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## Using Section 40(c) of the Clean Water Act to Prohibit the Unacceptable Environmental Impacts of the Proposed Pebble Mine

David A. Wilkinson

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# Using Section 404(c) of the Clean Water Act to Prohibit the Unacceptable Environmental Impacts of the Proposed Pebble Mine

David A. Wilkinson<sup>†</sup>

*The Pebble Limited Partnership seeks to develop one of the world's largest low-grade copper, gold, and molybdenum deposits located in Southwest Alaska. Although the development could bring economic diversification to a region with few jobs and a high cost of living, the extraction of the sulfidic ore deposit threatens to devastate the region's economically and culturally vital salmon runs. In an effort to obviate that threat, nine federally recognized tribes, a group of commercial fishers, and 363 sporting conservation groups, businesses, and trade associations have petitioned the Environmental Protection Agency (EPA) to initiate public process under Section 404(c) of the Clean Water Act.*

*Building upon the arguments in the tribes' original petition to the EPA, this paper argues that judicial precedent and past agency actions support the use of the Section 404(c) process to protect unique headwater streams by prohibiting the issuance of dredge and fill permits. The EPA should initiate the Section 404(c) process to support the protection of the Bristol Bay Region's unique ecology.*

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## I. INTRODUCTION

Two foreign mining companies, Northern Dynasty Minerals Ltd. of Canada and Anglo American Plc. of England, working jointly as the Pebble Limited Partnership (PLP), have proposed the development of one of the world’s largest, low-grade, copper, gold, and molybdenum deposits in Southwest Alaska.<sup>1</sup> The proposed mine would be located in the watersheds of the South Fork Kaktuli River, North Fork Kaktuli River, and Upper Talarik Creek.<sup>2</sup>

1. Geoffrey Y. Parker, *Pebble Mine: Fish, Minerals, and Testing the Limits of Alaska’s “Large Mine Permitting Process.”* 25 ALASKA L. REV. 1, 3 (2008) [hereinafter Parker, *Testing the Limits*].

2. *Nunamta Aulukestai v. State of Alaska*, No. 3AN-09-09173-CI, slip op. at 3 (Alaska Super. Ct. Sept. 26, 2011) (court’s findings of fact and conclusions of law); *see also* Plaintiffs’ Proposed Findings of Fact and Conclusions of Law at 2, *Nunamta Aulukestai v. State of Alaska*, No. 3AN-09-9173-CI (Alaska Super. Ct. Jan. 31, 2011) (although the trial court did not adopt the plaintiffs’ proposed findings of fact and conclusions of law, the plaintiffs articulated a comprehensive description

These waters are major spawning tributaries of the Kvichak and Nushagak rivers, part of the Bristol Bay drainages.<sup>3</sup> The drainages supply the largest commercial sockeye salmon fishery in the world, which accounts for “a major portion of all salmon harvest in the State of Alaska and the world annually.”<sup>4</sup> In addition to commercial fishing, the Pebble region has important ties to subsistence fish and caribou harvests and is home to world-class recreational fishing and hunting.<sup>5</sup> The unique ecological value of the headwaters of the Kvichak and Nushagak rivers may be threatened by the environmental consequences of large-scale mining, and particularly by acidic run-off and the resultant leaching of toxic metals into ground and surface waters.<sup>6</sup>

One principal concern is that the applicable permitting processes are not adequately equipped to account for risks associated with massive mineral development in environmentally sensitive areas like the Bristol Bay watershed. One of those processes is permitting under the Clean Water Act (CWA) for the discharge of dredged or fill material.<sup>7</sup> Under Section 404 of the CWA, the Army Corps of Engineers (Army Corps) is charged with issuing permits for dredge and fill discharge into navigable waters.<sup>8</sup> The dredge and fill permitting process works in concert with the National Environmental Policy Act (NEPA) environmental impact statement (EIS) process.<sup>9</sup> Analysis of alternatives in the EIS process, and consequently the CWA dredging permits analysis,<sup>10</sup> will likely be based

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of the environmental concerns present in the Pebble Region, some of which was adopted by trial court).

3. *Nunamta Aulukestai*, No. 3AN-09-9173-CI, slip op. at 3.

4. *Id.* (internal quotations omitted).

5. Parker, *Testing the Limits*, *supra* note 1, at 7–8; Letter from Geoffrey Y. Parker to EPA 4 (May 7, 2010) (on file with author) (regarding secondary impacts on subsistence and recreation interests from the proposed Pebble Mine); Plaintiffs’ Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 3.

6. Parker, *Testing the Limits*, *supra* note 1, at 16.

7. See Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm’r, and Dennis J. McLerran, EPA Reg’l Adm’r, Region X 1–2 (May 2, 2010), available at <http://ourbristolbay.com/pdf/Tribes-EPA-404c-letter.pdf>.

8. 33 U.S.C. § 1344(a) (2006).

9. Alaska Dep’t of Natural Res., *The Process and Requirements for Large Mine Permit Applications in Alaska 2* (2008), <http://dnr.alaska.gov/mlw/mining/largemine/may5pptcolor6.pdf>.

10. The federal regulation implementing the Army Corps’ permitting process for Section 404(b)(1) of the CWA states:

For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

in part on the State of Alaska's 2005 Bristol Bay Area Plan (BBAP), which reclassifies the Pebble area as mineral land and discounts the importance of the region's habitat.<sup>11</sup>

Highlighting the inadequacies of the BBAP and its impact on the permitting process, six federally recognized tribes from the Kvichak and Nushagak river drainage areas petitioned the EPA to initiate public process under Section 404(c) to determine whether to restrict or prohibit dredge and fill discharge into wetlands.<sup>12</sup> Specifically, Section 404(c) of the CWA authorizes the EPA to prohibit or withdraw the specification, or to deny, restrict, or withdraw the use for specification, of an area for disposing dredged or fill material.<sup>13</sup> The EPA may prohibit the dredge and fill discharge if it "is having or will have an 'unacceptable adverse effect' on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."<sup>14</sup>

Due to the potential for adverse environmental impacts and the probable inadequacies of the current permitting process, the EPA should respond to the tribes' petition and initiate public process under Section 404(c) of the CWA.<sup>15</sup> Public process under Section 404(c) will enable the EPA to gather information about the proposed Pebble Mine development, communicate with the State, developers, and communities, and effectively protect economically and culturally valuable resources and habitat. Although the EPA has begun a scientific assessment of the Bristol Bay watershed and the potential impacts of large-scale development on the region,<sup>16</sup> the agency should take a proactive and efficient approach to protecting the Bristol Bay watershed by officially initiating the Section 404(c) process.

This article begins by examining the nature of the environmental, economic, and political risks that the development of the Pebble prospect poses to the Bristol Bay Region.<sup>17</sup> Then, this article turns to the

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40 C.F.R. § 230.10(a)(4) (2010).

11. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 7; *see also* 40 C.F.R. § 230.10(a)(4) (2010).

12. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7.

13. 33 U.S.C. § 1344(c) (2006); 40 C.F.R. § 231.1 (2010).

14. 40 C.F.R. § 231.1 (2010) (emphasis added).

15. 33 U.S.C. § 1344(c) (2006).

16. Press Release, U.S. Envtl. Prot. Agency, EPA Plans Scientific Assessment of Bristol Bay Watershed (Feb. 7, 2011) *available at* <http://yosemite.epa.gov/opa/admpress.nsf/0/8C1E5DD5D170AD99852578300067D3B3>.

17. The environmental, political, and social background of the Bristol Bay Region and the Pebble Mine controversy has been covered in detail in other publications. *See, e.g.,* Parker, *Testing*

regulatory background and the basis for the petition to the EPA that urged the implementation of Section 404(c) process. Section 404(c) will be analyzed in terms of the administrative law framework<sup>18</sup> and factors that will inform its implementation and durability, including jurisdiction, judicial review, and analogous agency action. Finally, this article applies the legal precedents, which define the scope of a Section 404(c) process, to the environmental and political context of the Pebble Mine controversy to support the initiation of the Section 404(c) process and to demonstrate the value of Section 404(c) as an essential element of the CWA's environmental protections.<sup>19</sup>

## II. ENVIRONMENTAL BACKGROUND

The Pebble prospect is located at the headwaters of Bristol Bay, a region that supports one of the most productive salmon fisheries in the world.<sup>20</sup> The rich ecology of the region is threatened by the development of the massive mining operation.<sup>21</sup>

### *A. The Bristol Bay Watershed Contains Unique Ecological, Economic, and Cultural Value*

The Bristol Bay Region produces the world's highest genetic biodiversity of salmon<sup>22</sup> and the world's largest sockeye salmon fishery.<sup>23</sup> Its harvests are "five-to-ten times larger than all other Alaska sockeye fisheries, combined," and account for one-third of all

*the Limits*, *supra* note 1. Therefore, this article will attempt to establish only the background information necessary for a discussion of the application of Section 404(c) of the Clean Water Act to the proposed development.

18. *See, e.g.*, 40 C.F.R. § 231 (2010).

19. 33 U.S.C. § 1251(a) (2006). The Clean Water Act was enacted with stated objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

20. Plaintiffs' Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 2.

21. *See, e.g., id.* at 20 ("The Pebble prospect is primarily a copper deposit . . . . Copper is one of the most toxic elements to aquatic life . . . ."); GEOFFREY Y. PARKER, ALASKA BAR ASS'N, PEBBLE MINE: FRAMING FACTUAL, LEGAL AND POLICY QUESTIONS BY FOCUSING ON DNR'S 2005 BRISTOL BAY AREA PLAN 1-2 (2010) (identifying both "Issues of Potential Biological effect," including sulfuric acid and metal leaching, and "Issues of Potential Socio-cultural and economic effect," including effects on subsistence and impacts on commercial fishing and recreational industries); DAVE CHAMBERS, ROBERT MORAN, & LANCE TRASKY, WILD SALMON CTR. & TROUT UNLIMITED, BRISTOL BAY'S WILD SALMON ECOSYSTEMS AND THE PEBBLE MINE: KEY CONSIDERATIONS FOR A LARGE-SCALE MINE PROPOSAL 4 (Jan. 2012) ("The proposed Pebble Mine and the regional mining district it will foster present serious and potentially catastrophic threats to the continued health of Bristol Bay's aquatic and terrestrial habitats and to the outstanding salmon fisheries that these habitats sustain.").

22. Plaintiffs' Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 17.

23. Parker, *Testing the Limits*, *supra* note 1, at 7.

commercial salmon earnings in Alaska.<sup>24</sup> The economy of the Bristol Bay Region is tied to the fisheries, which, in 2005, supplied a total of 5,540 jobs.<sup>25</sup>

In addition to the salmon fishery, the Bristol Bay watershed also supports world-class recreational trout and king salmon fishing. The South Fork Koktuli is the premier stream for recreational king salmon fishing in the Bristol Bay Region.<sup>26</sup> Within the Pebble prospect, fish surveys have noted the presence of eight anadromous fish species, “including salmonids . . . and Dolly Varden,” as well as ten other resident fish species, “including Arctic grayling, blackfish, burbot, Arctic char, lake trout, longnose sucker, Northern pike, smelt, rainbow trout, and whitefish.”<sup>27</sup> Additionally, the Pebble prospect includes “designated essential winter and calving habitat for the Mulchatna Caribou Herd, ‘essential stream concentration’ for brown bears, and moose wintering grounds.”<sup>28</sup> Not surprisingly, the Alaska Superior Court has noted that “[p]eople are drawn to this region to enjoy one of the finest sport fishing and hunting areas of the world.”<sup>29</sup>

Biologists have attributed the sustainability of the Bristol Bay sockeye fisheries to, in large part, the diversity of sockeye populations in the region.<sup>30</sup> Although productivity fluctuates over time, one of the essential elements of the Bristol Bay sockeye fisheries is the biocomplexity of the sockeye salmon runs.<sup>31</sup> While one stream may be unproductive for a time, it may become the most productive stream in the region as the runs fluctuate. Even streams that are marginally productive in the present may be essential to the biocomplexity that maintains the Bristol Bay runs.<sup>32</sup> Furthermore, in a process described by ecologists as the “portfolio effect,” the diversity of the Bristol Bay sockeye populations throughout the region’s watersheds reduces

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24. *Id.*

25. *Id.* at 8.

