

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-R10-OW-2017-0369; FRL-9281-01-R10]

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In light of the U.S. District Court for the District of Alaska’s recent decision to remand and vacate the United States Environmental Protection Agency (EPA)’s 2019 decision to withdraw the Proposed Determination to Restrict the Use of an Area and a Disposal Site; Pebble Deposit Area, Southwest Alaska pursuant to section 404(c) of the Clean Water Act (CWA), EPA Region 10 is providing notice that EPA has good cause to extend the time requirement to allow the EPA Region 10 Regional Administrator to consider available information, including information that has become available since EPA issued the 2014 Proposed Determination in order to determine appropriate next steps in the CWA section 404(c) review process.

FOR FURTHER INFORMATION CONTACT: Visit www.epa.gov/bristolbay or contact Cami Grandinetti through the Bristol Bay-specific phone line, (206) 553-0040, or email address, r10bristolbay@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How to Obtain a Copy of the Bristol Bay Watershed Assessment: The Bristol Bay Watershed Assessment is available via the internet on the EPA Region 10 Bristol Bay site at www.epa.gov/bristolbay.

B. How to Obtain a Copy of the 2014 Proposed Determination: The July 2014 Proposed Determination is available via the internet on the EPA Region 10 Bristol Bay site at www.epa.gov/bristolbay.

C. How to Obtain a Copy of the Settlement Agreement: The May 11, 2017 settlement agreement is available via the internet on the EPA Region 10 Bristol Bay site at www.epa.gov/bristolbay.

D. How to Obtain a Copy of the Proposal to Withdraw the 2014 Proposed Determination: The July 2017 proposal to withdraw the 2014 Proposed Determination is available via the internet on the EPA Region 10 Bristol Bay site at www.epa.gov/bristolbay. Information regarding the proposal to withdraw can also be found in the docket for this effort at www.regulations.gov, *see* docket ID No. EPA-R10-OW-2017-0369 or via the following website located at <https://www.regulations.gov/docket?D=EPA-R10-OW-2017-0369>.

E. How to Obtain a Copy of Notification of Suspension: The February 2018 notice announcing EPA's decision to suspend the proceeding to withdraw the 2014 Proposed Determination at that time is available via the internet on the EPA Region 10 Bristol Bay site at www.epa.gov/bristolbay. Information regarding the suspension can also be found in the docket

for this effort at www.regulations.gov, *see* docket ID No. EPA-R10-OW-2017-0369 or via the following website located at <https://www.regulations.gov/docket?D=EPA-R10-OW-2017-0369>.

F. How to Obtain a Copy of the Notice of Withdrawal of the 2014 Proposed

Determination: The August 2019 notice of withdrawal of the 2014 Proposed Determination is available via the internet on the EPA Region 10 Bristol Bay site at www.epa.gov/bristolbay. Information regarding the proposal to withdraw can also be found in the docket for this effort at www.regulations.gov, *see* docket ID No. EPA-R10-OW-2017-0369 or via the following website located at <https://www.regulations.gov/docket?D=EPA-R10-OW-2017-0369>.

II. *Factual Background*

A. Bristol Bay Watershed Assessment and 2014 Proposed Determination.

In 2011, after EPA received petitions to use its CWA section 404(c) authority to protect Bristol Bay's salmon fishery, EPA initiated a three-year ecological risk assessment to determine the significance of the Bristol Bay watershed's ecological resources and to evaluate the potential impacts of large-scale mining on those resources. In January 2014, EPA finalized the peer-reviewed Bristol Bay Watershed Assessment (BBWA), which it prepared through an open and inclusive process that included two opportunities for public comment, eight public meetings, interagency coordination, and consultation with 13 federally recognized tribal governments.

On February 28, 2014, after careful consideration of available material, including information collected as part of the BBWA, other existing science and technical information, and information provided by stakeholders, EPA Region 10 notified the U.S. Army Corps of

Engineers (Corps), the State of Alaska (State), and the Pebble Limited Partnership (PLP) that it had decided to proceed under its CWA section 404(c) regulations to review potential adverse environmental effects of discharges of dredged and fill material associated with mining the Pebble deposit in southwest Alaska. In accordance with its regulations at 40 CFR 231.3(a)(1), EPA Region 10 offered the Corps, the State, and PLP the opportunity to demonstrate to the satisfaction of the Region 10 Regional Administrator that no unacceptable adverse effects would occur as a result of such discharges.

