for discharges of dredged or fill material in all waters of the United States involves the Corps in both regulating developments affecting navigation and also protecting ecologically significant" areas, which "often have high development value").

40 Wilkinson, *supra* note 39, at 194. It is beyond serious dispute that a project in the watershed will impact jurisdictional waters. Indeed, as discussed in Part II.A, it is estimated that over 1000 acres would be destroyed.

41 40 C.F.R. pt. 230 (2017).

42 Blumm & Mering, *supra* note 23, at 222, 236 (section 404 permits "may be issued on a case-by-case basis (individual permits) for proposed discharges, or on a nationwide or regional basis (general permits) for authorizing the discharge of certain activities that have only minor individual and cumulative adverse effects."); 33 C.F.R. pt. 320e (Corps regulations).

whenever [it determines 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."[43]

EPA has promulgated a regulation to implement CWA § 404(c) that specifically addresses the timing when EPA may exercise its authority under the section. It states that not only can EPA

> exercise a veto over the specification by the U.S. Army Corps of Engineers . . . of a site for the discharge of dredged or fill material [but EPA] may also prohibit the specification of a site under CWA section 404(c) with regard to any existing or potential disposal site before a permit application has been submitted to or approved by the Corps or a state.[44]

The CWA § 404(c) regulations also establish the procedure by which EPA can arrive at a final determination to prohibit discharges into a given area. If an EPA Regional Administrator (RA) "has reason to believe . . . that an 'unacceptable adverse effect' could result from the . . . specification of a defined area for the disposal of dredged or filled material," the RA may commence the CWA § 404(c) process by first notifying the appropriate District Engineer of the Corps, the owner of the site, and "the applicant, if any" that EPA intends to issue a public notice of a proposed determination.[45]

"If within 15 days, it has not been demonstrated to the satisfaction of the Regional Administrator that no unacceptable adverse effect(s) will occur" the RA must publish notice of a proposed determination.[46] The RA then must "provide a comment period of not less than 30 or more than 60 days" and can provide public hearings when in the public interest.[47] He or she must "either withdraw the proposed recommendation or prepare a recommended determination" within either 30 days of the public hearing, "or

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[43] 33 U.S.C. § 1344(c) (2012); 33 C.F.R. pts. 320–332 (2017) (Corps regulations). Subsection(c) of the statute reads in full as follows:

> 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 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.

[44] 40 C.F.R. § 231.1(a) (2017).

[45] 40 C.F.R. § 231.3(a)(1).

[46] 40 C.F.R. § 231.3(a)(2).

[47] 40 C.F.R. § 231.4(a) (providing regulatory dates that can be extended for good cause); 40 C.F.R. § 231.8 (stating "the Administrator or the Regional Administrator may, upon a showing of good cause, extend the time requirements in these regulations").

if no hearing was held, within 15 days after the expiration of the comment period."[48]

If the RA decides to withdraw the proposed determination, he or she must inform the EPA Administrator, who then has the option to review the RA's decision to withdraw the proposed determination.[49] And should the EPA Administrator elect not to review the RA's decision to withdraw the proposed determination, the RA is required to give notice that the proposed determination is being withdrawn and "[s]uch notice shall constitute final agency action."[50]

But if the EPA Administrator chooses to review either the RA's decision to withdraw the proposed determination or the RA's recommended determination "to prohibit, deny, restrict, or withdraw" the use for specification, the EPA Administrator has thirty days to "initiate consultation with the Chief of Engineers, the owner of record, and, where applicable, the State and the applicant, if any."[51]

In turn, these parties have "15 days to notify the Administrator of their intent to take corrective action to prevent an unacceptable adverse effect(s)."[52] Following such notification, the EPA Administrator then has sixty days to "make a final determination affirming, modifying, or rescinding the recommended determination."[53] Parties may then challenge the EPA's Administrator's decision because the regulations state that the "final determination constitutes final agency action under section 404(c) of the [CWA]."[54]

Thus, although ultimately subject to judicial review, EPA wields a "veto" power over a proposed project under review by the Corps—or even a "pre-emptive" veto for areas not yet authorized as a discharge site by the Corps. And although EPA has used its CWA § 404(c) veto power "infrequently," it now has taken center stage with respect to mining development in the Bristol Bay watershed.[55]

III. BACKGROUND OF THE PROPOSED MINING DEVELOPMENT AND THE PROPOSED PROTECTION OF THE BRISTOL BAY WATERSHED

This Part first summarizes the proposed mining development in the Bristol Bay watershed by the PLP. Next, it explains the proposed protection of the watershed under CWA § 404(c) that is currently underway. This will set up the analysis of EPA's options under CWA § 404(c) in Part IV.

48 40 C.F.R. § 231.5(a).

49 *Id.*

50 40 C.F.R. § 231.5(c)(1) (providing the EPA Administrator ten days in which to decide to review RA recommendations.).

51 40 C.F.R. §§ 231.5(d)(2), 231.6.

52 40 C.F.R. § 231.6.

53 *Id.*

54 *Id.*

55 Blumm & Mering, *supra* note 23, at 218, 223.

A. The Pebble Deposit and the Proposed Pebble Project

In December 2017, PLP submitted an application to develop "the Pebble copper-gold-molybdenum porphyry deposit (Pebble Deposit) as an open-pit mine, with associated infrastructure."[56] "The Pebble Deposit is located under rolling, permafrost-free terrain in the Iliamna region of southwest Alaska, approximately 200 miles southwest of Anchorage and 60 miles west of Cook Inlet."[57] The site is located in the headwaters of tributaries to both the Nushagak and Kvichak Rivers.[58]

The Pebble Project is situated on lands owned by the State of Alaska, which according to PLP, the state acquired from the federal government in 1974 "specifically for its mineral development potential."[59] The existence of the deposit was discovered in 1988 by Cominco Alaska, which acquired development rights and began investigating the deposit for several years until it discontinued work on the project in 1997.[60] The Pebble claim was subsequently optioned by Northern Dynasty Minerals Ltd., which began further exploring the size of the deposit raising its estimates from one billion to four billion tons of extractable material.[61]

Following an "extensive environmental baseline data collection program commenced in [2004], as well as geotechnical investigation and preliminary engineering studies," Northern Dynasty exercised its option to obtain the rights to the Deposit in 2005.[62] As a result of subsequent exploration and drilling over the next seven years, the Deposit became "one of the most significant copper-gold-molybdenum deposits discovered."[63] PLP (which was a partnership later formed by Northern Dynasty) continued to develop the Project and "[t]o date, more than one million feet of drilling has been conducted on the Pebble Deposit."[64]

PLP estimates that the Pebble Deposit contains 7.1 billion tons of mineral resources which is comprised of approximately "57 billion pounds of copper, 70 million ounces of gold, 344 million ounces of silver, and 3.46 billion pounds of molybdenum."[65] Over its twenty-year life span, the Project

56 THE PEBBLE P'SHIP, THE PEBBLE PROJECT: DEPARTMENT OF THE ARMY APPLICATION FOR PERMIT (POA-2017-271): ATTACHMENT D—PROJECT DESCRIPTION 1 (2017), https://perma.cc/HA3A-SLDN.

57 *Id.* at 4. The project would be situated approximately seventeen miles west and northwest of the villages of Iliamna, Newhalen, and Nondalton. *Id.* In addition to the mine, PLP proposes "a 188-mile natural gas pipeline from the Kenai Peninsula across Cook Inlet" to mine in order to power the site, as well as a transportation corridor, which includes an eighteen-mile crossing of Lake Iliamna and an Amakdedori Port facility on the western shore of Cook Inlet. *Id.* at 2, 5.

58 *Id.* at 4.

59 THE PEBBLE P'SHIP, *supra* note 56, at 2.

60 *See id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* at 14. In addition, significant quantities of silver, palladium, and rhenium are present. *Id.*

is expected to yield approximately 1.1 billion tons of mineralized material, totaling "6.7 billion pounds of copper, 353 pounds of molybdenum, and 11 million ounces of gold."[66]

Unsurprisingly, the magnitude of the Pebble Project is breathtaking. Although it will be "a conventional drill, blast, truck, and shovel operation," it will have a final pit dimension of approximately 6,500 feet in length, 5,500 feet in width, and 1,350 to 1,750 feet in depth.[67] According to its permitting documents, the Pebble Mine will have "an average mining rate of 90 million tons per year and an overall stripping ratio of 0.1 ton of waste per ton of mineralized material."[68] PLP estimates a project life of twenty years with a total of 1.5 billion tons of material mined over the life of the Project "of which approximately 1.3 billion tons is ore and 200 million tons is waste."[69] With an estimated mining rate of about ninety million tons per year, PLP estimates an annual copper-gold concentrate production of 600,000 tons and an annual molybdenum concentration production of 15,000 tons.[70] It will have a "[f]inal tailings storage facility capacity of 1.1 billion tons" and a "[p]eak low-grade ore storage capacity of 330 million tons."[71]

B. The Bristol Bay Assessment and the 2014 Proposed Determination

The exploration of the Pebble Deposit by PLP was well-known to the local communities, especially the native Alaskan tribes in the area. Over the years, most expressed their opposition to the potential development and its potential impact on the Bristol Bay region. Then, on May 2, 2010, six of the federally recognized Bristol Bay tribal governments petitioned EPA to invoke its authority under CWA § 404(c) to protect the area.[72] In response, other groups requested that EPA not take action under CWA § 404(c) at this time and offered reasons, such as additional time was necessary to comprehend the impacts of resource development in the watershed and therefore EPA should wait until an application to develop the area was

66 *Id.*

67 *Id.* at 29. The Project will be operated by "two 12-hour shifts per day for 365 days per year" and will also require a power source with a generating capacity of approximately 250 megawatts. *Id.* at 1. PLP puts the employment potential of the entire project at "850 to 2,000 personnel for operations and construction." *Id.* at 2.