26. Plaintiffs’ Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 18.

27. *Nunamta Aulukestai v. State of Alaska*, No. 3AN-09-09173-CI, slip op. at 4 (Alaska Super. Ct. Sept. 26, 2011) (internal quotations omitted).

28. *Id.*

29. *Id.*

30. Ray Hilborn et al., *Biocomplexity and Fisheries Sustainability*, 100 PROC. NAT’L ACAD. SCI. 6564, 6567 (2003). The record returns and catches can also be attributed to, among other factors, “(i) favorable ocean conditions in recent decades, (ii) a single, accountable management agency, and (iii) a well established program of limited entry to the fishery.” *Id.* at 6564.

31. *Id.* at 6567.

32. *Id.*

variability in annual returns for the fishery.<sup>33</sup> Nutrient-rich headwater areas like the Upper Talarik Creek, the North Fork Koktuli River, and the South Fork Koktuli River provide habitat for salmon rearing, maintaining the abundance of salmon downstream.<sup>34</sup>

The protection of the fisheries lies at the heart of the Pebble Mine controversy. On the one hand, communities and commercial fisheries that depend on the abundant salmon runs fear that the development of the mineral prospect will cause irreparable harm to the base of the regional economy and a way of life.<sup>35</sup> On the other hand, fisheries do not maintain the economy of every community in the Bristol Bay Region. Some residents of upstream villages, located closer to the Pebble deposit than the coastal villages, benefit little from the coastal fisheries and the sport-fishing lodges and camps.<sup>36</sup> Thus, for residents in those villages, large-scale development in the region could mean a boost to a struggling economy.<sup>37</sup>

### *B. The Development of the Proposed Pebble Mine Threatens the Bristol Bay Watershed*

The proposed Pebble Mine is massive in scope, and while it could lead to some economic stimulation, it has the potential to devastate Bristol Bay's fisheries and unique environment.

The Pebble prospect is approximately 200 miles southwest of Anchorage and 120 miles from Bristol Bay,<sup>38</sup> and it is closest to the communities of Iliamna, Newhalen, and Nondalton.<sup>39</sup> The prospect is expected to contain approximately 80.6 billion pounds of copper, 5.6 billion pounds of molybdenum, and 107.4 million ounces of gold, plus significant amounts of silver, rhenium, and palladium.<sup>40</sup> The estimated

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33. Daniel E. Schindler, et al., *Population Diversity and the Portfolio Effect in an Exploited Species*, 465 NATURE 609, 609 (2010) ("Each river stock contains tens to hundreds of locally adapted populations distributed among tributaries and lakes . . .").

34. Plaintiffs' Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 18.

35. See Edwin Dobb, *Alaska's Choice: Salmon or Gold*, NAT'L GEOGRAPHIC MAG., Dec. 2010, at 2.

36. *Id.*

37. *Id.*; see also *Frequently Asked Questions*, PEBBLE LTD. P'SHIP, <http://www.pebblepartnership.com/project/faqs> (last visited Mar. 4, 2011). According to PLP, the mine will bring "a multi-billion capital investment, 1000 high-skill, high-wage operating jobs for 25–30 years, roughly 2000 jobs during construction, hundreds of millions of dollars in annual operating expenditures, local and state taxes to help support public infrastructure and other service in the region, supply and service contracts with spin-off benefits for local communities." *Id.*

38. *Id.*

39. *Id.*

40. *Id.*



value of the prospect ranges from \$100 billion to \$500 billion;<sup>41</sup> however, a recent preliminary assessment estimated a net smelter return of \$120.2 billion.<sup>42</sup> The same assessment estimates an initial mine life of only twenty-five years, which could be prolonged through expansions, mainly additional underground development.<sup>43</sup> In comparison, the Bristol Bay salmon fisheries have an estimated value of \$120 million annually, a sustainable, long-term source of income.<sup>44</sup>

Although official plans for the mine have not yet been submitted for permitting, development of the Pebble prospect may encompass two mines: Pebble West and Pebble East.<sup>45</sup> Pebble West will likely comprise an open pit mine about 2000 feet deep and two square miles in area.<sup>46</sup> Pebble East will likely be an underground mine of comparable size, but about 5000 feet deep.<sup>47</sup> This development will require massive infrastructure. Specifically, the development may include waste rock dams as large as 740 feet high and three miles long storing reactive tailings; mills; a deep-water port; a 104-mile road; two 100-mile pipelines;<sup>48</sup> and a 378-megawatt natural-gas-fired turbine plant.<sup>49</sup> Even in the current exploration stage, the proposed Pebble Mine has become “one of the most extensive and expensive mineral exploration projects” that Alaska has ever seen.<sup>50</sup>

The mineral deposit is composed of a metallic sulfide ore body with both copper-bearing and ferrous metallic sulfides.<sup>51</sup> Oxidation of the sulfide minerals leads to acid runoff, which, in turn, dissolves metals such as copper into the waters.<sup>52</sup> Copper is one of the most toxic heavy metals to freshwater and marine life.<sup>53</sup> Even copper concentrations at the

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41. Dobb, *supra* note 35, at 6.

42. *Northern Dynasty Receives Positive Preliminary Assessment Technical Report for Globally Significant Pebble Copper-Gold-Molybdenum Project in Southwest Alaska*, PR NEWSWIRE, Feb. 23, 2001, <http://www.prnewswire.com/news-releases/northern-dynasty-receives-positive-preliminary-assessment-technical-report-for-globally-significant-pebble-copper-gold-molybdenum-project-in-southwest-alaska-116768794.html>.

43. *Id.*

44. Dobb, *supra* note 35, at 6.

45. Parker, *Testing the Limits*, *supra* note 1, at 12–14.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Northern Dynasty Receives Positive Preliminary Assessment Technical Report for Globally Significant Pebble Copper-Gold-Molybdenum Project in Southwest Alaska*, *supra* note 42.

50. Plaintiffs’ Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 4.

51. PARKER, ALASKA BAR ASS’N, *supra* note 21.

52. *Id.*

53. RONALD EISLER, HANDBOOK OF CHEMICAL RISK ASSESSMENT: HEALTH HAZARDS TO HUMANS, PLANTS, AND ANIMALS VOLUME 1: METALS 93 (Lewis Publishers 2000).

part-per-billion level<sup>54</sup> lead to accumulation and irreversible harm in aquatic species.<sup>55</sup> One way copper impacts the viability of salmon runs is by harming salmon's sense of smell, which disrupts their ability to navigate to spawning areas and their capacity to identify threats, food, and mates.<sup>56</sup>

The threat of toxic leaching would not be a passing ailment of the mining development. In fact, sulfidic hard rock mines can require water quality treatment in perpetuity.<sup>57</sup> Although the State of Alaska requires financial assurance for the reclamation of mines,<sup>58</sup> “[t]he duration expected for water treatment at hard rock mines can exceed the demonstrated durability of all human institutions.”<sup>59</sup> That is, the environmental implications of the proposed Pebble Mine could outlast the state and federal institutions that will mandate the cleanup of the mine site.

### III. REGULATORY BACKGROUND

The proposed development of the Pebble prospect is contingent on permitting from both state and federal agencies. Agency permitting of a large mine in the Bristol Bay Region may not adequately protect the region's ecology, in part due to the inadequacies of the State's current Bristol Bay Area Plan (BBAP).<sup>60</sup> The six federally recognized tribes that petitioned the EPA to initiate Section 404(c)'s public process rightly expressed their “doubt that federal agencies can engage in legally required, reasoned decision-making necessary to approve federal permits so long as the 2005 BBAP is in place.”<sup>61</sup>

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54. Plaintiffs' Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 20.

55. EISLER, *supra* note 53.

56. Plaintiffs' Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 20.

57. Houston Kempton, *Policy Guidance for Identifying and Effectively Managing Perpetual Environmental Impacts from New Hardrock Mines*, 13 ENVTL. SCI. & POL'Y, 558, 559 (2010).

58. See ALASKA STAT. § 27.19.040 (2011) (requiring miners to provide individual financial assurance not more than reasonably necessary to ensure faithful performance of a reclamation plan).

59. Kempton, *supra* note 57, at 559.

60. See generally Amended Complaint for Declaratory Judgment at 2, *Nondalton Tribal Council v. State*, No. 3DI-09-46-CI (Alaska Super. Ct. June 9, 2009) (alleging that acts and omissions by the State involving the BBAP were and are unlawful); see also Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 6–7.

61. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 7.

A. *The Bristol Bay Area Plan Undermines Environmentally Sound Land Use Planning*

According to the Alaska Department of Natural Resources (ADNR), area plans covering expansive areas of state land are used by the State to delineate “goals, policies, management intent, and guidelines for the use of state land.”<sup>62</sup> Land use is allocated through plan designations, which establish priorities and can, for example, open land to mineral entry.<sup>63</sup>

The BBAP classification of the state land encompassing the Pebble prospect<sup>64</sup> contains several discrepancies in that it (1) uses primarily marine criteria to evaluate inland uplands in habitat designation,<sup>65</sup> (2) omits consideration of salmon in non-navigable waters for the purpose of determining habitat,<sup>66</sup> (3) omits consideration of moose and caribou for the purpose of habitat classification,<sup>67</sup> and (4) has no land use classification for subsistence hunting and fishing, but does have a classification for sport hunting and fishing—strangely, the BBAP defines recreation as excluding “subsistence or sport hunting and fishing.”<sup>68</sup>

The BBAP undermines environmental protection in the land encompassing the Pebble prospect by using marine criteria to evaluate inland uplands. The BBAP essentially precludes habitat designations in upland areas, even when they contain sensitive habitat like salmon spawning streams or caribou calving areas.<sup>69</sup> According to the BBAP, if land is designated as habitat, then any uses of that land that that would result in degradation of resources by, for example, “dredging, filling . . . alteration of flow patterns, discharge of toxic substances, or disturbance during sensitive periods,” are considered incompatible with the intended use of the land and should be excluded.<sup>70</sup> The BBAP disqualifies the protective habitat designation for the land encompassing the Pebble

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62. *Land Use Planning*, ALASKA DEP'T OF NATURAL RES., <http://dnr.alaska.gov/mlw/plannin/g/> (last visited Mar. 4, 2011).

63. *Id.*

64. STATE OF ALASKA, BRISTOL BAY AREA PLAN FOR STATE LANDS 1-2 to -3 (2005) [hereinafter BRISTOL BAY AREA PLAN].

65. *Id.* at 2-9 to -10.

66. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 6-7.

67. BRISTOL BAY AREA PLAN, *supra* note 64, at 2-9 to -10.

68. *See id.* at A-11. The BBAP's definition of recreation is somewhat ambiguous: “subsistence or sport hunting and fishing,” could be read to exclude all types of fishing or just subsistence fishing. In either reading, the BBAP fails to adequately recognize subsistence interests in its land use criteria.

69. *See id.* at 2-9 to -10.

70. *Id.* at 2-10.

prospect. Further, using its inadequate designation criteria, the BBAP reclassifies the land encompassing the prospect as solely mineral land.<sup>71</sup>

In addition to precluding environmentally protective land use designations for the Bristol Bay watershed, the BBAP fails to prioritize subsistence interests. State land use regulations and the BBAP lack a land use classification for subsistence hunting and fishing.<sup>72</sup> Although the BBAP recognizes “harvest areas,” this land use classification is limited to tideland management units.<sup>73</sup> The harvest area designation recognizes “discrete fish and wildlife areas historically important to a community”; however, like the habitat designation’s marine criteria, the limit of harvest designation to tidelands undermines the recognition of subsistence hunting and fishing interests in the land encompassing the Pebble prospect.

