

## NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Pebble Limited Partnership		File Number: POA-2017-00271	Date: 25 NOV 2020
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)		A
	PROFFERED PERMIT (Standard Permit or Letter of permission)		B
X	PERMIT DENIAL		C
	APPROVED JURISDICTIONAL DETERMINATION		D
	PRELIMINARY JURISDICTIONAL DETERMINATION		E

**SECTION I -** The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at [http://www.usace.army.mil/CECW/Pages/reg\\_materials.aspx](http://www.usace.army.mil/CECW/Pages/reg_materials.aspx) or Corps regulations at 33 CFR Part 331.

**A: INITIAL PROFFERED PERMIT:** You may accept or object to the permit.

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **OBJECT:** If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

**B: PROFFERED PERMIT:** You may accept or appeal the permit

- **ACCEPT:** If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- **APPEAL:** If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**C: PERMIT DENIAL:** You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

**D: APPROVED JURISDICTIONAL DETERMINATION:** You may accept or appeal the approved JD or provide new information.

- **ACCEPT:** You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- **APPEAL:** If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

**SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT**

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

See attached State of Alaska's Request for Appeal of Section 404 Permit Denial.

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

**POINT OF CONTACT FOR QUESTIONS OR INFORMATION:**

If you have questions regarding this decision and/or the appeal process you may contact:

**Shane McCoy, Program Manager**  
Alaska District Corps of Engineers  
CEPOA-RD  
P.O. Box 6898  
JBER, AK 99506-0898  
(907) 753-2715

If you only have questions regarding the appeal process you may also contact:

Regulatory Program Manager  
U.S. Army Corps of Engineers, Pacific Ocean Division  
CEPOD-PDC, Bldg 525  
Fort Shafter, HI 96858-5440

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

/s/ Ronald W. Opsahl  
Assistant Attorney General, Alaska Department of Law

Signature of appellant or agent.

Date:  
January 22, 2021

Telephone number:  
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**UNITED STATES ARMY CORPS OF ENGINEERS  
PACIFIC OCEAN DIVISION**

<i>In re:</i> Application submitted by	)	File No. POA-2017-271
Pebble Limited Partnership to the	)	
United States Army Corps of Engineers,	)	<b>State of Alaska’s Request for Appeal</b>
Alaska District	)	<b>of Section 404 Permit Denial</b>
_____	)	

Pursuant to 33 C.F.R. part 331, the State of Alaska requests Division review of the Alaska District’s (“District”) November 25, 2020 denial of the Clean Water Act (“CWA”) Section 404 Permit Application submitted by Pebble Limited Partnership (“PLP”), dated June 8, 2020 (as revised) (“Permit Denial”).<sup>1</sup> The State is the sovereign owner of the surface and mineral estates within the proposed project area, subject only to

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<sup>1</sup> For purposes of this appeal, the term “Permit Denial” includes both the November 25, 2020 permit denial letter and the November 20, 2020 Record of Decision for Application Submitted by Pebble Limited Partnership (“ROD”).

the state-issued mining claims held or controlled by PLP. Accordingly, the State is an “affected party” entitled to appeal the permit denial.<sup>2</sup>

As demonstrated below, the District’s Permit Denial ignored long-standing Corps guidance that required the District to tailor mitigation requirements to recognize Alaska’s unique position of holding more intact wetlands than all of the lower-48 states combined, and Alaska’s constitutional and statutory mandates to develop its natural resources for the benefit of its citizens. Instead, the District imposed unprecedented compensatory mitigation requirements for Alaska, and even when PLP met those requirements, the District applied an unsupported “more than trivial” standard to conclude that CWA Section 404(b)(1) precluded issuance of the permit.

Further, the process employed by the District has interfered with the State completing its statutorily required review of PLP’s Section 401 water quality certification application. Had the State been afforded the appropriate time to review and determine whether the project would comply with state water quality standards, a more-complete record would have been available for the District’s public interest review. Because of the District’s hasty decision, however, key analyses were omitted from the record that were necessary to inform an appropriate public interest review.<sup>3</sup>

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<sup>2</sup> See 33 C.F.R. § 331.2 (defining “affected party” to include “landowner”).