68 *Id.* at 29.

69 *Id.* at 1; Letter from James Fueg, Pebble Limited P'ship, to Shane McCoy, U.S. Army Corps of Engineers (May 11, 2018), https://www.pebbleprojecteis.com/files/05_11_2018_Pebble_Project_Updates_to_Proposed_Project.pdf.

70 THE PEBBLE P'SHIP, *supra* note 56, at 29, 34.

71 *Id.* at 1.

72 PROPOSED DETERMINATION, *supra* note 23, at 2-4. https://perma.cc/K56U-T7QN. The tribes were the Nondalton Tribal Council, New Stuyahok Traditional Council, Levelock Village Council, Ekwok Village Council, Curyung Tribal Council, and Koliganek Village Council. *Id.* Later, three more federally recognized Bristol Bay tribal governments joined the request: Native Village of Ekuk, Village of Clark's Point, and Twin Hills Village Council. *Id.*

submitted, which would require a comprehensive "environmental impact statement" under the federal National Environmental Policy Act.[73]

In response, EPA began a scientific assessment (Bristol Bay Assessment or BBA) in order to evaluate the impact of large-scale mining projects on water resources, particularly the Bristol Bay's salmon fisheries.[74] It explained that its purpose in conducting the assessment was to

> [1)] characterize the biological and mineral resources of the Bristol Bay watershed; [2)] increase understanding of the potential impacts of large-scale mining, in terms of both day-to-day operations and potential accidents and failures, on the region's fish resources; and [3)] inform future decisions, by government agencies and others, related to protecting and maintaining the chemical, physical, and biological integrity of the watershed.[75]

Following its Guidelines for Ecological Risk Assessment, EPA compiled background information on the Bristol Bay region paying special attention to the Nushagak and Kvichak River watersheds.[76] Of principal interest were the "the ecology of Pacific salmon and other fishes; the ecology of relevant wildlife species; mining and mitigation, particularly in terms of porphyry copper mining; potential risks to aquatic systems due to road and pipeline crossings; fishery economics; and Alaska Native culture."[77]

EPA requested public input on its first draft assessment in May 2012 and received approximately 230,000 comments by the end of the sixty-day comment period.[78] In June 2012, it also held seven public comment meetings in Alaska and one in Seattle, which were attended by about 2,000 people.[79] EPA's second draft assessment was released in April 2013 and received approximately 890,000 comments.[80] Then, in March 2014, EPA posted its Response to Public Comments documents for both BBA drafts.[81] Based on public comments, as well as an extensive peer review process, EPA released the Final BBA in January 2014.[82]

On February 28, 2014, EPA announced that it would begin the CWA § 404(c) process according to the process set forth in its regulations by "review[ing] potential adverse environmental effects of discharges of dredged or fill material associated with mining the Pebble deposit."[83] It also notified PLP, the Alaska District U.S. Army Corps of Engineers, the State of

73 *Id.* at 2-5. These groups included PLP, former-Governor Parnell of Alaska, four federally recognized Bristol Bay tribal governments (Newhalen Tribal Council, South Naknek Tribal Council, King Salmon Traditional Village Council, and Iliamna Village Council), and other tribal organizations outside of the Bristol Bay region. *See id.*

74 *Id.*

75 *Id.* at 2-6.

76 *Id.*

77 *Id.* at 2-6, 2-7.

78 *Id.* at 2-9.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* at 2-10.

83 *Id.* at 2-11.

Alaska and "provid[ed] them an opportunity to submit information, for the record, to demonstrate either that no unacceptable adverse effects on aquatic resources would result from discharges associated with mining the Pebble deposit or that actions could be taken to prevent such unacceptable adverse effects."[84]

EPA considered the additional information submitted by PLP and the State of Alaska, but "was not satisfied that no unacceptable adverse effect could occur, or that adequate corrective action could be taken to prevent an unacceptable adverse effect."[85] It therefore published its CWA § 404(c) Proposed Determination in July 2014.[86]

C. PLP's Challenges to the 2014 Proposed Determination

Following EPA's publication of the proposed determination, PLP brought suit in the United States District Court for the District of Alaska.[87] PLP's central claim was that EPA was not permitted to commence the CWA § 404(c) process absent a pending CWA § 404 permit application.[88] The court, however, dismissed the case because "the decision to initiate § 404(c) proceedings . . . cannot be considered final agency action."[89] The Ninth Circuit affirmed the district court in a brief unpublished opinion agreeing that because there was no final agency action, "the federal courts lack subject matter jurisdiction."[90]

PLP also alleged in separate suit before the same federal district court judge that EPA "established and utilized three groups that . . . constituted Federal Advisory Committees" in violation of the Federal Advisory Committee Act (FACA) in order to skew EPA's scientific assessment and conclusions of the Bristol Bay CWA § 404(c) proposed determination.[91] More specifically, PLP alleged that EPA had created "(i) the Anti-Mine Coalition FAC; (ii) the Anti-Mine Scientists FAC; and the Anti-Mine Assessment Team FAC" to assist EPA to "furtively and unlawfully . . . preemptively . . . prohibit mining of the Pebble Deposit."[92] PLP subsequently moved for a preliminary

84 *Id.*; *see* 40 C.F.R. pt. 231 (2017).

85 PROPOSED DETERMINATION, *supra* note 23, at 2-14.

86 *Id.* at 2-14; *see* Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. 42,314, 42,315 (July 21, 2014).

87 Blumm & Mering, *supra* note 23, at 299.

88 Pebble Ltd. P'ship v. U. S. Envtl. Prot. Agency, 155 F. Supp. 3d 1000, 1004 (D. Alaska 2014), *aff'd sub nom.* Pebble Ltd. P'ship v. U.S. Envtl. Prot. Agency, 604 F. App'x 623 (9th Cir. 2015) (alleging that "defendants exceeded their authority by initiating § 404(c) proceedings in the absence of a permit application"). PLP also "allege[d] that defendants' initiation of § 404(c) proceedings violates the Alaska Statehood Act and The Cook Inlet Exchange Legislation." *Id.* at 1004–05.

89 *Id.* at 1007.

90 *Pebble Ltd. P'ship*, 604 F. App'x at 625.

91 Complaint at 1, *Pebble Ltd. P'ship*, 155 F. Supp. 3d 1000 (D. Alaska 2014), No. 3:14-cv-00171-HRH.

92 *Id.* at 3.

injunction (PI) to restrain EPA from moving forward with the CWA § 404(c) determination.[93]

On November 25, 2014, after extensive briefing and a hearing, the court found that although it was "unpersuaded that plaintiff [was] likely to succeed on the merits of its contentions with respect to the 'anti-mine coalition' and the 'anti-mine scientists,'" it was "persuaded that plaintiff demonstrated a fair chance of success on the merits—at least raising a question serious enough to justify litigation—with respect to the 'anti-mine assessment team.'"[94] The court noted that the team had been "composed primarily of the 'Bristol Bay Assessment Team,' a subgroup of which is the 'Inter-Governmental Technical Team.'"[95] It enjoined EPA "from taking any action in furtherance of a decision to veto a possible Pebble (Bristol Bay area) mine project pursuant to § 404(c) of the CWA until after the court has ruled on the merits of plaintiff's complaint" and prohibited EPA from "issu[ing] any recommendation on a pending proposed determination regarding the Pebble Mine project."[96]

D. The Settlement Between PLP and EPA

Following the entering of the preliminary injunction in 2014, the parties continued to aggressively litigate the case.[97] But after the Trump administration took control, EPA began negotiations with PLP to settle the pending lawsuits involving the Pebble Deposit. A media outlet reported that on May 1, 2017, within hours of a meeting with the PLP Chief Executive Officer Tom Collier, EPA Administrator Pruitt instructed his staff to withdraw the CWA § 404(c) Proposed Determination for the Pebble Deposit.[98] Shortly thereafter, on May 12, 2017, the parties reached a settlement and jointly moved the court to dissolve the PI and to dismiss the case with prejudice.[99] On that same day, the court entered a one-page order doing that.[100]

The settlement agreement (PLP Settlement), which was not provided to the court, purports to place a temporal limit on EPA's ability to move forward with the CWA § 404(c) process for the Pebble Deposit for between

93 Pl. Mot. for Prelim. Inj., at 1, *Pebble Ltd. P'ship*, 155 F. Supp. 3d 1000 (D. Alaska 2014), No. 3:14-cv-00171-HRH.

94 Order on Pl. Mot. for Prelim. Inj., at 1–2, *Pebble Ltd. P'ship*, 155 F. Supp. 3d 1000 (D. Alaska 2014), No. 3:14-cv-00171-HRH.

95 *Id.* at 2.

96 *Id.* at 3.

97 *See Settlement Agreement with Pebble Limited Partnership*, U.S. ENVTL. PROTECTION AGENCY (May 11, 2017), https://perma.cc/VR6S-ELJ2.

98 Griffin et al., *supra* note 7.

99 Joint Mot. to Dissolve the Prelim. Inj. and Stipulation to Dismiss with Prejudice, at 1, *Pebble Ltd. P'ship*, 155 F. Supp. 3d 1000 (D. Alaska 2014), No. 3:14-cv-00171-HRH; *see also* FED. R. CIV. P. 41(a)(2), 65(b)(4).