### *B. Federal Permits and NEPA Review Will Be Tainted by the Faulty Bristol Bay Area Plan*

Development of the Pebble prospect will also be subject to federal procedural and permitting requirements.<sup>74</sup> By applying for federal authorization, the developers will trigger process under the National Environmental Policy Act (NEPA), which will include the consideration and evaluation of alternatives through an Environmental Impact Statement (EIS).<sup>75</sup> The analysis of alternatives will provide information for the Army Corps when it decides whether to issue permits under

71. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm’r, and Dennis J. McLerran, EPA Reg’l Adm’r, Region X, *supra* note 7, at 6. This reclassification has already been used by the PLP to justify the development of the Pebble Prospect. *See, e.g.*, Pebble Ltd. P’ship, *Introduction to the Pebble Partnership*, NORTHERN DYNASTY MINERALS LTD. <http://www.northerndynastyminerals.com/ndm/Home.asp> (last updated Mar. 30, 2011) (follow “Investor Information: Introduction to the Pebble Partnership (WMF, 6 Mb)” hyperlink) (“This is state land, designated for mineral exploration and development”).

72. ALASKA ADMIN. CODE tit. 11, § 55.040 (2001) (“Surface resource classifications include agricultural, coal, forest, geothermal, grazing, heritage resources, material, mineral, oil and gas, public recreation, reserved use, resource management, settlement, transportation corridor, water resources, and wildlife habitat land.”); *see also* Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm’r, and Dennis J. McLerran, EPA Reg’l Adm’r, Region X, *supra* note 7, at 6–7.

73. BRISTOL BAY AREA PLAN, *supra* note 64, at 2-15.

74. CHAMERS, *supra* note 21, at 72–77 (outlining the environmental consequences of the Pebble prospect and how they intersect with the National Environmental Policy Act, the CWA, and the Endangered Species Act); *see also* Tom Crafford, Alaska Bar Ass’n, Pebble Cu-Au-Mo Project Permitting 4–5 (Sept. 24, 2008), <https://www.alaskabar.org/SectionMeetingHandouts/EnvNaturalResources/AK%20BAR%20PebblePrsntn.pdf>.

75. *Id.*; *see also* 42 U.S.C. § 4332(C) (requiring a “detailed statement” covering, *inter alia*, “(i) the environmental impact . . . (ii) any adverse environmental effects which cannot be avoided . . . (iii) alternatives to the proposed action . . .”).

Section 404 of the CWA.<sup>76</sup> Under the implementing regulations for the EIS process, the federal agencies must “integrate [EIS]s into State or local planning processes,” and “reconcile” any inconsistencies between the federal action and the state plan—because of that requirement, the alternatives analysis will likely be influenced by the inadequate definitions of the BBAP.<sup>77</sup>

In addition to the impact of the inadequate BBAP, the EIS process may also be subject to informational deficiencies because the PLP terminated Technical Working Groups (TWGs).<sup>78</sup> The TWGs were established to enhance communication between the PLP and state and federal authorities as the PLP conducted studies in preparation of the permitting process.<sup>79</sup> Although the TWGs did not establish policy or have decision-making authority, they guided the PLP’s environmental and project design studies and therefore shaped the environmental impact information available to state and federal permitting authorities.<sup>80</sup>

The EPA may alleviate some informational deficits of the EIS process through its recently initiated scientific assessment of the Bristol Bay watershed. In its scientific assessment, the EPA will focus on the Nushagak and Kvichak watersheds,<sup>81</sup> which include the Pebble prospect. Although the EPA’s analysis will likely provide valuable environmental data for the region, its focus—assessing the impacts of large-scale development in general<sup>82</sup>—may not be sufficiently tailored to fill the informational gap left by the abandonment of the TWGs.

#### IV. SECTION 404(C) OF THE CLEAN WATER ACT

The EPA should initiate public process under Section 404(c) of the CWA as the six federally recognized tribes have urged.<sup>83</sup> The tribal petition<sup>84</sup> has been endorsed and echoed by various interest groups who

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76. 33 U.S.C. § 1344 (2006); *see also* 40 C.F.R. § 230.10(a)(4) (2010).

77. *See* 40 C.F.R. § 1506.2 (2010) (“Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements.”); *see also* Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm’r, and Dennis J. McLerran, EPA Reg’l Adm’r, Region X, *supra* note 7, at 6.

78. *See* Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm’r, and Dennis J. McLerran, EPA Reg’l Adm’r, Region X, *supra* note 7, at 5–6.

79. TECHNICAL WORKING GROUP STEERING COMMITTEE, PEBBLE PROJECT: REVISED TWG GUIDELINES 1 (2009), *available at* <http://dnr.alaska.gov/mlw/mining/largemine/pebble/twg/rev1prot o.pdf>.

80. *See id.*

81. Press Release, U.S. Env’tl. Prot. Agency, *supra* note 16.

82. *Id.*

83. *See* Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm’r, and Dennis J. McLerran, EPA Reg’l Adm’r, Region X, *supra* note 7, at 6–8.

84. The number of petitioning tribes has since increased to nine. Press Release, U.S. Env’tl. Prot. Agency, *supra* note 16.

have sent letters to the EPA urging the agency to initiate the Section 404(c) process. These groups include the Alaska Independent Fishermen's Marketing Association,<sup>85</sup> the Alaska Wilderness Recreation & Tourism Association,<sup>86</sup> and 363 sporting conservation groups, businesses, and trade associations.<sup>87</sup> Although the EPA is conducting a scientific assessment of the Bristol Bay watershed, the EPA emphasized that its decision to assess the watershed was not a regulatory determination: the agency has yet to decide whether it will initiate public process under Section 404(c).<sup>88</sup>

This section outlines the jurisdictional reach of the EPA's Section 404(c) authority and the procedural elements of Section 404(c) public process. First, the EPA's CWA jurisdiction encompasses the development of the proposed Pebble Mine, making the exercise of Section 404(c) at the mine site within the EPA's jurisdictional authority. Second, the statutory language and procedural requirements of Section 404(c) support a precautionary and democratic approach to preventing unacceptable adverse impacts on waters from dredge and fill activities.

#### *A. The EPA's Clean Water Act Jurisdiction Encompasses the Pebble Prospect*

Section 404 of the CWA extends the regulatory jurisdiction of the EPA and the Army Corps over navigable waters,<sup>89</sup> which includes wetlands, tidal waters, and fresh waters.<sup>90</sup> More specifically, agency regulations have interpreted navigable waters as "waters of the United States," encompassing tributaries,<sup>91</sup> "rivers, streams . . . [or] 'wetlands,' " that could be used for recreation by interstate or foreign travelers, or to harvest fish or shellfish for interstate or international commerce.<sup>92</sup>

The Pebble deposit falls within the Army Corps and the EPA jurisdictions under Section 404 because development of the prospect would require discharge of dredged or fill material into waters of the

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85. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 1.

86. Alaska Wilderness Recreation & Tourism Ass'n, *AWRTA Urges EPA to "Veto" Pebble Mine*, VISIT WILD ALASKA (Jan. 11, 2011), [http://www.visitwildalaska.com/whats\\_new/?m=20110](http://www.visitwildalaska.com/whats_new/?m=20110).

87. Letter from 363 Sporting Conservation Groups, Businesses, and Trade Associations to EPA (Feb. 24, 2011), *available at* <http://www.nationalparkstraveler.com/files/Sportsmen-Bristol%20Bay.pdf>.

88. *See* Press Release, U.S. Env'tl. Prot. Agency, *supra* note 16.

89. 33 U.S.C. § 1344(a) (2006).

90. U.S. ARMY CORPS OF ENG'RS, REGULATORY JURISDICTION OVERVIEW 2-3, *available at* [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg\\_juris\\_ov.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_juris_ov.pdf).

91. Marjorie A. Shields, Annotation, *What are "Navigable Waters" Subject to Federal Water Pollution Control Act*, 160 A.L.R. FED. 585 (2000).

92. 40 C.F.R. § 122.2 (2010).

United States.<sup>93</sup> The development of the mine 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.<sup>94</sup> The mine will impact rivers and creeks that meet the jurisdictional definition of navigable waters.<sup>95</sup>

*B. The Substance and Procedure of Section 404(c) are Protective and Precautionary*

Section 404 governs the “discharge of dredged or fill material into the navigable waters at specific disposal sites,” and enables the Secretary of the Army to issue permits for the discharge and to specify disposal sites.<sup>96</sup> When specifying disposal sites, the Army Corps must adhere to regulations established by the EPA Administrator;<sup>97</sup> therefore, the EPA’s rulemaking authority grants the EPA some initial oversight in the Army Corps’ permitting of dredging and filling.<sup>98</sup> Nevertheless, perhaps the EPA’s ability to prohibit permits of specific projects is its most powerful tool to oversee the Army Corps’ permitting.<sup>99</sup>

Under Section 404(c) of the CWA, the EPA is authorized to “prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and . . . to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site,” if, after notice and public hearings, the Administrator of the EPA determines that the dredging or filling discharge “will have an *unacceptable adverse effect* on municipal water supplies, shellfish beds and *fishery areas (including spawning and breeding areas)*, *wildlife, or recreational areas.*”<sup>100</sup> In essence, this provision enables the EPA to halt the dredging and filling of navigable waters, their tributaries, and associated wetlands if the dredging and filling will cause unacceptable environmental impacts.<sup>101</sup>

Although Section 404(c) grants broad authority to the EPA, the agency has adopted specific procedures for prohibiting site specification

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93. See Parker, *Testing the Limits*, *supra* note 1, at 5.

94. *Id.* at 12–16.

95. See *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (limiting the jurisdiction of the Army Corps under Section 404 to “relatively permanent, standing or continuously flowing bodies of water”).

96. 33 U.S.C. § 1344(a)–(d) (2006).

97. 33 U.S.C. § 1344(b) (2006).

98. See *id.*

99. See 33 U.S.C. § 1344(c) (2006).

100. *Id.* (emphasis added).

101. Stacy L. Davis et al., *Veto Power of the EPA Administrator*, 11A FED. PROC., L. ED. § 32:925 (2010).

and permitting.<sup>102</sup> Regulations clarify that the EPA may prohibit the specification of a discharge site even “before a permit application has been submitted to or approved by the Corps.”<sup>103</sup> Therefore, the EPA may begin the process of investigating a prohibition for a given location well in advance of receiving any applications.<sup>104</sup> Along with the statutory grant to prohibit specification—that is, “to prevent the designation of an area as a present or future disposal site,”<sup>105</sup>—EPA’s proactive authority implies that the EPA must base its Section 404(c) determination on an analysis of a specific aquatic environment and its unique sensitivities.<sup>106</sup>

An EPA Regional Administrator may initiate the Section 404(c) process where, based upon available information, the Regional Administrator has reason to believe that “an ‘unacceptable adverse effect’ *could result* from the specification or use for specification of a defined area for the disposal of dredged or fill material . . . .”<sup>107</sup> An unacceptable adverse effect is interpreted as, “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.*”<sup>108</sup> The EPA must also consider the permitting guidelines that the EPA laid out for the Army Corps under Section 404(b)(1).<sup>109</sup> Although to prohibit permits through Section 404(c) the EPA must ultimately find that activity “*will have* an unacceptable adverse effect,”<sup>110</sup> the EPA can initiate the process if it finds the possibility, not certainty, of an unacceptable adverse effect. The EPA drafted the principle of precautionary action into these regulations.<sup>111</sup>

Once the Regional Administrator concludes that unacceptable adverse impacts could result from the dredge and fill activity, the Regional Administrator publishes notice of a proposed determination.<sup>112</sup> After notification, the Regional Administrator holds a public comment

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102. See 40 C.F.R. § 231 (2010).

