



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

**Department of Environmental
Conservation**

OFFICE OF THE COMMISSIONER

P.O. Box 111800
Juneau, Alaska 99811-1800
Main: 907.465.5066
Fax: 907.465.5070

March 21, 2023

The Honorable Zack Fields
State Capitol
Juneau, AK 99801
Sent via Email

Dear Representative Fields,

Thank you for your inquiry about how an Alaska-assumed 404 program will affect the proposed Pebble project. This question is understandably at the forefront of many people's minds in light of the Environmental Protection Agency (EPA)'s recent action under section 404(c) of the Clean Water Act, which vetoes the 404 permit for that project and imposes other restrictions on the Pebble deposit area.

As testified to by the Department of Law before Senate Resources, State assumption of the 404 program cannot change the 404(c) veto. The reasons are as follows:

First, EPA's statutory power, as laid out in section 404(c) of the Clean Water Act, remains unaffected by the State's assumption of the 404 program.

Second, state-assumed 404 programs are specifically prohibited, by regulation, from issuing (or trying to re-issue) a 404 permit in this type of scenario. Under 40 C.F.R. 223.20(c), a state administering an assumed 404 program may not issue a 404 permit "[w]hen the proposed discharges" associated with the project at issue "would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the [EPA] under section 404(c)" of the Clean Water Act "or when the discharge would fail to comply with a restriction imposed thereunder." This regulation, in other words, specifically prohibits states from disregarding vetoes previously issued by EPA following assumption of the 404 program.

Third, the Alaska Department of Fish & Game (ADF&G) is charged with protecting anadromous fish in the state, including in the Bristol Bay area; any development of the Pebble deposit would need to obtain a Title 16 permit before proceeding. Title 16 permits are required for "all activities"

altering or affecting the “natural flow or bed” of catalogued anadromous waterbodies. The experts at ADF&G will only approve a Title 16 permit for the project if “any adverse effect upon fish or wildlife, or their habitat” is sufficiently mitigated pursuant to ADF&G’s robust mitigation requirements. This permitting process had not yet been initiated before EPA vetoed the project but would be required for the project to proceed.

Lastly, the Alaska Legislature has the power, via Bristol Bay Forever, to stop the Pebble mine. Now codified at AS § 38.05.142(a), Bristol Bay Forever provides that, in addition to any permits required by law, a final authorization “must be obtained” from the Legislature for a large-scale metallic sulfide mining operation located within the watershed of the Bristol Bay Fisheries Reserve.

I hope this letter allays any concerns that have been expressed regarding DEC’s motive in seeking to assume the program. Permitting the Pebble mine never was, never will be, and never *could* be DEC’s motivation for seeking assumption of the 404 program. DEC is pursuing assumption because we firmly believe it will have tremendous benefits for the State of Alaska. A myopic focus on the Pebble project misconstrues our motives and obscures these benefits—to the detriment of the State of Alaska.

Sincerely,



Jason Brune, Commissioner

Cc: Doug Vincent-Lang, Commissioner, ADF&G
Joseph Felkl, Legislative Liaison, ADF&G
John Boyle, Commissioner-Designee, DNR
Joseph Byrnes, Legislative Liaison, DNR
Laura Stidolph, Legislative Director, Office of Governor Dunleavy
Emma Pokon, Deputy Commissioner, DEC
Randy Bates, Director of Water, DEC