100 Order on Joint Mot. to Dissolve the Prelim. Inj. and Dismiss Case with Prejudice, at 1, *Pebble Ltd. P'ship*, 155 F. Supp. 3d 1000 (D. Alaska 2014) No. 3:14-cv-00171-HRH.

two and a half to four years.[101] It prohibits the RA from forwarding a signed Recommended Determination to the Administrator for at least thirty months from the date of the PLP Settlement.[102] Moreover, if PLP applies for a CWA § 404 permit for the Pebble Project within thirty months of the date of the settlement (which PLP did), the RA cannot forward a signed Recommended Determination to the Administrator "until EPA publishes a notice in the Federal Register of the final Environmental Impact Statement (EIS) regarding PLP's Permit Application . . . or 48 months from the Effective Date of the Settlement Agreement, whichever is earlier in time."[103] It also requires EPA to "propose to withdraw the Proposed Determination" within 60 days after the dissolution" of the PI.[104]

IV. VETO-ING THE VETO?

On July 19, 2017, EPA commenced an action that proposed to withdraw its 2014 Proposed Determination for the Pebble Deposit.[105] EPA stated that the action was "to afford the public an opportunity to comment on the rationale for the proposed withdrawal."[106] When the three-month comment period closed on October 17, 2017, over 950,000 comments had been submitted.[107] Opponents of mineral development in the Bristol Bay watershed were certain that EPA would, in fact, withdraw the 2014 Proposed Development. But on February 28, 2018, in what was regarded as a surprising development, EPA indicated that it was temporarily suspending its proposal.[108]

Although EPA's 2017 action to withdraw the 2014 Proposed Determination is no longer ongoing, EPA further indicated that it "intends at a future time to solicit public comment on what further steps, if any, the Agency should take under Section 404(c) . . . in light of the permit application [for the Pebble Mine] that has now been submitted to the U.S. Army Corps of Engineers."[109] Accordingly, this Part assesses the steps now available to EPA and proposes that principles of administrative, constitutional, and environmental law demonstrate that EPA's options are now limited with respect to allowing the Pebble Project to move forward.

101 *Settlement Agreement with Pebble Limited Partnership*, *supra* note 97.

102 *Id.* at 3–4.

103 *Id.*

104 *Id.*

105 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123, 33,213 (July 19, 2017).

106 *Id.*

107 *See Proposed Determination to Restrict Use of Area as Disposal Site: Pebble Deposit Area, Southwest Alaska; Proposed Withdrawal*, REGULATIONS.GOV, https://perma.cc/BYC2-KKBT (last visited Nov. 25, 2018) (indicating 959,713 comments were received on EPA's Proposed Determination).

108 *See* Notification of Decision Not to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 83 Fed. Reg. 8,668 (Feb. 28, 2018).

109 *Id.*

First, this Part analyzes the crucial issue of whether and how EPA can withdraw its 2014 Proposed Determination, if it recommences the process to do so.[110] It sets forth reasons why EPA is constrained to withdraw the 2014 Proposed Determination on the same basis that it proposed in 2017.[111] For instance, in 2014, EPA relied on factors wholly outside of its statutory duty to determine whether a discharge into the area would result in unacceptable adverse environmental impacts.[112]

Second, this Part also details how there are persuasive legal and policy arguments that can be challenged in court to move forward with the CWA § 404(c) process for the Pebble Deposit. Although EPA nominally has discretionary authority to invoke its power under CWA § 404(c), its action (or inaction) is nonetheless subject to judicial oversight.[113] In addition, once it begins the CWA § 404(c) process by issuing a proposed determination, there are convincing reasons why it must either finalize it or adequately justify its withdrawal.

In addition, although EPA might attempt to justify its refusal to complete the CWA § 404(c) process based on its 2017 settlement with PLP, the agreement should not be an impediment. Likewise, former EPA Administrator Pruitt's new policy addressing EPA's veto power under CWA § 404(c) does not bar EPA from acting now to complete the CWA § 404(c) Determination for the Pebble Deposit. Finally, this Part concludes that based on the findings and conclusions in its 2014 Proposed Determination, as well as applicable legal standards, EPA, when challenged in the future, will be hard pressed to justify not finalizing its 2014 Proposed Determination to protect the Bristol Bay watershed.

A. Can EPA Withdraw the 2014 Proposed Determination?

On July 19, 2017, EPA moved forward with its proposal to withdraw its 2014 Proposed Determination for the Pebble Deposit.[114] It seems likely that in commencing its 2017 action, EPA intended to expeditiously pave the way to formally withdraw its proposed determination. Although it has now temporarily suspended that action, EPA indicated that it "intends at a future

110 *See id.* at 8,669 (discussing comments regarding whether EPA can withdraw the 2014 Proposed Determination).

111 *Id.*

112 EPA relied on multiple factors: extent of streams, wetlands, lakes, ponds, adjacent watersheds in the region, loss of fish habitat, fragmentation of streams wetlands, or other aquatic resources, risks to the health and sustainability ecosystem of "one of the greatest wild salmon fisheries left in the world," the total miles of habit lost associated with different stages of mine, and stream flow changes which would result in major changes to the ecosystem. PROPOSED DETERMINATION, *supra* note 23, at ES-2–ES-4.

113 *See* All. to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 606 F. Supp. 2d 121, 140 (D.D.C. 2009).

114 *See* Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123 (July 19, 2017).

time to solicit public comment on what further steps, if any, the Agency should take under § 404(c)."[115]

Given the policy preferences expressed by EPA, it also is likely that EPA will propose again to withdraw the 2014 Proposed Determination. And a future attempt by EPA to withdraw its prior determination will surely be challenged. This Part explores some key legal issue that will be presented in a challenge, including the issue of whether EPA attempts to withdraw the 2014 Proposed Determination on the same basis that it did in 2017.

1. Judicial review and the applicable standard of review for EPA's withdrawal of the 2014 Proposed Determination

A threshold question is whether any such withdrawal by EPA of its 2014 Proposed Determination would be subject to judicial review. EPA commenced its withdrawal consistent with its CWA § 404(c) regulations, which among other requirements, specifies that once a RA "decides to withdraw the proposed determination, he [or she] shall promptly notify the Administrator . . . who shall have 10 days from receipt of such notice to notify the Regional Administrator of his [or her] intent to review such withdrawal."[116] In addition, the RA must give notice to "all persons who commented on the proposed determination or participated at the hearing" and also grants the right to "submit timely written recommendations concerning review."[117]

EPA's regulations instruct that if the Administrator chooses to review such decision, the RA must provide to the Administrator the administrative record and then the Administrator proceeds to review the RA's decision pursuant to the regulations.[118] The regulations further state that "[w]here there is review of a withdrawal of proposed determination or review of a recommended determination . . . final agency action does not occur until the Administrator makes a final determination."[119] On the other hand, if the Administrator does "not notify [the RA], the [RA] shall give notice at the withdrawal of the proposed determination . . . [and] [s]uch notice shall constitute final agency action."[120] These provisions therefore unambiguously make an action to either withdraw or finalize a proposed determination subject to judicial review as final agency action.[121]

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115 Notification of Decision Not to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 83 Fed. Reg. at 8,668.

116 40 C.F.R. § 231.5(c); *see* Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. at 33,124.

117 *Id.*

118 40 C.F.R. § 231.5(c)(2). *See generally* 40 C.F.R. § 231.5(e) (criteria for administrative record); 40 C.F.R. § 231.6 (outlining the procedure for reviewing RA's decision to withdraw the proposed determination).

119 40 C.F.R. § 231.5(c)(2).

120 40 C.F.R. § 231.5(c)(1); *see also* 40 C.F.R. 231.3(d) (prescribing the RA's method of notice).

121 *See* 40 C.F.R. § 231.5(c)(1) (stating that notice by RA constitutes "final agency action," which is a trigger for judicial review under the APA); 40 C.F.R. § 231.5(c)(2) (same).

Any such review would be under the Administrative Procedure Act[122] (APA), which, as applicable here, instructs courts to

> hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law.[123]

Thus, although EPA may choose to withdraw a proposed CWA § 404(c) determination, such an action would be constrained primarily by the APA's arbitrary, capricious, abuse of discretion or otherwise not in accordance with law standard.[124]

The United States Supreme Court has elaborated on this standard of review in the context of a rule that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute."[125] Thus, the standard "is narrow and a court is not to substitute its judgment for that of the agency."[126] With that said, the Court also has warned that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[127]

2. Withdrawing the 2014 Proposed Determination

In EPA's 2017 proposal to withdraw its 2014 Proposed Determination, EPA asserted that it was doing so based on "the settlement agreement [with PLP] and policy direction from EPA's Administrator."[128] EPA explained that "[t]he proposal reflects the Administrator's decision to provide PLP with additional time to submit a permit application to the Army Corps and potentially allow the Army Corps permitting process to initiate without having an open and unresolved section 404(c) review."[129] In its view, the

122 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

123 5 U.S.C. § 706 (2012).

124 In the context of a rulemaking, circuit courts have found "that an agency's termination of an ongoing rulemaking is judicially reviewable." *See, e.g.*, Williams Nat. Gas Co. v. Fed. Energy Regulatory Comm'n, 872 F.2d 438, 443 (D.C. Cir. 1989) ("[I]n light of the strong presumption of reviewability, discretionary decisions not to adopt rules are reviewable where, as here, the agency has in fact held a rulemaking proceeding and compiled a record narrowly focused on the particular rules suggested but not adopted." (quoting Envtl. Def. Fund v. Envtl. Prot. Agency, 852 F.2d 1316 (D.C. Cir. 1988), *cert denied*, 489 U.S. 1011 (1989)).

125 Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 42 (1983).

126 *Id.* at 43.