103. This ability is important. Although it is within the Administrator’s discretionary authority it weighs against Alaska Governor Sean Parnell’s assertion that the EPA should wait to initiate Section 404(c) process until after permit applications have been submitted. Initiating this process prior to permit applications is embraced by the agency’s interpretation of the Clean Water Act. 40 C.F.R. § 231.1 (2010).

104. *Id.*

105. 40 C.F.R. § 231.2(b) (2010).

106. See Davis et al., *supra* note 101.

107. 40 C.F.R. § 231.3(a) (2010) (emphasis added).

108. *Id.* § 231.2(e) (emphasis added).

109. *Id.*; *Id.* § 230.5 (2010) (outlining permitting guidelines).

110. 33 U.S.C. § 1344(c) (2006) (emphasis added).

111. See 40 C.F.R. § 231.3(a) (2010).

112. *Id.*



period and, if the Regional Administrator finds “a significant degree of public interest,” a public hearing.<sup>113</sup> Due to the contentious nature of the proposed development of the Pebble prospect, it is likely that a public hearing will be warranted and that the administrative record will abound with testimony and comments.<sup>114</sup> After a comment period and a public hearing, the Regional Administrator will either withdraw the proposed determination, which initiated Section 404(c) process, or issue “a recommended determination to prohibit or withdraw specification, or to deny, restrict, or withdraw the use for specification, of the disposal site because the discharge of dredged or fill material at such site would be *likely* to have an unacceptable adverse effect.”<sup>115</sup> The Regional Administrator’s recommended determination will then be reviewed by the EPA Administrator.<sup>116</sup>

After consulting with the Army Corps, the landowner, and, if applicable, the State and the permit applicant, the EPA Administrator will make a “final determination affirming, modifying, or rescinding the recommended determination.”<sup>117</sup> The final determination will include a description of any necessary corrective action, make findings, and outline the EPA’s reasoning.<sup>118</sup> In its regulations, the EPA defines the final determination as a final agency action, thereby triggering the possibility of judicial review.<sup>119</sup>

## V. JUDICIAL REVIEW OF SECTION 404(C) ACTIONS

Even though a court may review a Section 404(c) determination as a final agency action, a court may also scrutinize the EPA for its preliminary determination of whether or not to initiate Section 404(c) process.<sup>120</sup> If the EPA’s final agency action is to deny a petition to initiate the Section 404(c) process, then potential plaintiffs may have two possible avenues to challenge the agency’s decision: (1) judicial review for abuse of discretion under the Administrative Procedures Act (APA),

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113. *Id.* § 231.4(a), (b) (2010). Note that (b) says that a hearing should be held near the affected site. Because of the political dichotomy of the Bristol Bay region, public sentiment and interest may play a prominent role in the hearing process and, therefore, significantly affect the record for the Regional Administrator’s proposed determination.

114. *See id.*

115. *Id.* § 231.5(a) (2010) (emphasis added). Note that the probability of harm required for action increases with each step of the administrative process, requiring that the dredging and filling *could, likely, and, finally, will* have an unacceptable adverse effect on the environment.

116. 40 C.F.R. § 231.6 (2010).

117. *Id.*

118. *Id.*

119. *Id.*; *see also* 5 U.S.C. § 704 (2006).

120. *See* Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs, 515 F. Supp. 2d 1, 10 (D.D.C. 2007).

or (2) a citizen suit to force the EPA to carry out a nondiscretionary duty of oversight. Although it is possible for a citizen suit seeking to enforce a nondiscretionary duty of oversight to survive a motion to dismiss, the judicial precedent discussed below indicates that an APA challenge is more tenable. The criteria which courts apply in undertaking an APA review of Section 404(c) actions will likely influence both the EPA's decision to initiate or withhold Section 404(c) process as well as the durability of a Section 404(c) determination.

*A. Challenging a Decision to Deny a Petition to Initiate Section 404(c) Process under the APA*

In at least one recent case, the court has allowed plaintiffs to bring an APA claim against the EPA for withholding Section 404(c) process.<sup>121</sup> While a court could interpret the EPA's authority to initiate Section 404(c) process as purely discretionary<sup>122</sup>—and therefore precluded from judicial review under the APA<sup>123</sup>—the language of Section 404(c) sufficiently restricts the EPA's authority so that a court can review a Section 404(c) determination, even when the agency declines to take action.<sup>124</sup>

In two federal opinions, each published over sixteen years ago, the courts held that the EPA's discretion to decline to initiate Section 404(c) process is unreviewable under the APA. First, in *Cascade Conservation League v. M.A. Segal, Inc.*, the U.S. District Court for the Western District of Washington held that it lacked subject matter jurisdiction to review claims against the EPA for failing to review an Army Corps' determination to apply farming exceptions to Section 404 permitting.<sup>125</sup> The court analogized the EPA's failure to act with prosecutorial decisions,<sup>126</sup> which are "generally committed to an agency's absolute discretion," and are therefore unreviewable under Section 701(a)(2) of the APA.<sup>127</sup> However, the plaintiffs in *Cascade Conservation League* "did not even attempt to identify statutory criteria" to guide the court's

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121. *Alliance to Save the Mattaponi*, 515 F. Supp. 2d at 8 (allowing judicial review).

122. *See, e.g.*, 40 C.F.R. § 231.3 (2010) ("[T]he Regional Administrator . . . may initiate . . .") (emphasis added).

123. The APA precludes judicial review for actions "committed to agency discretion." 5 U.S.C. § 701(a)(2) (2006). *See, e.g.*, *Cascade Conservation League v. M.A. Segale, Inc.*, 921 F. Supp. 692, 699 (W.D. Wash. 1996) (precluding judicial review).

124. *See Alliance to Save the Mattaponi*, 515 F. Supp. 2d at 8–10.

125. *Cascade Conservation League*, 921 F. Supp. at 699.

126. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

127. *Cascade Conservation League*, 921 F. Supp. at 699 (internal quotations omitted).

review of the agency's discretion, perhaps failing to adequately highlight Section 404(c)'s specific language couching the EPA's discretion.<sup>128</sup>

Second, the U.S. District Court for the Northern District of Georgia held that Section 404(c) gave the EPA unreviewable discretionary authority to issue or to withhold Section 404(c) process.<sup>129</sup> That court emphasized the language of Section 404(c) stating that the "Administrator is *authorized* to prohibit . . . and *authorized* to deny or restrict the use of any defined area for specification."<sup>130</sup> This holding would leave interested parties at the mercy of the discretion of the Army Corps and the EPA. Even the court recognized the plaintiff's dilemma, "the Corps cannot be sued as the Secretary is not named within the statute, and the EPA cannot be sued because the Section 404(c) determination is a discretionary function."<sup>131</sup>

However, in 2007 a federal court allowed interested parties to bring an APA claim against the EPA for withholding Section 404(c) process.<sup>132</sup> In *Alliance to Save the Mattaponi v. United States Army Corps of Engineers* the U.S. District Court for the District of Columbia reasoned that the APA allowed interested parties to sue the EPA for withholding Section 404(c) process.<sup>133</sup> First, the court concluded that judicial review of the EPA's exercise of its CWA authority is not limited to citizen suits, but that claims regarding discretionary action can be reviewed under the APA.<sup>134</sup> Second, the court emphasized that the APA's prohibition on judicial review of action "committed to agency discretion by law"<sup>135</sup> is limited to circumstances where "the statute is drawn in such broad terms that in a given case there is no law to apply."<sup>136</sup> In the case of Section 404(c), there is a "meaningful standard

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128. *Id.* Section 404(c) expressly guides the EPA's decision-making authority by limiting dredge and fill prohibitions to circumstances where the EPA Administrator finds that the dredging and filling "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c) (2006).

129. Pres. Endangered Areas of Cobb's History, Inc. ("P.E.A.C.H.") v. U.S. Army Corps of Eng'rs, 915 F. Supp. 378, 381 (N.D. Ga. 1995), *aff'd sub nom.* Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 87 F.3d 1242 (11th Cir. 1996).

130. *Id.* (quoting 33 U.S.C. § 1344(c) (2006)).

131. *Id.*

132. *See, e.g.,* Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 1, 8 (D.D.C. 2007); S. Carolina Coastal Conservation League v. U.S. Army Corps of Eng'rs, CA 2:07-3802-PMD, 2008 WL 4280376, at \*8 (D.S.C. Sept. 11, 2008).

133. *Alliance to Save the Mattaponi*, 515 F. Supp. 2d at 8-9.

134. *Id.* at 7; *see also* 33 U.S.C. § 1365(a)(2) (2006) (allowing for citizen suits against the EPA Administrator for abdicating nondiscretionary acts or duties only).

135. 5 U.S.C. § 701(a)(2) (2006).

136. *Alliance to Save the Mattaponi*, 515 F. Supp. 2d at 7-8 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)) (internal quotations omitted).

against which to judge the agency's exercise of discretion,"<sup>137</sup> namely that the EPA's authority applies "whenever [it] determines . . . that the discharge . . . will have an unacceptable adverse effect . . . ." <sup>138</sup> Therefore, the EPA does not have absolute discretion in initiating Section 404(c): the EPA can be sued under the APA and the court, under the reasoning of the D.C. federal district court in *Alliance to Save the Mattaponi*, will look at whether the EPA's decision was based on an analysis of unacceptable adverse effects.

In addition to concluding that courts may scrutinize the EPA's Section 404(c) initiation decision, the court held that the fact that the plaintiffs were suing the EPA for *inaction* does not preclude judicial review.<sup>139</sup> A claim based on the EPA's failure to initiate Section 404(c) process is directed at a final agency action: the denial of a request for Section 404(c) process, even though "the agency 'did' nothing."<sup>140</sup> Therefore, even if the EPA withholds Section 404(c) public process, that agency's decision is reviewable under Section 706(2) of the APA.<sup>141</sup> By taking no action in response to a petition to initiate Section 404(c) process, the EPA may be held accountable for abusing its discretion.

#### *B. Enforcing a Non-Discretionary Duty of Oversight through a Citizen Suit*

In addition to suits challenging the EPA's exercise of discretionary Section 404(c) authority, interested parties may be able to use the CWA's citizen suit provision<sup>142</sup> to compel EPA oversight of the Army Corps' Section 404 permitting.<sup>143</sup> However, courts have been reluctant to allow these citizen suits to proceed absent some "substantial failure" in meaningful oversight.<sup>144</sup>

The U.S. District Court for the District of South Carolina applied Fourth Circuit precedent in *Coastal Conservation League v. United States Army Corps of Engineers* to accept jurisdiction of a suit against the EPA for failing to select a less-damaging alternative to a permitted development project; specifically, the EPA never initiated Section 404(c) process.<sup>145</sup> The court emphasized that the EPA is "ultimately responsible

137. *Id.* at 7 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

138. *Id.* at 7–8 (quoting 33 U.S.C. § 1344(c) (2006)).

139. *Id.* at 9–10.

140. *Id.* at 8–10.

141. *Id.* at 10. Compare 5 U.S.C. § 706(2) (2006), with 5 U.S.C. § 706(1) (2006).

142. 33 U.S.C. § 1365(a)(2) (2006).

143. See *S. Carolina Coastal Conservation League v. U.S. Army Corps of Eng'rs*, CA 2:07-3802-PMD, 2008 WL 4280376, at \*8 (D.S.C. Sept. 11, 2008) (allowing judicial review).

144. See *Alliance to Save the Mattaponi*, 515 F. Supp. 2d at 5.

145. *S. Carolina Conservation League*, 2008 WL 4280376, at \* 1.

for the protection of the wetlands,” under Section 404.<sup>146</sup> From that responsibility stems a “duty of oversight,” which should be read alongside the citizen suit provision<sup>147</sup> so that “a plaintiff may maintain a citizen suit . . . when the [EPA] Administrator fails to exercise the duty of oversight imposed by [Section 404(c)].”<sup>148</sup> Although the court did not outline circumstances where a court will hold that the EPA has breached its duty of oversight, if the Army Corps’ permitting processes cannot adequately protect the waters, public process under Section 404(c) may be the only way for the EPA to effectively ensure the protection of wetlands and fulfill its duty of oversight.

