



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Resuming consideration of the withdrawal of the July 2014 Proposed Determination to restrict use of the Pebble Deposit Area as a disposal site

**FROM:** Matthew Z. Leopold, General Counsel

**TO:** Chris Hladick, Regional Administrator, Region 10

As you know, in July 2014, Region 10 issued a Proposed Determination under section 404(c) of the Clean Water Act (CWA) to restrict the use of the Pebble Deposit Area as a disposal site for dredged or fill material associated with mining the deposit. Five years later, the 2014 Proposed Determination is still pending, but there have been several other significant developments over that time including: a lawsuit challenging EPA's process for developing the 2014 Proposed Determination and a related settlement, a permit application to the U.S. Army Corps of Engineers (Corps), additional direction from the former EPA Administrator in January 2018, and a lengthy Draft Environmental Impact Statement (DEIS) which is currently subject to public comment. EPA must at all times be committed to advancing a fair and predictable process on matters it is considering for both the project proponents and the public in a manner that allows views to be presented and adequately considered. We must also maintain fidelity to our core mission of protecting human health and the environment while working within the statutory authority provided to the Agency by Congress. We should also attempt to discharge our obligations in a manner that reduces confusion and uncertainty surrounding arcane regulatory processes.

In keeping with these principles and for the reasons that follow, I am directing Region 10 to resume its consideration whether to withdraw the 2014 Proposed Determination to restrict the use of the Pebble Deposit Area as a disposal site under CWA section 404(c). The Region should also reconsider its previous statement that it would seek additional public comment on the 2014 Proposed Determination, in light of the ample opportunity for public comment previously provided and the current public comment opportunity on the more than 1,400-page DEIS. In addition, as the Region works to finalize EPA's Clean Water Act section 404 comment letter to the Corps on the proposed mining project, which is due on July 1, 2019, Region 10 should invoke the elevation procedures established between EPA and the Army if the factual analysis leads to a conclusion that the requisite standard is satisfied. The elevation procedure is the

longstanding, well-understood, and agreed-upon process that the agencies have utilized for more than two decades if a project as proposed may result in substantial and unacceptable impacts to aquatic resources of national importance. As you know, the elevation procedure is exercised in conjunction with a pending permit application, not preemptively, and when circumstances justify, it allows EPA to continue to work with the Corps as it considers public comments and develops the Record of Decision on the permit.

By making an up-or-down decision on the 2014 Proposed Determination and by invoking these well-understood elevation procedures, Region 10 can discharge its obligations under the law and take two significant steps toward restoring normal order to this protracted and uncertain process.

### *I. Background*

EPA agreed to initiate a process to propose to withdraw the 2014 Proposed Determination as part of a May 2017 settlement agreement with the Pebble Limited Partnership (PLP), whose subsidiaries own the mineral claims to the Pebble deposit. The settlement agreement resolved PLP's outstanding legal claims against EPA. In July 2017, Region 10 published a proposal to withdraw the 2014 Proposed Determination. The notice opened a three-month-long public comment period, during which EPA held two public hearings in the watershed area and consulted with federally recognized tribal governments and Alaska Native Claims Settlement Act Regional and Village Corporations with lands in the watershed.

In December 2017, PLP submitted a CWA section 404 permit application to the Corps that proposes to develop a mine in the Pebble Deposit Area. The Corps then invited relevant federal and state agencies, including EPA, to cooperate on the development of the DEIS under the National Environmental Policy Act ("NEPA"). The Corps released a DEIS for public comment in February 2019; this public comment period is scheduled to close on July 1, 2019.

On January 26, 2018, EPA announced that it was "suspending th[e] withdrawal proceeding and leaving the [2014] Proposed Determination in place" at that time. EPA's decision neither terminated the withdrawal proceeding nor advanced to the next stage of the regulatory process. Rather, the action "suspend[ed] the proceeding to withdraw the 2014 Proposed Determination and le[ft] that Determination in place" subject to future action by the Agency. At that time, Region 10 indicated an intent "at a future time to solicit public comment on what further steps, if any, the Agency should take in the section 404(c) process."

On March 22, 2019, the EPA Administrator signed a one-time delegation of authority to the General Counsel to "perform all functions and responsibilities retained by the Administrator or previously delegated to the Assistant Administrator for Water related to the Pebble Deposit Area, Southwest Alaska," which includes the pending 404(c) action and withdrawal proceeding.

### *II. Resumption of withdrawal proceeding*

By this memorandum, I am directing Region 10 to continue its deliberations regarding whether to withdraw the 2014 Proposed Determination or, alternatively, decide to leave the 2014 Proposed Determination in place. This step is appropriate for several reasons.