127 *Id.* (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

128 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123, 33,124 (July 19, 2017).

129 *Id.* EPA noted that, "[w]hile the pendency of a section 404(c) review would not preclude PLP from submitting an application and the Army Corps from reviewing that application, as noted above, the Army Corps could not have issued a permit while a section 404(c) process was ongoing." *Id.*

"withdrawal of the Proposed Determination would remove any uncertainty, real or perceived, about PLP's ability to submit a permit application and have that permit application reviewed."[130]

Applying the principles set forth by the Supreme Court explained above, a court is unlikely to accept EPA proffered reasons to withdraw the 2014 Proposed Determination if EPA attempts to rely on these same reasons in a subsequent proposal to withdraw the 2014 Proposed Determination. For instance, in reviewing EPA's explanation for its withdrawal, the reviewing court would be required to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[131]

Here, Congress established the parameters by which EPA determines whether or not to "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site" under CWA § 404(c).[132] Section 404(c) of the CWA mandates that such determinations be made "whenever [the EPA Administrator] determines . . . 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."[133]

In turn, the EPA regulations that implement CWA § 404(c) echo these parameters.[134] Indeed, EPA has stated that the "guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources."[135] These environmental considerations apply with equal force in the context of determining whether to withdraw a proposed determination under CWA § 404(c) as when EPA assesses whether to make a final determination.

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130 *Id.* EPA also asserted that

> [b]ecause the Agency retains the right under the settlement agreement to ultimately exercise the full extent of its discretion under section 404(c), including the discretion to act prior to any potential Army Corps authorization of discharge of dredged or fill material associated with mining the Pebble deposit, the Agency believes that withdrawing the Proposed Determination now, while allowing the factual record regarding any forthcoming permit application to develop, is appropriate at this time for this particular matter.

Id.

131 *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting Bowman Transp. Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974)).

132 CWA, 33 U.S.C. § 1344(c) (2012).

133 *Id.*

134 EPA regulations state:

> *Unacceptable adverse effect* means impact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies (including surface or ground water) or significant loss of or damage to fisheries, shellfishing, or wildlife habitat or recreation areas. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the section 404(b)(1) guidelines (40 CFR part 230).

40 C.F.R. § 231.2(e) (1995).

135 40 C.F.R. § 230.1(d) (CWA § 404(b)(1) Guidelines).

Devoid in CWA § 404(c) and during the consideration of past CWA § 404(c) actions are the impact of voluntary settlements and an unspecified "policy direction."[136] As the Supreme Court explained, an agency action

> would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[137]

In its 2017 Proposal to Withdraw the 2014 Proposed Determination, EPA has done just that.[138]

In addition, the Court has made clear that a "reviewing court should not attempt itself to make up for such deficiencies" and that it "may not supply a reasoned basis for the agency's action that the agency itself has not given."[139] But it noted that courts can "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[140] In its 2017 proposal to withdraw, however, EPA was very clear on the reasons for its withdrawal so that no path need be elucidated.[141] It stated that it was "only seeking public comment on whether to withdraw the July 2014 Proposed Determination" based on the new "policy direction" and the PLP settlement.[142] Moreover, it specified that it was not soliciting comments on other matters at the heart of the CWA § 404(c) analysis, such as "science or technical information underlying the Proposed Determination."[143]

If EPA relies, like it did in 2017, on these reasons as a basis for withdrawing the 2014 Proposed Determination, the reviewing court would therefore reject EPA's attempt. This conclusion is further supported by a 2009 CWA case addressing whether EPA must invoke its § 404(c) authority.[144] The court in *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers* (*Mattaponi I*) held that "the Administrator's exercise of discretion must relate to whether the permit will 'have an unacceptable

136 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123, 33,124 (July 19, 2017).

137 Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983).

138 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. at 33,123.

139 *Motor Vehicle Mfrs.s Ass'n*, 463 U.S. at 43 (citing Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947)).

140 *Id.* (quoting Bowman Transp. Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 286 (1974)).

141 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. at 33,124.

142 *Id.*

143 *Id.* EPA also stated it was "not soliciting comment on the proposed restrictions" to its § 404(c) authority contained in the settlement agreement. *Id.*

144 All. to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 606 F. Supp. 2d 121, 140 (D.D.C. 2009).

adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas.'"[145]

At issue in *Mattaponi I* was a challenge to a CWA § 404 permit issued to the city of Newport News, Virginia.[146] The project was projected to "flood over 1,500 acres of land and require the excavation, fill, destruction and flooding of approximately 403 acres of freshwater wetlands and the elimination of 21 miles of free-flowing streams" in King William County, Virginia.[147]

After EPA did not veto the permit at issue under CWA § 404(c), plaintiffs asserted that one of the reasons that EPA's failure to do so was arbitrary and capricious was because "the Regional Administrator's declaration shows that his decision not to veto the permit was not based on any analysis of the environmental effects of granting the permit."[148] The court agreed.[149]

The court first recognized that CWA § 404(c), "[t]o be sure . . . grants the Administrator 'a degree of discretion.'"[150] Such discretion, however, it further found, was "not a roving license to ignore the statutory text."[151] In other words, in determining whether to exercise its CWA § 404(c) authority, which in that case would have been to "veto" the recently issued permit by the Corps, the court held that EPA's discretion must be tied to whether the project permit will "have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas."[152]

After applying this standard, the court determined that EPA's decision not to invoke its CWA § 404(c) authority was based "on a whole range of other reasons completely divorced from the statutory text."[153] For example, EPA had found that analyzing the issue and initiating a notice and comment period "would divert resources" and also that because there had been "extensive public process provided by the Corps, another such process would be unlikely to add any new information."[154]

The court also faulted EPA for not looking to see whether the project complied with the CWA § 404(b) Guidelines, which "EPA's regulations specifically direct him to do in determining whether issuance of a permit would result in unacceptable adverse effects."[155] The court concluded that

145 *Id.* (quoting CWA, 33 U.S.C. § 1344(c) (2012)).

146 *Id.* at 125.

147 *Id.* at 126.

148 *Id.* at 139.

149 *Id.* at 140.

150 *Id.* (quoting Her Majesty the Queen in Right of Ont. v. U.S. Envtl. Prot. Agency, 912 F.2d 1525, 1533 (D.C. Cir. 1990)).

151 *Id.* (quoting Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 533 (2007)).

152 *Id.* (quoting CWA, 33 U.S.C. § 1344(c) (2012)).

153 *Id.*

154 *Id.* The court, however, did make clear that it was not holding that "EPA must always undergo notice and comment to make a determination that issuance of a permit will or will not have an unacceptable adverse effect," but rather this determination must be made based on whether there is unacceptable adverse effects. *Id.* at 141 n.8.

155 *Id.* at 141 (citing 40 C.F.R § 231.2(e) (1995)).

EPA's reliance "on factors which Congress has not intended [it] to consider," rendered its decision arbitrary and capricious.[156]

Similar to *Mattaponi I*, when deciding whether to withdraw the 2014 Proposed Determination, EPA must base the decision on adverse environmental effects and not on reasons that are extraneous to the statutory text of CWA § 404(c), such as policy preferences or representations that EPA made in a voluntary settlement agreement.[157] EPA's statement in its 2017 proposal that "[t]oday's action is the agreed-upon initiation" specified in the PLP Agreement and that its proposal was "[p]ursuant to the settlement agreement" was fatal to its legitimacy.[158]

In addition, although it is unclear what precise "policy direction" EPA referred to in its 2017 proposal to withdraw the 2014 Proposed Determination, EPA stated that PLP should have "additional time to submit a permit application" to the Corps, which might potentially allow the Corps' permitting process to begin without having a pending CWA § 404(c) process.[159] In EPA's view, withdrawal of the 2014 Proposed Determination would therefore "remove any uncertainty, real or perceived, about PLP's ability to submit a permit application and have that permit application reviewed."[160]

But as a group asserted during the public comment period, allowing PLP extra time was neither supported by the record, nor related to the CWA § 404(c) criteria.[161] Likewise, EPA's reliance on "uncertainty" with respect to PLP's permit application fails to provide a legitimate basis under the CWA and is belied by EPA's own statements in its proposal.[162] EPA recognized that "the pendency of a section 404(c) review would not preclude PLP from submitting an application and [would not preclude] the Army Corps from reviewing that application."[163]

Finally, EPA's limitation of the scope of the public comment period to these reasons further shows why a future court would likely reject EPA's withdrawal on this basis. EPA made clear that it "is not soliciting comment on the proposed restrictions or on science or technical information underlying the Proposed Determination."[164] Simply stated, its

156 *Id.* at 141 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983)).

157 33 U.S.C. § 1344(c).

158 *See* Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123, 33,123–24 (July 19, 2017).

159 *Id.* at 33,124.

160 *Id.*

161 Letter from BBNC to EPA Adm'r Scott Pruitt & Acting Reg'l Adm'r Michelle Pirzadeh, *supra* note 18 ("PLP does not need additional time to submit a permit application" and that "PLP has made promises since at least far back as November 2004 that a permit application is imminent, six years before the 404(c) petitions were sent to EPA and ten years before EPA issued its Proposed Determination.").

162 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. at 33,124.

163 *Id.* Although it is true that the "Corps could not have . . . issued a final decision on a permit application while a § 404(c) process remained open and unresolved" under 33 C.F.R. § 323.6(b), EPA did not cite this as a reason for "uncertainty." *Id.* at 33,123–24.