However, in allowing plaintiffs to bring a citizen suit against the EPA through the CWA to enforce a nondiscretionary duty, this court arguably precluded simultaneous abuse of discretion claims under the APA. First, the APA only enables suits “for which there is no other adequate remedy in a court,” and, second, CWA citizen suits may only be used to enforce a *nondiscretionary* duty, not discretionary authority.<sup>149</sup> A plaintiff would probably have to choose to bring either a suit under the APA or a CWA citizen suit.

One weakness of a CWA citizen suit is that a court may find that the EPA fulfilled its oversight duty through very superficial involvement in Army Corps’ permitting. For example, in *Alliance to Save the Mattaponi*, where the court rejected a CWA citizen suit claim but allowed APA abuse of discretion review,<sup>150</sup> the court emphasized that “[o]nly if (and even this proposition is uncertain) the [citizen suit] claim was one of a substantial failure to engage in meaningful oversight could the claim survive a motion to dismiss.”<sup>151</sup> Because the EPA in that case had monitored the Army Corps’ permitting process, the court found it had performed its duty of oversight, even though the EPA declined to initiate public process under Section 404(c).<sup>152</sup> If this narrow interpretation of the EPA’s oversight duty is applied to the context of the Pebble prospect, then there is a chance that a court will interpret the EPA’s initiation of a scientific assessment of the Bristol Bay watershed

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146. *Id.* at \*6 (quoting Nat’l Wildlife Fed’n v. Hanson, 859 F.2d 313, 315–16 (4th Cir. 1988)).

147. 33 U.S.C. § 1365(a)(2) (2006).

148. *S. Carolina Conservation League*, 2008 WL 4280376, at \*8 (internal quotations omitted).

149. *Id.* (quoting 5 U.S.C. § 704 (2006)).

150. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 1, 5 (D.D.C. 2007).

151. *Id.*

152. *Id.*; see also *United States v. Sensient Colors, Inc.* CIV. 07-1275 (JHR), 2009 WL 394317, at \*5 (D.N.J. Feb. 13, 2009) *aff’d*, 649 F. Supp. 2d 309 (D.N.J. 2009) (“the CWA’s citizen suit provision only provides federal jurisdiction when the government fails to perform a nondiscretionary duty, not when a duty is performed erroneously.”) (citing *Cascade Conservation League v. M.A. Segale, Inc.*, 921 F. Supp. 692, 698 n.8 (W.D. Wash. 1996)).

as sufficient oversight to preclude a finding of a “substantial failure to engage in meaningful oversight.”<sup>153</sup> However, if the Army Corps’ permitting fails to protect the watershed from unacceptable adverse effects, then Section 404(c) public process is the only *meaningful* way for the EPA to oversee the protection of wetlands, making withholding the process a substantial failure of oversight.

Still, even if a citizen suit to enforce a nondiscretionary duty of oversight is less likely to be successful because of the difficulty in proving a substantial failure of oversight, courts have recognized that the EPA has an affirmative duty to oversee the Army Corps’ permitting: that recognition can bolster arguments in an APA abuse of discretion claim. Even in *Alliance to Save the Mattaponi*, where the court dismissed the nondiscretionary duty citizen suit claims, the court ultimately held that the EPA abused its discretion in withholding Section 404(c) process by basing its determination on reasons other than an analysis of unacceptable adverse effects to the environment.<sup>154</sup>

### C. Criteria for APA Abuse of Discretion Review in the Context of Section 404(c)

An action under the APA may be anticipated if the EPA either denies a Section 404(c) petition or if the agency successfully carries out the Section 404(c) process.<sup>155</sup> Interested parties can use judicial review to pressure the EPA to initiate the Section 404(c) process and carry out its prohibitory authority, but the efficacy of that pressure will depend both on the scope of judicial review and the criteria the courts apply when scrutinizing the EPA’s exercise of its Section 404(c) discretion.<sup>156</sup>

The successful use of Section 404(c) to prevent the Army Corps from issuing dredge and fill permits has been reviewed under the APA’s deferential abuse of discretion standard.<sup>157</sup> In a recent case reviewing the EPA’s prohibition at the Two Forks project, the court asked whether the decision to initiate Section 404(c) was “arbitrary and capricious or contrary to law.”<sup>158</sup> Although another case, which dealt with the

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153. *Alliance to Save the Mattaponi*, 515 F. Supp. 2d at 5.

154. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 126, 140 (D.D.C. 2009), *appeal dismissed per stipulation*, No. 09-5201, 2009 WL 2251896, at \*1 (D.C. Cir. July 1, 2009).

155. *See Alliance to Save the Mattaponi*, 515 F. Supp. 2d at 8–10.

156. *See generally* 5 U.S.C. § 706(2) (2006).

157. *See Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 491 (D. Colo. 1996); *City of Alma v. United States*, 744 F. Supp. 1546, 1557 (S.D. Ga. 1990); *see also* 5 U.S.C. § 706(2)(A) (2006).

158. *Alameda Water & Sanitation Dist.*, 930 F. Supp. at 489–91.

withdrawal of Section 404 permits at the Lake Alma project,<sup>159</sup> also applied the “highly deferential” abuse of discretion standard of review, it appeared to scrutinize the EPA’s decision more rigorously.<sup>160</sup> The court asked whether the EPA had “considered relevant factors and articulated a satisfactory explanation for its decision.”<sup>161</sup> The relevant factors and the content of the EPA’s explanation for its decision may be determined, in part, by the adequacy of the Army Corps’ permitting for the project and by the EPA’s scope of authority under the CWA.

The EPA has a strong obligation to initiate Section 404(c) process when the Army Corps’ permits would not adequately prevent unacceptable adverse impacts.<sup>162</sup> The Army Corps is generally bound by the guidelines established by the EPA pursuant to Section 404(b)(1).<sup>163</sup> Two points, however, may be useful for the context of the Pebble prospect. First, the Army Corps must consider recreational interests in permitting.<sup>164</sup> This may become important because of the BBAP’s impact on Army Corps’ permitting process and exclusion of sport hunting and fishing from the area plan’s definition of recreation.<sup>165</sup> Second, if the Army Corps’ permitting decision “is based upon conclusions in an EIS which are not arrived at in good faith or in a rational and reasoned manner,” the action is “necessarily arbitrary.”<sup>166</sup> This may be important if the NEPA analysis for the Pebble prospect is based upon the inadequate BBAP.<sup>167</sup> In either situation, if the Army Corps issues a permit based upon the inadequate BBAP, not only is there a chance that the permit may not withstand judicial review, there is also a possibility that the EPA would not be able to “articulate[] a satisfactory

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159. *City of Alma*, 744 F. Supp. at 1549.

160. *See id.* at 1557.

161. *Id.* at 1562; *see also* *Barclay v. U.S. Army Corps of Eng’rs*, No. CIV. 06-CV-368-SM, 2008 WL 413845, at \*9 (D.N.H. Feb. 14, 2008) (holding that the Army Corps’ “reasonable, logical, and thorough explanation” of a permitting decision is sufficient to survive abuse of discretion review).

162. *See, e.g., S. Carolina Coastal Conservation League v. U.S. Army Corps of Eng’rs*, CA 2:07-3802-PMD, 2008 WL 4280376, at \*8 (D.S.C. Sept. 11, 2008) (affirming that the EPA may have a “duty of oversight”).

163. 33 U.S.C. § 1344(b)(1) (2006).

164. *Am. Littoral Soc. v. Herndon*, 720 F. Supp. 942, 950 (S.D. Fla. 1988).

165. *See* Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm’r, and Dennis J. McLerran, EPA Reg’l Adm’r, Region X, *supra* note 7, at 6–7.

166. *Sierra Club v. U.S. Army Corps of Eng’rs*, 614 F. Supp. 1475, 1516 (S.D.N.Y. 1985).

167. *See* Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm’r, and Dennis J. McLerran, EPA Reg’l Adm’r, Region X, *supra* note 7, at 7–8; *see also* 40 C.F.R. § 1506.2 (2010) (“Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements.”).

explanation for its decision,” making a determination to withhold public process under Section 404(c) likely to be struck down.<sup>168</sup>

In addition to considering the adequacy of the Army Corps’ permitting determination, a reviewing court will also scrutinize whether the EPA acted within the bounds of the agency’s discretionary authority in responding to a Section 404(c) petition. In *Alliance to Save the Mattaponi* the court held that a decision to not prohibit an Army Corps permit is arbitrary and capricious if not based upon an analysis of the possibility of the project causing unacceptable adverse effects on the environment.<sup>169</sup> The permitted reservoir project in *Alliance to Save the Mattaponi* had been characterized by the EPA as “the largest single permitted wetland loss in the Mid-Atlantic region . . . .”<sup>170</sup> The reservoir would also impact that Mattaponi Tribe and its access to shad, “an important source of food and income, as well as a resource of cultural and religious significance.”<sup>171</sup>

The court held that the EPA’s decision not to initiate Section 404(c) process was arbitrary and capricious because the agency based its determination on a “whole range of . . . reasons completely divorced from the statutory text.”<sup>172</sup> Namely, the Regional Administrator explained that the petition was denied on the assumption that no new information would come from the public process, in an effort to conserve agency resources, on the speculation that the Army Corps’ permit would be litigated, and on the belief that the development was fulfilling a need in the area.<sup>173</sup>

Additionally, instead of articulating the statutory reasons for denying Section 404(c) process, the Regional Administrator tried to justify the agency’s inaction by emphasizing the discretionary nature of the decision.<sup>174</sup> The notion that the EPA may have some discretion in deciding to initiate Section 404(c) process does not shield an arbitrary and capricious determination from reversal. The court had previously

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168. *City of Alma v. United States*, 744 F. Supp. 1546, 1562 (S.D. Ga. 1990).

169. *See Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 140 (D.D.C. 2009), *appeal dismissed per stipulation*, No. 09-5201, 2009 WL 2251896, at \*1 (D.C. Cir. July 1, 2009).

170. *Id.* at 126.

171. *Id.*

172. *Id.* at 140.

173. *Id.*

174. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining that an agency’s decision to withhold enforcement action involves an assessment of the agency’s resources and priorities).



determined the CWA provided a meaningful, statutory standard to gauge the agency's decisions.<sup>175</sup>

At a minimum, the EPA must base its Section 404(c) decision on the possibility of unacceptable adverse effects, but the agency is not additionally required to balance environmental concerns with public interest.<sup>176</sup> That is, the EPA may base its determination on environmental concerns alone.<sup>177</sup> Those concerns may also encompass impacts on recreational interests.<sup>178</sup>

Additionally, when deciding whether to initiate Section 404(c) process, the EPA is not bound by the Army Corps' factual findings. That is, the EPA's analysis may differ from the Army Corps', allowing the agency to initiate Section 404(c) process when it "disagree[s] with the Corps' conclusions."<sup>179</sup> Although the EPA can initiate Section 404(c) process after scrutinizing the Army Corps' permitting determination, notions of efficiency and agency policy strongly favor initiation of Section 404(c) process before the Army Corps issues a permit.<sup>180</sup>

In its review of whether to initiate Section 404(c) process for the proposed Pebble Mine, the EPA will have to act within the scope of its statutorily granted discretion, base its decision on the possibility of unacceptable adverse environmental effects, and review the facts independently from the Army Corps' determinations and analysis. While the specter of judicial review for abuse of discretion should encourage the EPA to initiate Section 404(c) public process and issue a durable Section 404(c) prohibition, past EPA actions also weigh heavily in favor of the initiation of Section 404(c) process at the Pebble prospect.