On July 21, 2014, EPA Region 10 published in the *Federal Register* notice of its 2014 Proposed Determination to restrict the use of certain waters in the South Fork Kaktuli River, North Fork Kaktuli River, and Upper Talarik Creek watersheds (located within the larger Bristol Bay watershed) as disposal sites for the discharge of dredged or fill material associated with mining the Pebble deposit (79 FR 42314, July 21, 2014). EPA Region 10 held seven public hearings throughout southwest Alaska during the week of August 11, 2014 and received more than 670,000 public comments, more than 99% of which supported the 2014 Proposed Determination.

B. PLP's Litigation and Settlement Agreement.

Before EPA could reach the next step in the CWA section 404(c) review process – to either withdraw the 2014 Proposed Determination or prepare a recommended determination pursuant to 40 CFR 231.5(a) – PLP filed multiple lawsuits against the Agency. On November 25, 2014, the U.S. District Court for the District of Alaska issued a preliminary injunction against

EPA in one of those lawsuits that halted EPA Region 10's CWA section 404(c) review process until the case was resolved. Order Granting Preliminary Injunction at 1-2, *Pebble Limited Partnership v. EPA*, No. 3:14-cv-00171 (D. Alaska Nov. 25, 2014). On May 11, 2017, EPA and PLP settled that lawsuit – and all of PLP's outstanding lawsuits – and the court subsequently dissolved the injunction and dismissed the case with prejudice.

Under the terms of the settlement, EPA agreed to “initiate a process to propose to withdraw the Proposed Determination.” EPA also agreed not to forward a signed recommended determination to EPA Headquarters until May 11, 2021 or until EPA published a notice of the Corps' final environmental impact statement (EIS) on PLP's CWA section 404 permit application for the proposed Pebble mine, whichever came first. To take advantage of this period of forbearance, PLP was required to submit its CWA section 404 permit application to the Corps within 30 months of execution of the settlement agreement. For a link to a copy of the settlement agreement, *see* Section I of this document.

C. Proposal to Withdraw the 2014 Proposed Determination, “Suspension,” and Withdrawal.

On July 19, 2017, in accordance with the terms of the settlement agreement, EPA Region 10 published in the *Federal Register* a notice of its proposal to withdraw the 2014 Proposed Determination (82 FR 33123, July 19, 2017). In its July 19, 2017 publication, EPA identified three reasons for its proposed withdrawal – that withdrawing the 2014 Proposed Determination would (1) provide PLP with additional time to submit a CWA section 404 permit application to

the Corps; (2) remove any uncertainty, real or perceived, about PLP's ability to submit a permit application and have that permit application reviewed; and (3) allow the factual record regarding any forthcoming permit application to develop. EPA explained that "[i]n light of the basis upon which EPA is considering withdrawal of the Proposed Determination, EPA is not soliciting comment on the proposed restrictions or on science or technical information underlying the Proposed Determination." (82 FR 33124, July 19, 2017)

EPA received more than one million public comments regarding its proposal to withdraw. Approximately 99% of commenters expressed opposition to the withdrawal of the 2014 Proposed Determination. The public comments, transcripts from the public hearings, and summaries of the tribal and ANCSA Corporation consultations can be found in the docket for this proceeding; *see* Section I of this document for information on how to access this docket.

On December 22, 2017, PLP submitted to the Corps a CWA section 404 permit application that proposed to develop a mine at the Pebble deposit. On January 5, 2018, the Corps issued a public notice that provided PLP's permit application to the public, stated that an EIS would be required as part of its permit review process consistent with the National Environmental Policy Act (NEPA), and invited relevant federal and state agencies, including EPA, to be cooperating agencies on the development of the EIS.

On January 26, 2018, EPA Region 10 announced a "suspension" of the proceeding to withdraw the 2014 Proposed Determination at that time. This action was published in the *Federal Register* on February 28, 2018 (83 FR 8668, February 28, 2018).