164 *Id.* at 33,214.

acknowledgment shows how EPA used "divorced reasoning" from CWA § 404(c) and that any such future decision to withdraw the 2014 Proposed Determination on this basis would be found arbitrary and capricious.[165]

In sum, this is not to say, of course, that EPA can never withdraw a proposed determination under CWA § 404(c). The cases above establish, however, that any such decision by EPA must be based on EPA's determination whether discharges in the area will "have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas."[166] But, as set forth in Part IV.B, once EPA has issued a proposed determination, its discretion to either withdraw that determination or to not finalize the determination is more limited.[167]

B. Can EPA Be Compelled to Continue the CWA § 404(c) Process?

In its Notice suspending its proposal to withdraw the 2014 Proposed Determination, EPA stated that it "intends at a future time to solicit public comment on what further steps, if any, the Agency should take under Section 404(c)."[168] Although EPA gave no indication on when this would take place, it is fair to assume that such an action will take place in the near future because, as EPA recognized, the Corps cannot issue "a final decision on a permit application while a section 404(c) process remain[s] open and unresolved."[169]

During such time, EPA will surely receive comments imploring EPA to invoke its discretion to finalize the 2014 Proposed Determination. In response, EPA might point to the PLP Settlement, as well as a recent memorandum by former Administrator Pruitt addressing EPA's CWA § 404(c) regulations as legitimate reasons for EPA to not move forward now with the process.[170] This Subpart explores these arguments.

As an initial matter, there are compelling arguments that even though the CWA § 404(c) appears to be a discretionary process that is not subject to judicial review, EPA can in fact be challenged in court to move forward with CWA § 404(c) process. Next, it is questionable whether the PLP Settlement's provisions that restrict EPA's authority to proceed with a final determination are enforceable. Likewise, former Administrator Pruitt's recent memorandum on proposed revisions to EPA's CWA § 404(c) regulations

165 *See Mattaponi I*, 606 F. Supp. 2d 121, 141 (D.D.C. 2009) ("Because the Regional Administrator 'relied on factors which Congress has not intended [him] to consider,' his decision was arbitrary and capricious.'").

166 *See, e.g.*, *id.* at 140 (quoting CWA, 33 U.S.C. § 1344(c) (2012)).

167 *See* discussion *infra* notes 189–90, 192 and accompanying text.

168 Notification of Decision Not to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 83 Fed. Reg. 8,668 (Feb. 28, 2018).

169 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123 (citing 33 C.F.R. § 323.6(b) (2017)).

170 *See Settlement Agreement with Pebble Limited Partnership*, *supra* note 97, at 3–4; Memorandum from Scott Pruitt, EPA Adm'r, to EPA's Gen. Counsel, Assistant Adm'r, and Reg'l Adm'rs (June 26, 2018), https://perma.cc/6AY6-LZ2J.

does not affect EPA's current ability to move forward with the § 404(c) process.[171] Finally, EPA's factual findings in the 2014 proposed determination, as well as applicable legal principles, suggest that it will be difficult for EPA to justify not finalizing its 2014 determination.

1. Challengers can bring suit against EPA to force EPA to continue with the CWA § 404(c) process

At first blush, the language in CWA § 404(c) suggests that the determination as to whether and how EPA uses its authority to prohibit disposal into a particular area is a purely discretionary act that is not subject to juridical review.[172] After all, the text of CWA § 404(c) states that EPA "*is authorized* to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site" if EPA *determines* a discharge will "have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas."[173] But a careful analysis of the APA, the statutory and regulatory scheme of the CWA, recent case law, and the current procedural posture of the Pebble Deposit's CWA § 404(c) action support two independent bases that challengers can raise to bring suit to force EPA to move forward with the process to finalize the 2014 Proposed Determination.

First, because EPA has missed its deadline to decide whether to issue a final determination or withdraw its proposed determination, its failure to act should afford challengers the right to compel further action by EPA. According to EPA's CWA § 404(c) regulations, the RA is required to "either withdraw the proposed recommendation or prepare a recommended determination" within either thirty days of the public hearing, "or if no hearing was held, within 15 days after the expiration of the comment period."[174] Although EPA extended this deadline for "good cause" and then suspended work on the CWA § 404(c) process due to a court order, EPA's basis for not continuing the process evaporated upon the dissolution of the preliminary injunction by the United States District Court for the District of Alaska in 2017.[175]

When it issued its original Notice of Proposed Determination for the Pebble Deposit on July 21, 2014, EPA indicated that the public comment period would end on September 19, 2014.[176] EPA also held seven hearings throughout southwest Alaska during the week of August 11, 2014.[177] This would have required the RA to either withdraw the proposed determination

171 *See* Memorandum from Scott Pruitt, EPA Adm'r to EPA's Gen. Counsel, Assistant Adm'r, and Reg'l Adm'rs, *supra* note 170.

172 *See e.g.*, 40 C.F.R. § 231.1(a) (2017).

173 33 U.S.C. § 1344(c) (2012) (emphasis added).

174 40 C.F.R. § 231.5(a).

175 *See* Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123, 33,124 (July 19, 2017).

176 Proposed Determination to Restrict the Use of an Area as a Disposal Site, 79 Fed. Reg. 42,314 (July 21, 2014).

177 *Id.*

or issue a recommended determination by the end of the comment period.[178] EPA announced on September 11, 2014, however, that it would extend that deadline.[179] It noted that "as of September 11, 2014, EPA had received over 155,000 written comments . . . [and that] EPA expects that number will be significantly larger at the conclusion of the comment period on September 19, 2014."[180] Therefore, in order "[t]o allow full consideration of the extensive administrative record, including public comments," EPA determined that "good cause" existed to extend the time period to "either withdraw the Proposed Determination or to prepare the Recommended Determination . . . until no later than February 4, 2015."[181]

About one week prior to that deadline, on January 29, 2015, EPA issued a "Notice of Status Update on the Proposed Determination for the Pebble Deposit Area, Southwest Alaska."[182] It noted that as a result of the litigation with PLP, the federal court on November 25, 2014, "issued a preliminary injunction that requires EPA to stop all work connected to the [CWA §] 404(c) proceeding, including reviewing and considering public comments."[183] Based on that order, EPA indicated that it was "complying with the court's order and as such is not taking any steps to withdraw the Proposed Determination or to prepare a Recommended Determination *while the preliminary injunction is in place*."[184]

However, on May 12, 2017, the Alaskan District Court dissolved the injunction, thereby putting EPA "back on the clock" with respect to its duty to continue the CWA § 404(c) process.[185] No matter how one recalculates EPA's new deadline based on the dissolution of the PI, EPA is at least one year overdue. Indeed, EPA conceded as much in its 2017 proposal to withdraw the 2014 Proposed Determination when it stated "[p]rior to the preliminary injunction, the next step in the section 404(c) process would have been for EPA Region 10 to either forward a Recommended Determination to EPA Headquarters or to withdraw the Proposed

178 40 C.F.R. § 231.5(a).

179 Announcement to Extend the Period to Evaluate Public Comments Received on the Proposed Determination for the Pebble Deposit Area, Southwest Alaska, 79 Fed. Reg. 56,365 (Sept. 19, 2014). The action was signed on September 11, 2014, but it was not published in the Federal Register until September 19, 2014. *Id.*

180 *Id.*

181 *Id.*

182 Notice of Status Update on the Proposed Determination for the Pebble Deposit Area, Southwest Alaska, 80 Fed. Reg. 4,917 (Jan. 29, 2015).

183 *Id.* The order enjoined EPA "from taking any action in furtherance of a decision to veto a possible Pebble (Bristol Bay area) mine project pursuant to Section 404(c) of the Clean Water Act until after the court has ruled on the merits of plaintiff's complaint," and EPA was prohibited from issuing "any recommendation on a pending proposed determination regarding the Pebble Mine project." Order on Pl. Mot. for Prelim. Inj., at 3, *Pebble Ltd. P'ship*, 155 F. Supp. 3d 1000 (D. Alaska 2014), No. 3:14-cv-00171-HRH.

184 Notice of Status Update on the Proposed Determination for the Pebble Deposit Area, Southwest Alaska, 80 Fed. Reg. at 4,917 (emphasis added).

185 Order on Joint Mot. to Dissolve the Prelim. Inj. and Dismiss Case with Prejudice, at 1, *Pebble Ltd. P'ship*, 155 F. Supp. 3d 1000 (D. Alaska 2014) No. 3:14-cv-00171-HRH.

Determination pursuant to 40 CFR 231.5(a)."[186] Thus, it appears clear that EPA can be compelled under § 706(1) of the APA, which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed," to move forward with the CWA section 404(c) process.[187]

Second, EPA's decision on whether to invoke its authority under CWA § 404(c) is subject to judicial review under APA § 706(2)(A).[188] Pertinent here, § 706(2)(A) instructs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[189] As stated above, judicial review of discretionary action—and in particular the decision by an agency *not* to act—is often precluded by APA § 701(a)(2), which makes the APA inapplicable to "agency action . . . committed to agency discretion by law."[190] Indeed, some courts have found in the CWA § 404(c) context that EPA's decision not to invoke its authority is not subject to challenge because of that APA provision.[191] In those cases, the courts compared EPA's discretion under CWA § 404(c) to that of an agency's refusal to take enforcement action applying the Supreme Court's guidance set forth in *Heckler v. Chaney*.[192]

A more persuasive analysis of this issue, however, is found in the 2007 case of *Alliance To Save Mattaponi v. U.S. Army Corps of Engineers* (*Mattaponi II*).[193] In that case, the court found that plaintiffs could bring suit against EPA for its failure to exercise its CWA § 404(c) authority.[194] As discussed in Part IV.A.2, the case involved a challenge by environmental groups and the Mattaponi Tribe to a CWA § 404 permit issued to the City of Newport News, Virginia for the construction of a 1,526-acre reservoir in King William County, Virginia.[195] After the plaintiffs moved to amend their complaints to, among other things, add a claim against EPA under the APA, the United States, as federal defendants, moved to dismiss all claims against

186 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123 (July 19, 2017).