## VI. PAST AGENCY ACTIONS: USE OF SECTION 404(C) IN OTHER CONTEXTS

The validity of Section 404(c) process for the Pebble prospect can be bolstered by contrast and analogy to past agency actions. Additionally, analysis of similar agency precedent can assuage lawmakers who fear that Section 404(c) process at the Pebble prospect

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175. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 7 (D.D.C. 2007) (quoting *Heckler*, 470 U.S. at 830).

176. *Creppel v. U.S. Army Corps of Eng'rs*, No. CIV.A. 77-25, 1988 WL 70103, at \*6 (E.D. La. June 29, 1988).

177. *Id.*

178. *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 491 (D. Colo. 1996) ("[T]he EPA authority to veto is 'practically unadorned.'").

179. *Newport Galleria Group v. Deland*, 618 F. Supp. 1179, 1183-84 (D.D.C. 1985).

180. U.S. ENVTL. PROT. AGENCY, FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY PURSUANT TO § 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA 45 (2011) [hereinafter *SPRUCE NO. 1 MINE FINAL DETERMINATION*].

would be unprecedented.<sup>181</sup> Because the Section 404(c) process at Pebble would be in line with past agency action, it would conform to President Obama's Executive Order 13,563, in which the President emphasized that the regulatory system must protect the environment and other national interests while "promot[ing] predictability and reduc[ing] uncertainty."<sup>182</sup>

Past action by the Army Corps illustrates its broad discretion in issuing permits and demonstrates that the process under Section 404(c) may be essential to ensure the CWA's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."<sup>183</sup> The Army Corps has a history of approving permits in the face of severe environmental harm, and courts have a similar history of upholding these permits under the highly deferential arbitrary and capricious standard of review.<sup>184</sup> In one case, a circuit court held that the Army Corps did not abuse its discretion where it permitted the filling of valleys for coal mining.<sup>185</sup> In another case, the Army Corps permitted a discharge of mining waste into a twenty-three-acre subalpine lake in the Tongass National Forest; it was "undisputed that the discharge would kill all of the lake's fish and nearly all of its other aquatic life."<sup>186</sup> The past Army Corps actions demonstrate the general importance of the Section 404(c) process.

Past EPA actions outline the circumstances and factors that have required public process under Section 404(c). The EPA has prohibited dredging and filling under Section 404(c) thirteen times,<sup>187</sup> and is currently in the midst of the administrative process for one other case.<sup>188</sup>

181. *See, e.g.*, Letter from Lisa Murkowski, U.S. Senator, to Lisa P. Jackson, U.S. EPA Adm'r 2 (Feb. 16, 2011), available at [http://murkowski.senate.gov/public/?a=Files.Serve&File\\_id=53976c39-0bc5-44e9-a6ab-ab56a970b56e](http://murkowski.senate.gov/public/?a=Files.Serve&File_id=53976c39-0bc5-44e9-a6ab-ab56a970b56e).

182. Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011). *But see* Letter from Lisa Murkowski, U.S. Senator, to Lisa P. Jackson, U.S. EPA Adm'r, *supra* note 181 (arguing that both a recent use of Section 404(c) in West Virginia and the possible use at the Pebble prospect is inconsistent with precedent and contrary to Executive Order 13,563).

183. 33 U.S.C. § 1251(a) (2006).

184. *See, e.g.*, *Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 448 (4th Cir. 2003); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2480 (2009) (Ginsburg, J., dissenting).

185. *Rivenburgh*, 317 F.3d at 448.

186. *Coeur Alaska*, 129 S. Ct. at 2480 (Ginsburg, J., dissenting); *see also* Press Release, Coeur, Army Corps of Engineers Reactivates Permit at Coeur's Kensington Gold Mine 1 (Aug. 17, 2009), available at <http://www.kensingtongold.com/documents/Final%20404%20Permit%20release%20FINAL%20081709.pdf>.

187. *Factsheet: Clean Water Act Section 404(c): "Veto Authority"*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf> (last visited Apr. 1, 2011).

188. *Id.*; *Clean Water Act Section 404(c): "Veto Authority"*, U.S. ENVTL. PROT. AGENCY, [http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c\\_index.cfm](http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c_index.cfm) (last visited Mar. 9, 2012).

The EPA has only twice exercised its Section 404(c) authority *after* the Army Corps issued a permit to discharge dredge and fill material.<sup>189</sup> Although the implementing regulations for Section 404(c) allow retroactive prohibitions by withdrawing specification of a disposal site post-permitting, the EPA “strongly prefers to initiate the § 404(c) process prior to issuance of a permit.”<sup>190</sup>

The EPA has employed Section 404(c) public process for a variety of developments, including, for example, waste storage, a duck hunting and aquaculture impoundment, a shopping mall, water supply impoundments, and a flood control project.<sup>191</sup> Strict oversight for dredging and filling resulting from mining has been on the forefront of the most recent Section 404(c) processes. In January 2011, the EPA exercised its authority to prevent the disposal of mining wastes in Appalachia.<sup>192</sup> Currently, the EPA is in the process of Section 404(c) review of a proposed surface mine in Kentucky.<sup>193</sup>

The recent mining-related Section 404(c) processes have specifically focused on the impacts of mining on headwater streams and the resulting downstream effects. In the proposed determination to prohibit the dredging permits at the Spruce No. 1 Surface Mine in West Virginia, which formed the basis of the final determination,<sup>194</sup> the Region III Administrator emphasized the importance of headwaters and the adverse environmental impacts of the proposed mountaintop-removal mining.<sup>195</sup> The EPA recognized that the headwater streams were “valuable in and of themselves and within the context of the . . . sub-watershed and . . . sub-basin.”<sup>196</sup> In light of that value, the proposed dredging activities, which would harm wildlife by burying them in streams and contributing to algal blooms and downstream toxic contamination, were clearly unacceptable.<sup>197</sup> Furthermore, the applicant’s proposed alternatives included mitigating harm through the creation of new on-site streams which could not “replace the physical,

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189. SPRUCE NO. 1 MINE FINAL DETERMINATION, *supra* note 180, at 99.

190. *Id.* at 45.

191. *Clean Water Act Section 404(c): “Veto Authority”*, *supra* note 188.

192. *See generally* SPRUCE NO. 1 MINE FINAL DETERMINATION, *supra* note 180.

193. *Big Branch Surface Mine*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/bigbranch.cfm> (last updated Jan. 27, 2011).

194. *See generally* SPRUCE NO. 1 MINE FINAL DETERMINATION, *supra* note 180.

195. *See* U.S. ENVTL. PROT. AGENCY, REGION III, RECOMMENDED DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION III PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE SPRUCE NO. 1 MINE, LOGAN COUNTY, WEST VIRGINIA 81–82 (2010) [hereinafter SPRUCE NO. 1 MINE RECOMMENDED DETERMINATION], *available at* [http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c\\_index.cfm](http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/404c_index.cfm).

196. *Id.*

197. *See id.* at 81–82.

chemical, and especially biological functions” of the damaged waters, making the proposed alternatives inadequate for a Section 404 permit.<sup>198</sup>

In the pending Section 404(c) process at the Big Branch Surface Mine, the EPA is also emphasizing a concern for downstream effects of mining.<sup>199</sup> The proposed development is a surface mine in Kentucky, which would “impact aquatic ecosystems on a large scale, affecting approximately 22,233 linear feet of waters of the United States.”<sup>200</sup> The EPA emphasizes that the massive scope of the surface mine’s impacts on waters warrants the Section 404(c) process.<sup>201</sup> Furthermore, the Regional Administrator for Region IV concluded that “the project may cause or contribute to significant degradation of the aquatic environment, including impacts to fish and wildlife,” specifically because of “the cumulative impacts of [the] project on the watershed, considering both the direct fill of natural streams and the indirect effects of such fill activities on downstream water quality . . . .”<sup>202</sup>

The EPA and its Region III and IV Administrators have clearly articulated a concern for water quality impacts from mining-related dredging and filling and have emphasized the impacts on downstream water quality. Similarly, the EPA has considered the effects of dredging discharge on human use of resources when issuing a Section 404(c) prohibition.<sup>203</sup> For example, the EPA prohibited the permitting of a floodwater control project in the Yazoo backwater area in Mississippi.<sup>204</sup> Among other factors, the Regional Administrator emphasized the impacts of dredging and filling activities on National Wildlife Refuges and the resulting harm to recreational interests.<sup>205</sup> Because the refuges were managed to “provide opportunities for compatible public use, or

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198. *Id.* at 82.

199. Letter from A. Stanley Meiburg, Acting Regional Adm’r, EPA, Region IV, to Colonel Dana R. Hurst, Dist. Eng’r, U.S. Army Corps of Eng’rs, Huntington Dist. 2 (Apr. 28, 2009), *available at* [http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/2009\\_06\\_11\\_wetlands\\_BigBranch\\_15Day\\_4-28-09.pdf](http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/2009_06_11_wetlands_BigBranch_15Day_4-28-09.pdf).

200. *Id.* at 1.

201. *See id.* at 2.

202. *Id.*

203. *See* U.S. ENVTL. PROT. AGENCY, REGION IV, RECOMMENDED DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION IV PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT CONCERNING THE YAZOO BACKWATER AREA PUMPS PROJECT IN HUMPHREYS, ISSAQUENA, SHARKEY, WARREN, WASHINGTON, AND YAZOO COUNTIES, MISSISSIPPI 64 (2008) [hereinafter YAZOO PUMPS RECOMMENDED DETERMINATION], *available at* [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008\\_10\\_21\\_pdf\\_Yazoo\\_404c\\_Recommended\\_Determination.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_10_21_pdf_Yazoo_404c_Recommended_Determination.pdf); *see also* Letter from Geoffrey Y. Parker to EPA, *supra* note 5, at 4.

204. Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project in Issaquena County, MS, 73 Fed. Reg. 54,398, 54,399 (Sept. 19, 2008).

205. YAZOO PUMPS RECOMMENDED DETERMINATION, *supra* note 203, at 64.

recreational activities,” and because the proposed dredging and filling project would adversely impact the wildlife used by the big game, upland game, and waterfowl hunters, as well as anglers, the recreational considerations provided a basis for Section 404(c) process.<sup>206</sup>

Additionally, the EPA must consider environmental justice (EJ) concerns when making Section 404(c) decisions. Pursuant to Executive Order 12,898, the EPA “shall make achieving environmental justice part of its mission by identifying and addressing as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>207</sup> In the Yazoo backwater area proposed determination, the Regional Administrator recognized the community residents’ “strong belief” that the dredge and fill activities would, “protect their homes and property against flooding and bring economic development, jobs, and a return of residents to the area.”<sup>208</sup> Although the EPA was sensitive to the community’s concerns, it also recognized that there may be alternative means to achieve these benefits for the community, and emphasized that the action under Section 404(c) would protect the interests of communities that use subsistence hunting and fishing.<sup>209</sup>

Finally, the EPA must consider the unique characteristics of the land in question. The Regional Administrator’s proposed determination for the Yazoo backwater area emphasized that a Section 404(c) prohibition was especially warranted because of the unique nature of the area it would protect.<sup>210</sup> The Regional Administrator explained that the impacts to the area “must be viewed in the context of the significant cumulative losses across the [Lower Mississippi River Alluvial Valley], which has already lost over 80 percent of its bottomland forested wetlands . . . the proposed project would significantly degrade important remnant bottomland forested wetlands.”<sup>211</sup>

Along with the EPA’s recent emphasis on protecting downstream habitat from upstream impacts, its goal of protecting unique habitats weighs heavily in favor of the use of Section 404(c) process to protect the Bristol Bay Region and its “important remnant[s]” of the once prolific salmon runs in the greater Northwest Region of the United

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206. *Id.* at 64–65.

207. *Id.* at 67 (quoting Exec. Order No. 12,898, 59 Fed. Reg. 7,629, 7,629 (Feb. 16, 1994)); see also Letter from Geoffrey Y. Parker to EPA, *supra* note 5, at 4.