On August 30, 2019, after conferring with EPA's General Counsel,¹ EPA Region 10 published in the *Federal Register* its decision to withdraw the 2014 Proposed Determination, thereby concluding the withdrawal process that was initiated on July 19, 2017 (84 FR 45749, August 30, 2019). EPA identified that it was withdrawing the Proposed Determination because:

(1) New information had been generated since 2014, including information and preliminary conclusions in the Corps' Draft EIS, that EPA would need to consider before any potential future decision-making regarding the matter;

(2) The record would continue to develop throughout the permitting process; and

(3) EPA could and then had initiated the section 404(q) MOA process and it was appropriate to use that process to resolve issues before engaging in any potential future decision-making regarding the matter.

In its August 30, 2019 notice of withdrawal of the 2014 Proposed Determination, EPA stated that “[a]s in EPA’s prior notices, EPA is not basing its decision-making on technical consideration or judgments about whether the mine proposal will ultimately be found to meet the

¹ In 1984, the EPA Administrator delegated the authority to make final determinations under CWA section 404(c) to EPA's national CWA section 404 program manager, who is the Assistant Administrator for Water. That general delegation remains in effect. On March 22, 2019, EPA Administrator Wheeler delegated to the General Counsel the authority to perform all functions and responsibilities retained by the Administrator or previously delegated to the Assistant Administrator for Water for EPA's section 404(c) action for the Pebble deposit area.

requirements of the 404(b)(1) Guidelines or results in ‘unacceptable adverse effects’ under CWA section 404(c).” (84 FR 45756, August 30, 2019)

In November 2020, the Corps denied PLP’s CWA section 404 permit application. The denial addresses only that specific permit application, and PLP filed an administrative appeal of the Corps’ decision pursuant to the Corps’ regulations at 33 CFR part 331.

D. Legal Challenge to Withdrawal of the 2014 Proposed Determination.

In October 2019, twenty tribal, fishing, environmental, and conservation groups challenged EPA’s withdrawal of the 2014 Proposed Determination in the U.S. District Court for the District of Alaska, asserting that EPA’s withdrawal decision was not supported by the record and that EPA had failed to consider the science and technical information, including whether the proposed project would result in unacceptable adverse effects. The District Court dismissed the action, holding that EPA’s decision to withdraw a proposed determination was unreviewable for lack of a meaningful legal standard governing the Agency’s action.

On appeal, in June 2021, the Ninth Circuit reversed the District Court’s holding that EPA’s decision to withdraw a proposed determination was unreviewable, finding instead that EPA’s regulation at 40 CFR 231.5(a) provides a standard for review. Specifically, the Ninth Circuit concluded that EPA is authorized to withdraw a proposed determination “*only* if the discharge of materials would be unlikely to have an unacceptable adverse effect.” *Trout*

Unlimited v. Pirzadeh, 1 F.4th 738, 757 (9th Cir. June 17, 2021) (emphasis in original). The Ninth Circuit remanded the case to the District Court for further proceedings.

On September 28, 2021, EPA filed a motion in the District Court requesting that the court vacate the Agency’s decision to withdraw the 2014 Proposed Determination and remand the action to the Agency to reconsider its action. In its motion, EPA explained that, in making the withdrawal decision, the Agency had not addressed the “unlikely to have an unacceptable adverse effect” standard that the Ninth Circuit subsequently held must be met when EPA withdraws a proposed determination and that such an omission “was serious and fundamental.” The District Court granted EPA’s motion on October 29, 2021.

III. *Legal Background*

A. CWA Section 404(c).

CWA section 404(a) allows the Corps to issue permits authorizing the discharge of dredged or fill material at specified disposal sites. Section 404(b) provides that “[s]ubject to subsection (c) . . ., each such disposal site shall be specified for each such permit by the Secretary. . . .” CWA Section 404(c) authorizes EPA to prohibit the specification of any defined area or deny or restrict the use of any defined area as a disposal site for the discharge of dredged or fill material into waters of the United States within the defined area “whenever” it determines that the discharge of such material into such area will have “an unacceptable adverse effect on

municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” 33 U.S.C. 1344(c).