187 APA, 5 U.S.C. § 706(1) (2012).

188 *See* 5 U.S.C. § 706(2)(A).

189 *Id.*

190 5 U.S.C. § 701(a)(2) (2012).

191 Wilkinson, *supra* note 39, at 197–98 (discussing Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs (*P.E.A.C.H.*), 915 F. Supp. 378 (N.D. Ga. 1995) and Cascade Conservation League v. M.A. Segale, Inc., 921 F. Supp. 692 (W.D. Wash. 1996)).

192 *See P.E.A.C.H*, 915 F. Supp. at 381 (stating that its interpretation of "authorize" was endorsed by the Supreme Court, "albeit in a different context," in Heckler v. Chaney, 470 U.S. 821, 835 (1985)); *Cascade Conservation League*, 921 F. Supp. at 699 ("An agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." (quoting *Heckler*, 470 U.S. at 831)).

193 515 F. Supp. 2d 1 (D.D.C. 2007)

194 *Id.* at 9.

195 *Id.* at 3. The original plaintiffs were the Alliance to Save The Mattaponi, The Chesapeake Bay Foundation, Inc., and the Sierra Club, Virginia Chapter. The Mattaponi Indian Tribe and its Chief, Carl T. Lone Eagle Custalow subsequently intervened as plaintiffs. *Id.*

EPA, and moved the court to deny the motion for leave to amend the complaints.[196]

The *Mattaponi II* court analyzed whether EPA could be sued under the APA for its failure to exercise its CWA § 404(c) authority, which in that case would have been to veto the permit issued by the Corps to the City of Newport News.[197] More specifically, it explored "whether APA claims against EPA are barred because the agency's decisions regarding CWA permits are 'committed to agency discretion by law'"[198] and "whether the fact that plaintiffs challenge EPA's alleged *inaction* in failing to veto the permit (as opposed to challenging some affirmative action) precludes review pursuant to APA."[199]

The court found that EPA's failure to exercise its CWA § 404(c) authority did not fall within the APA's ambit of "agency action . . . committed to agency discretion by law," which would preclude review.[200] This exception to judicial review, the court found, is reserved to situations where the underlying law is "drawn in such broad terms that in a given case there is no law to apply,"[201] so that "the court would have no meaningful standard against which to judge the agency's exercise of discretion."[202] Thus, contrary to other courts, the *Mattaponi II* court recognized that not every provision that grants discretion to an agency, including EPA's CWA § 404(c) authority, is shielded from review.[203]

As the Supreme Court has concluded, this construction of APA § 701(a)(2) makes good sense.[204] To find otherwise would create a tension with the APA's central standard of review under APA § 706(2)(A), which requires courts to overturn agency action that is "arbitrary, capricious, [or] an *abuse of discretion*."[205] In other words, it cannot be that "action committed to agency discretion can be unreviewable [under APA § 701(a)(2)] and yet courts still can review agency actions for abuse of that discretion" under APA § 706(2)(A).[206]

As would apply with respect to the Pebble Project, the *Mattaponi II* court concluded that EPA's action was reviewable under the APA and would be judged by the standard set forth in CWA § 404(c) that EPA should act "whenever [it] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies,

196 *Id.*

197 *Id.* at 6–7.

198 *Id.* at 7 (quoting APA, 5 U.S.C. § 701(a)(2) (2012)).

199 *Id.* (emphasis added).

200 *See id.* at 8 (quoting 5 U.S.C. § 701(a)(2)).

201 *Id.* at 7–8 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)).

202 *Id.* at 8 (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)).

203 *Compare id.* at 7–8 (finding agency inaction reviewable because Congress had provided a standard of law), *with Heckler*, 470 U.S. at 837–38 (holding that agency inaction, unless otherwise specified by Congress, fits within the exception to judicial review).

204 *Heckler*, 470 U.S. at 832–33.

205 5 U.S.C. § 706(2)(A) (emphasis added); *Heckler*, 470 U.S. at 829.

206 *Heckler*, 470 U.S. at 829 (citing 5 K. Davis, Administrative Law § 28:6 (1984); Raol Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 58 (1965)).

shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[207]

The *Mattaponi II* court next addressed the related question of whether a challenge to EPA's inaction for not exercising its CWA § 404(c) authority provides a separate basis for finding that "agency action is committed to agency discretion by law."[208] The court distinguished the situation presented in a CWA § 404(c) from that of "a prosecutor's decision not to prosecute—a decision which 'has traditionally been committed to agency discretion.'"[209] Like in *Mattaponi II*, the inaction presented by EPA's failure to move forward with the Pebble Deposit CWA § 404(c) process does not "involve to the same extent the difficult decisions regarding manpower and allocation of resources that inform enforcement decisions and give rise to the hesitancy to undertake judicial review."[210] Moreover, the court noted that the crucial justification for withholding review remains whether "the court would have no meaningful standard against which to judge the agency's exercise of discretion," which, as here, the court has.[211] These arguments apply *a fortiori* where EPA has already initiated the CWA § 404(c) process and issued a proposed determination because, as set forth in more detail in Part III.B.4, EPA has already set forth that a CWA § 404(c) action is warranted.[212]

In sum, regardless of whether APA review is available to "compel agency action unlawfully withheld or unreasonably delayed" under § 706(1) based on EPA's failure to follow the steps and deadline pursuant to its regulations, or whether EPA's failure to continue the § 404(c) process is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under § 706(2)(A), challengers should have an avenue for APA review.

2. It is questionable whether the PLP Settlement's restrictions on EPA's authority to proceed with a final determination are enforceable

In a future action by EPA "to solicit public comment on what further steps, if any, the Agency should take under Section 404(c)" or during a lawsuit brought to compel EPA to finalize the 2014 Proposed Determination, EPA will likely attempt to rely on its 2017 Settlement Agreement with PLP as a basis for not moving forward expeditiously.[213] However, certain terms in the PLP Settlement that purport to cabin EPA's authority under CWA § 404(c) might not be enforceable because a court could find that EPA lacks the authority to bind future executive action in this manner.[214]

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207 CWA, 33 U.S.C. § 1344(c) (2012); *Mattaponi II*, 515 F. Supp. 2d 1, 4 (D.D.C. 2007).

208 *Mattaponi II*, 515 F. Supp. 2d at 8.

209 *Id.* (quoting *Heckler*, 470 U.S. at 832).

210 *Id.*

211 *Id.* (quoting *Heckler*, 470 U.S. at 830).

212 *See supra* notes 83, 86 and accompanying text.

213 *See* Notification of Decision Not to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 83 Fed. Reg. 8,668 (Feb. 28, 2018).

214 *Settlement Agreement with Pebble Limited Partnership*, *supra* note 97, at 3–5.

As set forth in Part III.D, the PLP Settlement states that EPA agrees to not exercise its discretion regarding CWA § 404(c) review for a certain period of time that spans years.[215] More specifically, EPA states that

> the settlement agreement limits the Agency's ability to move forward with a signed Recommended Determination if PLP submits a permit application to the Army Corps within 30 months from the date of settlement . . . [and i]f PLP files a permit application during that time, EPA may not move forward with a signed Recommended Determination for 48 months from the effective date of the settlement agreement or following issuance of a final environmental impact statement on PLP's permit application, whichever comes first.[216]

EPA's settlement under these terms, however, does not conform to EPA's own regulations governing the CWA § 404(c) process (as set forth above) and, more importantly, with policy directives of the United States Department of Justice (DOJ) with respect to settlements that limit the future exercise of executive branch authority.[217] These policies reflect DOJ's sensitivity that certain settlements that attempt to constrain future agency discretion are subject to both statutory and constitutional limitations.[218] In particular, DOJ explained that such constitutional restrictions

> inhere in (1) the constitutional limitations that are rooted in both the general executive power that Article II of the Constitution vests in the President and that may constrain, in extreme cases, the executive branch's authority to adopt enforceable limitations on the future exercise of congressionally conferred executive discretion, as well as the specific discretionary powers that Article II confers directly upon the President, such as the power to recommend legislation to Congress and (2) the restrictions that Article III imposes on the power of federal courts to enforce certain types of executive branch settlements that are otherwise constitutionally permissible.[219]

To address these concerns, then-Attorney General Meese issued a policy in 1986, pursuant to the litigation and settlement authority vested to him by Congress.[220] The policy prohibits DOJ from entering into certain consent decrees and settlements, and further requires the Attorney General, the Deputy Attorney General, or the Associate Attorney General, to, among other things, approve settlement agreements that "divest discretionary power granted by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights

215 *See supra* notes 101–03 and accompanying text.

216 Proposal to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site, 82 Fed. Reg. 33,123, 33,123–24 (July 19, 2017); *see also Settlement Agreement with Pebble Limited Partnership*, *supra* note 97, at 3–4.

217 *See* Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126 (1999).

218 *Id.* at 141.

219 *Id.* at 140.

220 *Id.* at 126 (discussing Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys 3, 4 (Mar. 13, 1986)).

of third parties."[221] The PLP Settlement terms in question fit neatly into this category.

In 1999, DOJ's Office of Legal Counsel (OLC) analyzed the 1986 Policy and issued a memorandum, titled "Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion" (OLC Authority Memo).[222] OLC concluded that although "there is no per se constitutional prohibition against settlements of this type that divest discretionary power granted by Congress," such agreements "will be determined by the statutes that govern the executive branch agency on behalf of which the settlement would be entered."[223] Therefore, of prime importance for an analysis of the PLP Settlement terms are the statutory and regulatory provisions of the CWA and the APA.