208. YAZOO PUMPS RECOMMENDED DETERMINATION, *supra* note 203, at 65.

209. *Id.* at 65–67.

210. See *id.* at 68–69.

211. *Id.* at 68.

States.<sup>212</sup> An analysis of past judicial and agency action as specifically applied to the proposed development of the Pebble prospect follows.

## VII. LEGAL AUTHORITY, PAST AGENCY ACTIONS, AND POLICY APPLIED TO PEBBLE

Statutory and regulatory authority, judicial precedent, past agency actions, and sound policy considerations all support the EPA initiating Section 404(c) process and justify prohibiting dredge and fill permits for the proposed Pebble Mine. The EPA should initiate Section 404(c) process immediately, prior to the issuance of dredging discharge permits and prior to the submission of mine plans by the PLP. In this way, the EPA can guarantee efficient communication with the area's stakeholders and can move forward with environmental protection at the forefront of the decision-making process. If the EPA withholds Section 404(c) process pending the Army Corps issuing permits, then the agency should look to its recent Section 404(c) determinations<sup>213</sup> to support initiating Section 404(c) after permitting. If the EPA refuses to exercise its Section 404(c) authority altogether, its decision may constitute an abuse of agency discretion and an abdication of a duty of oversight.

### A. *Statutory and Regulatory Authority Alone Support Section 404(c) Process at Pebble*

First, as outlined above, the proposed development of the Pebble prospect will fall within the permitting jurisdiction of the Army Corps under Section 404 and will therefore be subject to the EPA's authority under Section 404(c).<sup>214</sup>

Second, statutory and regulatory authorities support the EPA in initiating public process under Section 404(c). The regulations implementing Section 404(c) enable the EPA Administrator to "prohibit or otherwise restrict a site" if there will be an "unacceptable adverse effect" to fishery areas, including spawning and breeding areas, recreational areas, or wildlife.<sup>215</sup> The interests that the regulations protect are all present in the Bristol Bay Region.<sup>216</sup> The fishery and recreational

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212. *Id.*; see Schindler, et al., *supra* note 33, at 611 ("[T]he Bristol Bay sockeye stock complex are a characteristic of a landscape with a largely undisturbed habitat . . . In contrast, in the southern end of their range, Pacific salmon populations have declined substantially owing to the cumulative impacts of heavy exploitation, habitat loss, climate change, hatchery dependence and hydropower development.").

213. See SPRUCE NO. 1 MINE RECOMMENDED DETERMINATION, *supra* note 195.

214. See 40 C.F.R. § 231.1 (2010).

215. *Id.*

216. See Parker, *Testing the Limits*, *supra* note 1, at 7–9.

areas would be uniquely threatened by acidic and toxic runoff created by the development of the sulfidic ore body.<sup>217</sup>

Furthermore, Army Corps permitting cannot be expected to prevent unacceptable adverse effects if it is based upon the BBAP, which minimizes recognition of ecologically important spawning and breeding areas by designating the Pebble area as mineral land.<sup>218</sup> Specifically, the BBAP uses inadequate criteria to disqualify the Pebble area from the environmentally protective habitat designation,<sup>219</sup> undermines recreational interests by excluding sport fishing and hunting from its definition of recreation,<sup>220</sup> and fails to recognize the importance of upland subsistence interests.<sup>221</sup>

The implementing regulations of Section 404(c) call for a proactive and precautionary approach to overseeing the protection of aquatic environments from unacceptable adverse effects of dredge and fill discharge. The Regional Administrator can initiate the Section 404(c) process with nothing more than a finding that the activity *could* result in an unacceptable adverse effect.<sup>222</sup> Subsequent procedural steps require findings that the unacceptable adverse effect is *likely*, and, for the final prohibition, that there *will* be an unacceptable adverse effect.<sup>223</sup> The regulations therefore encourage a precautionary approach, accounting for an increase in information-gathering throughout the public process. In light of the environmental sensitivities and regulatory background of the Pebble controversy, initiation of Section 404(c) process is warranted on the CWA's statutory and regulatory authority alone.

### *B. Judicial Precedent and Past Agency Actions Favor Protecting the Bristol Bay Watershed*

Although the statutory and regulatory authority is sufficient to justify the initiation of Section 404(c) process, judicial precedent and past agency action also provide support.

First, although the determination to initiate Section 404(c) process has been described as discretionary, the decision is not immune from

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217. See EISLER, *supra* note 53; Kempton, *supra* note 57, at 559.

218. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 6.

219. See BRISTOL BAY AREA PLAN, *supra* note 64, at 2-9 to -10.

220. See *id.* at A-11.

221. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 6-7.

222. 40 C.F.R. § 231.3(a) (2010).

223. *Id.* § 231.5(a); 33 U.S.C. § 1344(c) (2006).

judicial review.<sup>224</sup> Even if the EPA declines to initiate Section 404(c) process, that inaction could be subject to judicial review to determine whether it is arbitrary and capricious.<sup>225</sup> Although less likely to survive a motion to dismiss than a suit alleging abuse of discretion, one could also file a citizen suit on grounds that by withholding Section 404(c) process the EPA is abdicating its nondiscretionary duty to oversee the Army Corps' permitting activities.<sup>226</sup> Even if the EPA is fulfilling its duty of oversight through the Bristol Bay watershed assessment, perhaps precluding a citizen suit, a court may nevertheless hold that the EPA's failure to initiate Section 404(c) process amounts to an abuse of discretion under the APA. Withholding Section 404(c) process and failing to prohibit the dredge and fill discharges at the proposed Pebble Mine could be arbitrary and capricious both because it is likely that Army Corps permits will be inadequate and because Section 404(c) was required or used in very similar contexts.

Army Corps Section 404 permits are subject to judicial review for abuse of discretion, and in a situation where the Army Corps permit may be arbitrary and capricious, the EPA will have a more pressing obligation to initiate Section 404(c) process to prevent unacceptable adverse effects to the environment. The Army Corps permitting process may be inadequate in the Pebble context because permits will probably be based upon the flawed BBAP and EIS alternatives analysis.<sup>227</sup> First, the Army Corps must consider recreational interests:<sup>228</sup> the BBAP confuses and discounts those interests.<sup>229</sup> Second, any Army Corps permits that are based upon EIS conclusions that are not rational or arrived at in good faith are inherently arbitrary.<sup>230</sup> Because the EIS alternatives analysis may be based upon the inadequate, BBAP the EIS conclusions will probably not be sufficient for rational permitting.<sup>231</sup>

Judicial precedent supports the initiation of Section 404(c) for the proposed Pebble development not only because of the likelihood of inadequate Army Corps permitting, but also because of the unique environmental sensitivities of the Kvichak and Nushagak drainages. In

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224. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 7 (D.D.C. 2007).

225. *Id.* at 9–10.

226. *S. Carolina Coastal Conservation League v. U.S. Army Corps of Eng'rs*, CA 2:07-3802-PMD, 2008 WL 4280376, at \*8 (D.S.C. Sept. 11, 2008).

227. *See* 40 C.F.R. § 1506(2)(d) (2010).

228. *Am. Littoral Soc. v. Herndon*, 720 F. Supp. 942, 950 (S.D. Fla. 1988).

229. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 6–7.

230. *Sierra Club v. U.S. Army Corps of Eng'rs*, 614 F. Supp. 1475, 1516 (S.D.N.Y. 1985).

231. Letter from Six Federally Recognized Tribes to Lisa P. Jackson, EPA Adm'r, and Dennis J. McLerran, EPA Reg'l Adm'r, Region X, *supra* note 7, at 6.



*Alliance to Save the Mattaponi*, the court held that the EPA abused its discretion by withholding a Section 404(c) prohibition when the EPA had based its determination on considerations of efficiency and economy, while failing to scrutinize the environmental impacts of the permitted project.<sup>232</sup>

Potential environmental impacts were apparent in *Alliance to Save the Mattaponi*, as they are in the context of the proposed Pebble Mine development. That case involved a reservoir and dam project that “would 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.”<sup>233</sup> The court found that these actions would also impact the shad population, “an important source of food and income, as well as a resource of cultural and religious significance to the [Mattaponi] Tribe.”<sup>234</sup> Similarly, the development of the Pebble prospect will require massive construction including the creation of waste rock dams storing reactive tailings with one up to 740 feet high and three miles long.<sup>235</sup> This development would occur in an area that provides essential caribou, brown bear, and moose habitat, that sustains ten resident fish species and eight anadromous fish species, and is “one of the finest sport fishing and hunting areas of the world.”<sup>236</sup> Reactive tailings impoundments would be constructed in the nutrient rich waters of the Kvichak and Nushagak drainages that maintain salmon rearing habitat.<sup>237</sup> But the risk at Pebble is not limited to uplands development and damming alone, it encompasses downstream impacts on the Bristol Bay fisheries which account for “a major portion of all salmon harvest in the State of Alaska and the world annually.”<sup>238</sup> Oxidation of the sulfidic ore in the mine’s tailing impoundments will lead to acidic runoff, dissolving copper<sup>239</sup>—one of the most toxic heavy metals for aquatic life<sup>240</sup>—into the Kvichak and Nushagak headwaters. The mine may even require water quality treatment in perpetuity.<sup>241</sup>

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232. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 140 (D.D.C. 2009) *appeal dismissed per stipulation*, 09-5201, 2009 WL 2251896 (D.C. Cir. July 1, 2009).

233. *Id.* at 126.

234. *Id.*

235. Parker, *Testing the Limits*, *supra* note 1, at 12–14.

236. *Nunamta Aulukestai v. State of Alaska*, No. 3AN-09-09173-CI, slip op. at 4 (Alaska Super. Ct. Sept. 26, 2011) (internal quotations omitted).

237. *See* Plaintiffs’ Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 18.

238. *Nunamta Aulukestai*, No. 3AN-09-9173-CI, slip op. at 3 (internal quotations omitted).

239. PARKER, *ALASKA BAR ASS’N*, *supra* note 21.

240. EISLER, *supra* note 53.

241. *See* Kempton, *supra* note 57.

In the least, *Alliance to Save the Mattaponi* demonstrates that the EPA Region X Administrator must consider the possible environmental impacts of the proposed Pebble Mine. It is hard to see how the Regional Administrator, upon considering these impacts, will be able to find other than the threshold requirement for Section 404(c) public process, that an “unacceptable adverse effect could result” from the dredging and filling projects.<sup>242</sup>

The EPA’s recent and past Section 404(c) actions also bolster the legitimacy of the exercise of Section 404(c) authority at the proposed Pebble Mine. The most recent Section 404(c) prohibition at the Spruce No. 1 Surface Mine in West Virginia and the current Section 404(c) process at Big Branch Surface Mine in Kentucky emphasize the value of headwater streams in the context of potential downstream impacts.<sup>243</sup> Similarly, the EPA should recognize the importance of protecting the Upper Talarik Creek, the North Fork Koktuli River, the South Fork Koktuli, and the downstream waters because of their essential role in maintaining healthy salmon runs in the Bristol Bay area.<sup>244</sup> The EPA’s Region III Administrator emphasized that headwater streams are valuable on their own, and even more so within the context of the downstream watershed.<sup>245</sup> Because of the importance of the streams, trying to mitigate the impacts of dredge and fill discharge by creating new on-site streams could not replace the unique ecological importance of the original headwaters.<sup>246</sup> Likewise, the headwaters of the Nushagak and Kvichak must be protected for their own value, and especially for the importance of the waters downstream.

The Section 404(c) prohibition at the Yazoo backwater area project also suggests that the EPA should initiate 404(c) action with the Pebble prospect, as the proposed projects share several aspects. First, in the Yazoo case the Regional Administrator emphasized that dredging and filling activities would have secondary impacts on recreational hunting and fishing interests.<sup>247</sup> Likewise, the world-class trout and king salmon recreational fishing and the caribou and moose hunting in the Pebble area should warrant special consideration.<sup>248</sup> Second, the Regional

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242. See 40 C.F.R. § 231.3(a) (2010).