As part of EPA's settlement agreement with PLP, EPA committed to "initiate *a process* to propose to withdraw the 2014 Proposed Determination." Although EPA has discharged this obligation by Region 10 issuing the July 2017 notice, the subsequent "suspension" calls this "process" into question, particularly given that EPA's regulations governing the exercise of section 404(c) neither use the phrase nor contemplate a "suspension." To resolve any ambiguity about EPA's full compliance with the regulations and settlement agreement, lifting the suspension is appropriate.

Furthermore, the continued "suspension" causes confusion about the status of the 2014 Proposed Determination, PLP's permit application, and the withdrawal proceeding itself. EPA's regulations provide a specific time period for the Regional Administrator to decide whether to withdraw the 2014 Proposed Determination or prepare a Recommended Determination. In consultation with the former Administrator, Region 10 extended those time frames and allowed for an additional public comment period. Some members of the public appear to have interpreted EPA's "suspension" as a final decision on the withdrawal proceeding, which it was not. Other members of the public misunderstood EPA's "suspension" as a final decision on PLP's permit application to the Corps, which it was not. Thus, to remove any confusion and uncertainty, Region 10 should lift the "suspension" and withdraw the 2014 Proposed Determination or decide to leave it in place. By making a decision one way or the other, the Region will provide much-needed clarity and transparency to the public on this issue.

Additionally, the Agency has significant new information to inform its decision-making. At the time Region 10 suspended the withdrawal proceeding—just one month after PLP's permit application was submitted to the Corps—the Agency had yet to review the application and associated supporting documents in detail. It is now undertaking this review as a part of its work under NEPA and the CWA. The Agency's review, in conjunction with its analysis of the Corps' DEIS, gives me confidence that the permit review process can inform the Region's consideration of whether to withdraw the 2014 Proposed Determination.

### *III. Reevaluation of additional comment period*

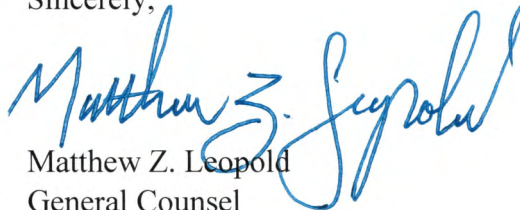
At the time the Region suspended the withdrawal proceeding, it indicated that it would seek additional public comment voluntarily "at a future time . . . on what further steps, if any, the Agency should take in the section 404(c) process." The Region, however, did not specify when it would seek additional public comment, what would be the scope of the public comments sought, and what would be the purpose of seeking additional comment. The Region should reevaluate the need for additional comment in light of the multiple rounds of public comment periods that the Agency has undertaken since 2011 regarding potential mining of the Pebble deposit. Indeed, the Region solicited public comments on the draft Bristol Bay Watershed Assessment in 2012 and 2013 and received approximately 1.1 million comments. The Agency solicited public comments on the Proposed Determination in 2014 and received approximately 670,000 comments. And the July 2017 notice proposing to withdraw the 2014 Proposed Determination elicited another 1 million public comments. Most recently, the public now has had an opportunity to provide the Corps with comments on its DEIS as part of the Corps' compliance with the NEPA process in consideration of PLP's permit application. The Region

should consider whether these public comment opportunities, when considered in conjunction with the millions of public comments previously submitted to the Agency, eliminate the need for yet another public comment period on the decision either to withdraw the 2014 Proposed Determination or to leave it in place.

*IV. Invocation of EPA-Army procedures*

As described above, EPA Headquarters and Region 10 are undertaking a thorough review of PLP's permit application, the Corps' DEIS, and supporting documentation. As you and your staff work to finalize the comment letter to the Corps regarding its public notice on the proposed mining project in the Pebble Deposit Area, Region 10 should invoke the elevation procedures under the 1992 Memorandum of Agreement ("MOA") between EPA and the Army implementing section 404(q) of the CWA if EPA's factual analysis leads it to conclude that the standard in section IV(3)(a) of the MOA is satisfied. Under the MOA, the first step in the elevation process involves EPA sending the Corps a letter within the public comment period if it determines at that time that the project "may result in substantial and unacceptable impacts to aquatic resources of national importance." As you finalize your review and analysis at this stage of the process, I encourage you to invoke this well-understood procedure in the MOA, as appropriate, to enable EPA's continuing role in the Corps' section 404 permit review process.

Sincerely,



Matthew Z. Leopold  
General Counsel