The OLC Authority Memo found that "actions taken pursuant to settlements are not inherently immune from APA review."[224] In other words, "[t]o the extent that a discretion-limiting settlement is subject to APA review . . . it must conform to the substantive and procedural requirements that the APA imposes upon agency action outside the settlement context."[225] Although the EPA pledged in the settlement *not* to act under CWA § 404(c), the APA still provides a meaningful check on whether EPA is abusing its discretion.[226] And, unlike situations where courts have accepted a "limited infringement on the Agency's discretion," which involved instances where the settlement "leaves the outcome of the process . . . to the Agency's discretion," the prohibition for EPA to exercise its CWA § 404(c) authority where the statutory criteria have been met would appear to constitute a significant—and impermissible—infringement.[227]

3. EPA's recent memorandum on CWA § 404(c) does not affect its current ability to move forward with the 2014 Proposed Determination

On June 26, 2018, then-EPA Administrator Pruitt issued a memorandum proposing a change to the regulations that govern EPA's authority under CWA § 404(c).[228] In his view, when EPA uses its veto authority "preemptively

221 *Id.* at 126–27; *see also* 28 C.F.R. § 0.160(d) (2015) ("Any proposed settlement, regardless of amount or circumstances, must be referred to the Deputy Attorney General or the Associate Attorney General . . . (3) When the proposed settlement converts into a mandatory duty the otherwise discretionary authority of a department or agency to promulgate, revise, or rescind regulations.").

222 Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, *supra* note 217, at 126.

223 *Id.* at 129.

224 *Id.* at 164.

225 *Id.*

226 *See* JARED P. COLE, CONG. RESEARCH SERV., AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 1 (2014).

227 Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, *supra* note 217, at 166 (discussing Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983)).

228 Memorandum from Scott Pruitt, EPA Adm'r to EPA's Gen. Counsel, Assistant Adm'r, and Reg'l Adm'rs, *supra* note 170.

and without the benefit of the fully developed factual record or attempts to reimagine its authority in ways that diverge from statutory text or congressional intent, it diverts its attention" from EPA's core mission to protect public health and the environment, as well as to provide regulatory certainty.[229]

He specifically used the 2014 Proposed Determination for the Pebble Deposit as an example of the previous administration's overreach based on the fact that EPA "applies the same procedures notwithstanding whether a permit application has been filed or a permit issued."[230] Former Administrator Pruitt expressed concern that "the mere potential of the EPA's use of its section 404(c) authority before or after the permitting process could influence investment decisions and chill economic growth by short-circuiting the permitting process."[231] The short timeframes set forth in the regulations for issuing a final determination, in his view, might result in a determination "without the benefit of full information about the project for which a permit is sought, the proposed disposal areas and the environmental impacts of those activities."[232]

To address these concerns, then-Administrator Pruitt directed EPA's Office of Water to propose changes to EPA's CWA § 404(c) regulations.[233] He required the proposed changes to 1) eliminate EPA's authority to begin a CWA § 404(c) before a permit application has been filed, 2) eliminate EPA's authority to begin a CWA § 404(c) process after a permit has been granted by the Corps, 3) require a RA to seek approval from EPA Headquarters prior to beginning a CWA § 404(c) process, 4) require a RA to "review and consider the finding of a final Environmental Assessment or Environmental Impact Statement prepared by the Corps or a state before preparing and publishing notice of a proposed determination," and 5) require EPA to publish and seek comment on a final determination prior to the determination being effective.[234]

The present impact of the memorandum on the Pebble Deposit's CWA § 404(c) process is negligible. As an initial matter, Pruitt resigned effective July 6, 2018, and Deputy Administrator Andrew Wheeler assumed the role of Acting EPA Administrator on July 7, 2018.[235] It is therefore unclear whether Wheeler will withdraw the June 26, 2018 policy directive. Recent media reports suggest, however, that EPA continues to work on the changes.[236]

229 *See id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *See READ: Scott Pruitt's Resignation Letter*, CNN (July 5, 2018), https://perma.cc/ST28-W7ZE; *Calendar for Andrew Wheeler, Acting Administrator*, ENVTL. PROTECTION AGENCY, https://perma.cc/8AJ3-VD9P (last visited Nov. 25, 2018).

236 As of August 17, 2018, however, "[a]n EPA spokeswoman confirmed after publication that the agency is 'continuing its work to evaluate updates to the regulations governing EPA's role in the permitting process under section 404c of the [CWA] in order to increase predictability and provide regulatory certainty for landowners, investors, businesses and other

Congress has also taken note of the issue. For example, Senator Tom Carper and Representative Peter DeFazio requested that Acting Administrator Wheeler "immediately and publicly" withdraw Pruitt's memorandum.[237] In their view, the proposed changes conflict with "the will of Congress" because CWA § 404(c) "provides EPA with clear authority" to act whenever EPA determines a discharge would have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.[238] It could be that either Congress or EPA will step in to stop the proposed changes.

In any event, by the policy's own terms, the memorandum does not prohibit EPA from continuing to use its CWA § 404(c) authority.[239] Rather, it directs the Office of Water to begin the process to change its existing CWA § 404(c) regulations.[240] With respect to timing, the Office of Water has until late December 2018, to propose new regulations to the Office of Management and Budget and any such proposal would be followed by a notice and comment period.[241] Thus, a final regulation establishing these changes is not likely until late 2019, and it certainly will be challenged, which would potentially take years to resolve, assuming a new administration (or Administrator) does not rescind the proposal before judicial review is complete.

4. EPA's factual findings in the 2014 Proposed Determination and applicable legal principles demonstrate that it will be difficult for EPA to justify not finalizing that determination

It seems unlikely that EPA will be able to withdraw its 2014 Proposed Determination on the same basis that it attempted to do so in 2017.[242] It also seems clear that EPA can be challenged to continue the CWA § 404(c) process for the Pebble Deposit.[243] What, then, are EPA's options moving forward? If EPA is challenged for its inaction, can EPA justify not finalizing the 2014 Proposed Determination? This section offers some brief concluding observations and tentative conclusions on these complicated legal, technical, and scientific questions.

Based on the extensive factual findings in the 2014 Proposed Determination and the applicable legal standards that courts would apply in the circumstances presented here, it appears that EPA will be hard-pressed

stakeholders.'" Ariel Wittenberg & Dylan Brown, *EPA Drafting Rule to Curb its Veto Power — Sources*, E&E NEWS (Aug. 17, 2018), https://perma.cc/C9BS-56NN.

237 Letter from Peter DeFazio, Ranking Member, Comm. on Transp. & Infrastructure, U.S. House of Representatives, & Tom Carper, Ranking Member, Comm. on Env't & Pub. Works, U.S. Senate, to Andrew Wheeler, Acting Adm'r, EPA (July 19, 2018), https://perma.cc/K25P-2NGS.

238 *Id.*

239 *See* Memorandum from Scott Pruitt, EPA Adm'r to EPA's Gen. Counsel, Assistant Adm'r, and Reg'l Adm'rs, *supra* note 170.

240 *Id.*

241 *Id.*

242 *See* discussion *supra* Part IV.A.

243 *See* discussion *supra* Part IV.B.1.

to justify that protection of the Bristol Bay watershed under CWA § 404(c) is not required—even under the exceedingly deferential "arbitrary and capricious" standard. As an initial legal matter, EPA's ability to change course with respect to protecting the Bristol Bay watershed is now constrained by the 2014 Proposed Determination. Although a proposed determination under CWA § 404(c) does not, of course, irreversibly commit EPA to a certain result (such as finalizing the determination), it does provide a basis for a court to review whether any such departure from the initial course of action is arbitrary and capricious. The Supreme Court, in the context of agency rulemaking, has cautioned that an agency rule typically would be found to be arbitrary and capricious if the agency sets forth an explanation for its decision that "runs counter to the evidence before the agency."[244] It has warned that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. . . . And of course the agency must show that there are good reasons for the new policy."[245]

Although these principles do not require the agency to prove that its new view is necessarily better than its previous position, in circumstances "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy," the Court has found "[i]t would be arbitrary or capricious to ignore such matters."[246] This heightened burden, however, is not "demanded by the mere fact of policy change" such a burden is required because the agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[247]

Applying these principles to the EPA's decision not to move forward with a CWA § 404(b) Final Determination for the Pebble Deposit, EPA will be strained to justify the absence of unacceptable adverse effects in the Bristol Bay watershed from mineral development of the Pebble Deposit. To be sure, the analysis of effects is more challenging in the situation here because EPA proposed and analyzed its preemptive veto in the absence of an issued permit for a project. And because a Pebble Deposit permit has not been finalized it might be easier for EPA to dispute the existence of an unacceptable adverse effect. However, the facts and conclusions established in the 2014 Proposed Determination and the Bristol Bay Assessment, the watershed's unique topography and the parameters under which mining would need to be undertaken in the Bristol Bay watershed make the likely unacceptable adverse effects possible to assess and difficult to refute.

For example, in its 2014 Proposed Determination, EPA outlined its statutory obligation to exercise its CWA § 404(c) authority "whenever" it determines "that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and

244 Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983).

245 Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (emphasis in original).