243. SPRUCE NO. 1 MINE RECOMMENDED DETERMINATION, *supra* note 195; Letter from A. Stanley Meiburg, Acting Regional Adm’r, Evntl. Prot. Agency, Region IV, to Colonel Dana R. Hurst, Dist. Eng’r, U.S. Army Corps of Eng’rs, Huntington Dist., *supra* note 199.

244. See Hilborn, *supra* note 30, at 6567; Plaintiffs’ Proposed Findings of Fact and Conclusions of Law, *Nunamta Aulukestai v. State of Alaska*, *supra* note 2, at 18.

245. SPRUCE NO. 1 MINE RECOMMENDED DETERMINATION, *supra* note 195.

246. *Id.*

247. YAZOO PUMPS RECOMMENDED DETERMINATION, *supra* note 203.

248. See Parker, *Testing the Limits*, *supra* note 1, at 7–9.

Administrator considered environmental justice issues, and concluded that a Section 404(c) prohibition was warranted to protect environmental, recreational, and subsistence interests even though it may prevent economic development.<sup>249</sup> In its Yazoo backwater area determination, the EPA was sympathetic to the community's belief that the dredge and fill activities could bring economic development, but the agency noted that there are alternative means to bring economic development, and emphasized the importance of protecting subsistence hunting and fishing for minority and low-income communities.<sup>250</sup> Similarly, even though development of the Pebble prospect arguably could result in economic diversification of the region,<sup>251</sup> environmental justice concerns may warrant special protection for subsistence interests in the Pebble area. Third, the Yazoo backwater area was recognized as an important ecological remnant.<sup>252</sup> Likewise, the Kvichak and Nushagak drainages and the abundant salmon runs that they support should be recognized as a unique vestige of the once bountiful salmon runs of the Northwest United States.<sup>253</sup>

### *C. Policy Overcomes Concerns about the Reach of EPA Authority*

Initiating public process under Section 404(c) is also supported by general principles of environmental protection and state and local interests. These policy-based justifications for initiating Section 404(c) process address concerns raised by the State of Alaska<sup>254</sup> and its congressional delegation.<sup>255</sup>

First, the precautionary principle supports the use of public process under Section 404(c) to evaluate potential unacceptable environmental impacts from the dredging and filling activities associated with the proposed Pebble development. The precautionary principle "calls for action to protect the environment to precede certainty of harm,"<sup>256</sup> and is written into the regulatory and statutory language that guides Section 404(c) process by allowing for variable probabilities of harm at the

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249. YAZOO PUMPS RECOMMENDED DETERMINATION, *supra* note 203, at 65–67.

250. *Id.*

251. *See Frequently Asked Questions*, PEBBLE LTD. P'SHIP, *supra* note 37.

252. YAZOO PUMPS RECOMMENDED DETERMINATION, *supra* note 203, at 68.

253. *See, e.g.*, Dobb, *supra* note 35, at 3.

254. *See generally* Letter from Sean Parnell, Alaska Governor, to Lisa P. Jackson, U.S. EPA Adm'r (Sept. 21, 2010) (on file with author).

255. *See generally* Letter from Lisa Murkowski, U.S. Senator, to Lisa P. Jackson, U.S. EPA Adm'r, *supra* note 181; *see also* H.R. 5992, 111th Cong. (2nd Sess. 2010) (proposing the removal of Section 404(c) from the CWA).

256. HOLLY DOREMUS, ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 305 (5th ed. 2008).

different steps of the process.<sup>257</sup> To initiate the public process, the Regional Administrator needs only to find that an unacceptable adverse effect *could result* from the activity, whereas the prohibition itself requires the EPA to determine that the activity *will have* an adverse effect.<sup>258</sup> Both the precautionary principle and the regulatory and statutory language therefore militate in favor of an initiating the Section 404(c) process early and before permitting.

Alaska Governor Sean Parnell wrote to the EPA urging the Agency to withhold process under Section 404(c); however, the governor's arguments are without merit.<sup>259</sup> The governor argued that initiating Section 404(c) process for the Pebble prospect would be premature because PLP has not yet submitted applications and the NEPA process has not yet produced sufficient studies to support reasoned decision-making by the EPA.<sup>260</sup> The governor's argument ignores the precautionary value of the Section 404(c) process, which allows the Regional Administrator to act on the mere chance of unacceptable adverse effects and to begin gathering information through the public process.<sup>261</sup> Furthermore, engaging in the Section 404(c) process prior to receiving permit applications is fully anticipated by the EPA's regulations which provide that "[t]he Administrator may prohibit the specification of a site . . . *before* a permit application has been submitted to or approved by the Corps or a state."<sup>262</sup> Governor Parnell's assertion that the "intended purpose" of Section 404(c) is a "backstop" to address actual or imminent adverse effects<sup>263</sup> misinterprets Section 404(c) and its implementing regulations.

Governor Parnell also raises concerns about unilateral action by the EPA.<sup>264</sup> Namely, he asserts that a Section 404(c) determination impinges on state land planning authority and "short change[s]" public participation.<sup>265</sup> First, in response to the governor's federalism concerns, Section 404 only concerns federal jurisdiction over waters that could be used for interstate or foreign recreation, or could be used to harvest fish or shellfish for interstate or foreign commerce.<sup>266</sup> Although this may

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257. *See, e.g.*, 40 C.F.R. § 231.3(a) (2010); *see also* 33 U.S.C. § 1344(c) (2006).

258. 40 C.F.R. § 231.3(a) (2010); 33 U.S.C. § 1344(c) (2006).

259. Letter from Sean Parnell, Alaska Governor, to Lisa P. Jackson, U.S. EPA Adm'r, *supra* note 254, at 1.

260. *See id.* at 2.

261. *See* 40 C.F.R. § 231.3(a) (2010).

262. *See id.* § 231.1(a) (2010) (emphasis added).

263. Letter from Sean Parnell, Alaska Governor, to Lisa P. Jackson, U.S. EPA Adm'r, *supra* note 254, at 3.

264. *See id.* at 1–2.

265. *Id.*

266. 40 C.F.R. § 122.2 (2010).

limit the use of state land to activities that do not harm waters that fall under the jurisdictional scope of the CWA, the EPA's authority to oversee the protection of those waters is accepted as well within the federal government's interstate commerce authority.<sup>267</sup> While the governor may be correct in assuming that a Section 404(c) prohibition may limit the use of state land, such a concern is not a lawful factor in EPA's determination. Ultimately, the EPA's decision must be based upon the environmental impacts of dredge and fill activities, not based on "other reasons completely divorced from the statutory text."<sup>268</sup>

Governor Parnell's second concern with the scope of EPA authority is that the Section 404(c) process would "short change public participation."<sup>269</sup> Essentially Governor Parnell argues that although Section 404(c) encompasses an opportunity for public comment and a hearing, it would not be as democratically involved as the state permitting and NEPA processes.<sup>270</sup> Again, the governor's argument is not supported by the facts. The Section 404(c) process includes not only a notice and comment period but also the opportunity for a rigorous public hearing.<sup>271</sup> In addition, the EPA Administrator's final determination is made in consultation with the Army Corps, the landowner, and, if initiated after applications are filed, the applicant.<sup>272</sup> The Section 404(c) process encompasses the inherently democratic principles of full public participation.

The controversy surrounding the possible use of Section 404(c) process at the Pebble prospect has also elicited hostility from Alaska's congressional delegation. In a letter to EPA Administrator Lisa Jackson, Senator Lisa Murkowski cautioned the EPA that the recent prohibition at Spruce Mine No. 1 in West Virginia and the possible prohibition at the

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267. See *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (explaining that the Army Corps' Section 404 jurisdiction includes "relatively permanent, standing or continuously flowing bodies of water,"); U.S. CONST. art. I, § 8, cl 3.

268. See *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 126, 140 (D.D.C. 2009), *appeal dismissed per stipulation*, No. 09-5201, 2009 WL 2251896, at \*1 (D.C. Cir. July 1, 2009).

269. Letter from Sean Parnell, Alaska Governor, to Lisa P. Jackson, U.S. EPA Adm'r, *supra* note 254, at 2.

270. *See id.*

271. Compare 40 C.F.R. § 231.4 (2010) (requiring, during Section 404(c) process, consideration of public comments by the Regional Administrator; allowing the Regional Administrator to conduct public hearings "in the vicinity of the affected site"; and enabling any person at the hearing to be represented by counsel, to "submit oral or written statements and data," and to have "an opportunity for rebuttal"), with 40 C.F.R. § 1506.6 (2010) (outlining public involvement for NEPA process; requiring public hearings "whenever appropriate or in accordance with statutory requirements," but not calling for the same degree of public involvement as 40 C.F.R. § 231.4).

272. 40 C.F.R. § 231.6 (2010).

Pebble prospect are unprecedented.<sup>273</sup> Senator Murkowski warned the agency that “failure to adhere to the intent of the legislature” may lead to “actions taken to clarify that intent,” and that the continued existence of the agency’s authority is dependent upon “justifiable and measured usage.”<sup>274</sup> In a more forward attempt to “clarify that intent,” Congressman Don Young has submitted a bill that would completely eliminate Section 404(c) from the CWA.<sup>275</sup> Another bill, sponsored by Representatives John Mica and Nick Rahall of Florida and West Virginia, respectively, would invalidate Section 404(c) restriction and prohibition determinations unless the “State in which the discharge originates or will originate . . . concur[s] with the Administrator’s determination . . . .”<sup>276</sup>

Despite consideration of the congresspersons concerns, the EPA should initiate public process under Section 404(c) at the Pebble prospect. Moreover, because Section 404(c) provides a powerful tool for the EPA to oversee possibly inadequate state and Army Corps permitting processes, providing a second check to prevent unacceptable adverse impacts to aquatic and wetland environments, Congress would be unwise to strike Section 404(c) from the CWA.<sup>277</sup> In fact, Congressman Young’s bill would limit the EPA’s ability to protect “important remnant[s]”<sup>278</sup> of unique aquatic environments and the recreational, commercial, and subsistence lifestyles that they fuel. By initiating Section 404(c) process for the proposed development of the Pebble Mine at the headwaters of Bristol Bay, the EPA can exemplify the utility and necessity of Section 404(c) for the fulfillment of the CWA’s mission to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>279</sup>

## VIII. CONCLUSION

The EPA should grant the petition originally submitted by the six federally recognized tribes and initiate public process under Section 404(c). By initiating the Section 404(c) process, the EPA can help protect the Bristol Bay watershed and the ecological, recreational, cultural, and commercial interests that it supports. The CWA and its implementing regulations reinforce a proactive, precautionary approach

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273. Letter from Lisa Murkowski, U.S. Senator, to Lisa P. Jackson, U.S. EPA Adm’r, *supra* note 181.

274. *Id.*

275. H.R. 5992, 111th Cong. (2nd Sess. 2010).

276. H.R. 2018, 112th Cong. (1st Sess. 2011).

277. *See* H.R. 5992, 111th Cong. (2nd Sess. 2010).

278. YAZOO PUMPS RECOMMENDED DETERMINATION, *supra* note 203, at 68.

279. 33 U.S.C. § 1251(a) (2006).

to the use of Section 404(c) public process. In light of the inadequate Bristol Bay Area Plan and its impacts on both the EIS process and the Army Corps' permitting determinations, if the EPA withholds Section 404(c) public process the EPA would likely be abusing its discretion and could arguably be abdicating its duty to oversee the Army Corps' permitting. By initiating Section 404(c) process the EPA will fulfill the CWA's oversight obligations while conforming to statutory and regulatory language, judicial precedent, and past agency action, all of which emphasize the precautionary principle and protecting upriver environments, and recognize the importance of recreational and subsistence interests. The EPA should use Section 404(c) and take a step towards protecting the integrity of the Bristol Bay watershed.