B. CWA Section 404(c) Regulations.

EPA’s regulations at 40 CFR part 231 provide a four-step process for the Agency to follow in exercising its 404(c) authority.

Step 1: Initial Notification. If the EPA Regional Administrator has reason to believe, after evaluating available information, that an unacceptable adverse effect could result from the specification or use for specification of a defined area as a disposal site, the Regional Administrator may initiate the section 404(c) process by notifying the Corps, the applicant (if any), and the owner of record of the site that s/he intends to issue a public notice of the proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification, whichever the case may be, of any defined area as a disposal site. 40 CFR 231.3(a)(1).

Step 2: Proposed Determination. If within 15 days of receipt of the Regional Administrator’s notice under Step 1, it has not been demonstrated to the satisfaction of the Regional Administrator that no unacceptable adverse effect(s) will occur or the Corps does not notify the Regional Administrator of its intent to take corrective action to prevent an unacceptable adverse effect satisfactory to the Regional Administrator, the Regional Administrator must publish a

notice of the proposed determination in the *Federal Register*, soliciting public comment and offering an opportunity for public hearing. 40 CFR 231.3(a)(2); 40 CFR 231.3(b).

Step 3: Withdrawal of Proposed Determination or Preparation of Recommended Determination.

Within 30 days after the conclusion of the public hearing (but not before the end of the comment period), or, if no hearing is held, within 15 days after the expiration of the comment period on the public notice of the proposed determination, the Regional Administrator must either withdraw the proposed determination or prepare a recommended determination. If the Regional Administrator prepares a recommended determination, the Regional Administrator must promptly forward the recommended determination and administrative record to the Assistant Administrator for Water. 40 CFR 231.5(a) and(b).

Step 4: Final Determination. Within 30 days of receipt of the recommendations and administrative record, the Assistant Administrator for Water shall initiate consultation with the Corps, the applicant (if any), and the owner of record of the site. Each of those parties shall have 15 days to notify the Assistant Administrator for Water of their intent to take corrective action to prevent unacceptable adverse effects, satisfactory to the Assistant Administrator for Water. Within 60 days of receipt of the recommendations and administrative record, the Assistant Administrator for Water shall make a final determination affirming, modifying, or rescinding the recommended determination.

EPA's regulations authorize it to extend the regulatory deadlines "upon a showing of good cause." 40 CFR 231.8. "Notice of any such extension shall be published in the *Federal Register* and, as appropriate, through other forms of notice." *Id.*

IV. *Extension of Regulatory Time Requirements for Good Cause*

The District Court's vacatur of the decision to withdraw the 2014 Proposed Determination reinstates the 2014 Proposed Determination and reinitiates the CWA section 404(c) review process. The next step in the CWA section 404(c) review process requires the Region 10 Regional Administrator to, within 30 days, decide whether to withdraw the 2014 Proposed Determination or prepare a recommended determination. *See* 40 CFR 231.5(a). EPA Region 10's 2014 Proposed Determination relied on EPA's authority under section 404(c) of the CWA; was issued in accordance with the regulations at 40 CFR part 231; and reflected EPA Region 10's robust consideration of the extensive science and technical information available to the Agency at the time. Since EPA issued the 2014 Proposed Determination, new information has become available, including the voluminous public comments EPA received on the 2014 Proposed Determination; technical information contained in PLP's CWA section 404 permit application and updated mine plan; analysis developed during the NEPA process and contained in Corps' Final EIS and its permit denial; as well as new and potentially relevant science and technical information produced through other contemporaneous efforts. EPA has concluded that it should consider this information in its decision-making. EPA has therefore determined that good cause exists under 40 CFR 231.8 to extend the thirty-day regulatory time requirement in 40 CFR 231.5(a). An extension through May 31, 2022 will allow the Region 10 Regional

Administrator to consider available information in order to determine appropriate next steps, which may include revising the 2014 Proposed Determination.

Dated: November 17, 2021

Michelle L. Pirzadeh

Acting Regional Administrator, Region 10