246 *Id.*

247 *Id.* at 515–16.

fishery areas (including spawning and breeding areas), wildlife, or recreational areas."[248] It noted that Congress had "specifically direct[ed] EPA to consider adverse effects from the discharge of dredged or fill material to fishery areas, including spawning and breeding areas."[249]

With respect to the key term "unacceptable adverse effect," it noted that although CWA § 404(c) does not define that term, EPA's regulation does:

> Impact 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. In evaluating the unacceptability of such impacts, consideration should be given to the relevant portions of the Section 404(b)(1) Guidelines.[250]

It also stated that EPA's longstanding view of the term "unacceptable . . . refers to the significance of the adverse effect" and in the past it had characterized an unacceptable adverse effect as "'a large impact' and 'one that the aquatic and wetland ecosystem cannot afford.'"[251] Given these past interpretations and definitions, as well as the breadth of these terms, it will be challenging for EPA to "walk back" its previous conclusions to a reviewing court when determining whether any unacceptable adverse effect would result.

In its 2014 Proposed Determination, EPA analyzed whether an unacceptable adverse effect could occur as a result of mining development in the Bristol Bay watershed by assessing impacts of different mine scenarios ranked on the amount of ore that would be processed over a certain number of years.[252] Based on PLP's statements to regulators and investors, EPA at the time considered that the future development of the Pebble Deposit would likely be in the range of 2.0 and 6.5 billion tons of ore.[253] EPA, however, decided to evaluate the impacts of a significantly smaller mine, called the .25 stage mine, which was "based on the worldwide median size porphyry copper deposit."[254] Thus, EPA studied the following:

- Pebble 0.25 stage mine (approximately 0.25 billion tons of ore over 20 years)

248 PROPOSED DETERMINATION, *supra* note 23, at 4-1; CWA, 33 U.S.C. § 1344(c) (2012).

249 PROPOSED DETERMINATION, *supra* note 23, at 4-1.

250 *Id.*; 40 C.F.R § 231.2(e) (2014).

251 PROPOSED DETERMINATION, *supra* note 23, at 4-1 (citing 44 Fed. Reg. 58,078 (Oct. 9, 1979)).

252 *See id.* at ES-3.

253 *See id.* EPA's estimate of the size of PLP's mine was high; PLP's 2017 permit application estimates a total of 1.5 billion tons of material mined over the project's life of 20 years. *See* THE PEBBLE P'SHIP, THE PEBBLE PROJECT: DEPARTMENT OF THE ARMY APPLICATION FOR PERMIT POA-2017-271 14 (2017), https://perma.cc/ECL6-UUA6. Nonetheless, it is six times larger than the .25 stage mine.

254 PROPOSED DETERMINATION, *supra* note 23, at ES-3.

- Pebble 2.0 stage mine (approximately 2.0 billion tons of ore over 25 years)

- Pebble 6.5 stage mine (approximately 6.5 billion tons of ore over 78 years)[255]

It then comprehensively studied the "direct and secondary effects" of discharges from each mine stage on fishery areas.[256] For instance, the direct effects resulting from a Pebble 0.25 stage mine included "stream and other aquatic resource losses within the footprints of the tailings dam, the waste rock pile, and the mine pit" and the secondary effects included:

> • "Elimination of streams and wetlands due to drowning by the tailings impoundment.
>
> • Dewatering of streams and other aquatic resources due to pumping of groundwater from the mine pit.
>
> • Fragmentation of aquatic resources due to the placement of the mine pit, waste rock pile, or [Tailings Storage Facility].
>
> • Degradation of downstream fish habitat due to streamflow alterations resulting from water capture, withdrawal, storage, treatment, or release at the mine site.
>
> • Degradation of downstream fish habitat due to the loss of important inputs such as nutrients and groundwater from upstream aquatic resources."[257]

In the Bristol Bay Assessment, which EPA relied on in the 2014 Proposed Determination, EPA estimated the 0.25 stage mine in the watershed would cause habitat losses of approximately twenty-four miles of streams which represented five miles of streams "with documented anadromous fish occurrence" and almost twenty miles of tributaries of such streams.[258] And the total habitat losses would be upward of 1,200 acres "of wetlands, lakes, and ponds, of which approximately 1,100 acres . . . are contiguous with either streams with documented anadromous fish occurrence or tributaries of those streams."[259]

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255 *Id.*

256 *Id.* at 4-3. EPA defined "direct effects" as "impacts on aquatic resources within the footprint of the discharge of dredged or fill material" and "secondary effects" as effects that "are associated with the discharge of dredged or fill material, but do not result from actual placement of this material." *Id.*

257 *Id.*

258 *Id.* at ES-4.

259 *Id.* Although EPA concentrated on the unacceptable adverse effects on fishery areas, it also evaluated "other potential Section 404(c) resources such as wildlife habitat and recreation." *Id.* at 4-2. Naturally, the impacts of the larger stage mines were greater. *Id.* at 2-15–17.

To place these losses into perspective, EPA projected that such stream losses would approximate 350 football fields and wetland losses of approximately 900 football fields.[260] It concluded that the destruction of some of these individual waters, which "support local, unique populations" of salmon would jeopardize "the genetic diversity of Bristol Bay's salmon populations," which is "crucial to the stability of the overall Bristol Bay salmon fisheries."[261] EPA also found that these losses not only "would reverberate downstream, depriving downstream fish habitats of nutrients, groundwater inputs, and other subsidies from lost upstream aquatic resource," but "would result in streamflow alterations in excess of 20% in more than 9 miles," which "would result in major changes in ecosystem structure and function and would reduce both the extent and quality of fish habitat downstream of the mine to a significant degree."[262]

Based on these conclusions documenting "unacceptable adverse effects" even at the .25 stage mine level, it is unlikely that EPA could muster sufficient arguments to supply a "reasoned explanation [to a reviewing court] . . . for disregarding facts and circumstances that underlay or were engendered" by the prior proposed determination to overcome even the very deferential "arbitrary and capricious" standard.[263] Moreover, any argument that EPA sets forth would also have to be confined to "the relevant factors" found in CWA § 404(c).[264]

Perhaps the sole basis that EPA might use to justify not moving forward with a final determination centers on a finding that sufficient compensatory mitigation measures could be employed in the area to offset the unacceptable impacts on streams, wetlands, and fish that would occur.[265] But even this justification is similarly constrained by EPA's earlier conclusions. For instance, EPA has already found that there are "significant challenges regarding the potential efficacy, applicability, and sustainability of compensation measures."[266]

In canvassing "[n]early all of the existing peer-reviewed literature reviews evaluating the effectiveness of stream restoration and rehabilitation projects," EPA observed that the view was unanimous that a "majority of restoration projects either are never measured for effectiveness or do not meet their restoration objectives."[267] Likewise, EPA found that PLP's proposed compensation methods, which include placement of instream structures, stream fertilization, and construction of spawning channels, were not suitable for the Bristol Bay watershed because such measures "[1)] have

260 *Id.* at ES-4.

261 *Id.*

262 *Id.*

263 *See* Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515–16 (2009).

264 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut., 463 U.S. 29, 42–43 (1983) (holding that agencies must provide an explanation for their decisions based on "relevant factors"); *Mattaponi I*, 606 F. Supp. 2d 121, 140 (D.D.C. 2009) (holding that discretion under CWA § 404(c) requires an explanation based on "unacceptable adverse effects").

265 *See* PROPOSED DETERMINATION, *supra* note 23, at 2-13–14.

266 *Id.* at 2-13.

267 *Id.* at 2-14.

typically had only variable, local, or temporary effects; [2)] were designed for use in degraded watersheds; or [3)] resulted in adverse, unintended consequences."[268]

Finally, EPA has studied—and already questioned—whether adequate compensation measures are even available to address expected impacts from development of the Pebble Deposit.[269] Because compensatory mitigation generally focuses on restoring and enhancing degraded waters, such measures are not necessary or appropriate in the Bristol Bay watershed because there is little dispute that the waters "are already among the most productive in the world."[270] Therefore, EPA concluded that it would be unlikely that artificial action to mitigate within the area "could improve upon the high-quality natural environment in the Bristol Bay watershed that nature has created and that has thus far been preserved."[271] In sum, legal commentators who have studied this precise issue have been even more blunt: "[I]t is neither reasonable nor practicable to offset the impacts of mining the Pebble deposit through the use of compensatory mitigation."[272]

V. CONCLUSION

The vitality of the Bristol Bay watershed lies in the balance due to proposed development of the Pebble Deposit. CWA § 404(c) provides the most effective basis for ensuring the watershed's survival. But if EPA's policy views remain in place over the next decade, litigation will be the best prospect to protect the area. To that end, EPA's initiation of the CWA § 404(c) process provides a solid foundation and building block for successfully forcing EPA to limit the development of the Pebble Deposit.

To be sure, challengers face a long battle to convince a court to force EPA to finalize its 2014 Proposed Determination. But based on the current procedural posture of the CWA § 404(c) process for the Pebble Deposit, convincing arguments can be made that EPA cannot withdraw its proposed determination without articulating a basis that adequately justifies that no unacceptable adverse effects will result from mineral development in the area. Moreover, judicial intervention should be available to compel EPA to continue the CWA § 404(c) process for the Pebble Deposit. And based on the comprehensive analysis already performed by EPA on the Pebble Deposit, which led to the 2014 Proposed Determination, EPA faces nearly insurmountable arguments to justify its refusal to invoke its CWA § 404(c) authority to protect the Bristol Bay watershed.

268 *Id.*

269 *Id.* at 2-13–14.

270 *Id.* at 2-13.

271 *Id.*

272 Thomas G. Yocom & Rebecca L. Bernard, *Mitigation of Wetland Impacts from Large-Scale Hardrock Mining in Bristol Bay Watersheds*, 3 SEATTLE J. ENVTL. L. 71, 100 (2013).