<sup>3</sup> In addition to interfering with the State’s Section 401 water quality certification process, the District’s Denial Decision also effectively terminated consultation with the U.S. Fish & Wildlife Service required by Section 7 of the Endangered Species Act, consultation with the State and other parties required by Section 106 of the National Historic Preservation Act, and interfered with the proper consideration of a right-of-way

Accordingly, the State requests that the Division vacate the District's Permit Denial, and that the permit application be remanded to the District with instructions to provide due consideration to the Corps' guidance regarding Section 404 compensatory mitigation requirements in Alaska, the appropriate legal standard for assessing degradation under Section 404(b)(1), the State's requirements to develop its natural resources, and the State's completed analysis of PLP's application for state water quality certification under CWA Section 401.

## **INTRODUCTION**

The District's Permit Denial and the process leading to it create a dangerous precedent that threaten harm to Alaska's future, and effectively prevent the State from fulfilling its constitutional and statutory mandates to develop its natural resources. Accordingly, that decision should be vacated and remanded to the District.

In December 2017, PLP submitted to the District an application for a Section 404 permit to allow fill material to be placed into purported jurisdictional waters for the purpose of developing a copper-gold-molybdenum porphyry deposit. The proposed mine site and a majority of the supporting infrastructure would be located on State of Alaska lands in the Lake and Peninsula Borough with the remainder of supporting infrastructure located on state lands, privately owned lands, or lands owned by village corporations or native allotments in the Kenai Peninsula Borough.

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application by the Department of Interior, Bureau of Safety & Environmental Enforcement and a bridge permit application by the U.S. Coast Guard.

In 2018, the District began the National Environmental Policy Act (“NEPA”) process for the proposed project, publishing a Notice of Intent to prepare an Environmental Impact Statement (“EIS”) and a Notice of Scoping for the Pebble project.<sup>4</sup> The District issued a Draft EIS in March 2019, accepting comments until July 1, 2019. As a “cooperating agency,” the State of Alaska provided comments during scoping and on the Draft EIS. PLP updated its permit application in December 2019 and June 2020, working to refine its application in response to the District’s comments and to minimize the impacts of the proposed project. The Environmental Protection Agency (“EPA”) published a Notice of Availability of the Final EIS (“FEIS”) in July 2020.<sup>5</sup> The FEIS concluded that the Pebble project could be developed without measurable impacts on the Bristol Bay fishery, noting that the “loss of habitat is not expected to have a measurable impact on fish populations downstream of the mine site.”<sup>6</sup> It also recognized the numerous public benefits associated with the Pebble project, including long-term beneficial impacts from employment and income and millions in state taxes and royalty payments.<sup>7</sup> Despite these findings, the District denied the Section 404 permit on

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<sup>4</sup> 83 Fed. Reg. 13,483 (March 29, 2018).

<sup>5</sup> See 85 Fed. Reg. 44,890 (July 24, 2020).

<sup>6</sup> Pebble Project Final Environmental Impact Statement, 4.24-1 (July 2020) (“FEIS”).

<sup>7</sup> *Id.* at 4.3-6, 7, 10; *id.* at Executive Summary at 47-48.

November 25, 2020, concluding that the “the proposed discharge does not comply with the 404(b)(1) Guidelines” and “the proposed project is contrary to the public interest.”<sup>8</sup>

During the NEPA process, PLP worked to develop a compensatory mitigation plan (“CMP”) that would allow the project to proceed. After rejecting several proposals for appropriate out-of-kind mitigation, the District indicated that it would require in-kind, in-watershed compensatory mitigation. The District did so even though the Corps and the EPA have consistently recognized that mitigation opportunities in and around a project area may be limited or non-existent in Alaska.<sup>9</sup>

Notwithstanding the nearly impossible task of crafting a CMP that proposed in-kind, in-watershed mitigation in a remote and generally untouched area, PLP submitted a Final CMP on November 4, 2020. However, less than a week after PLP submitted the Final CMP, the District announced that it had completed its “review” and determined that the Final CMP was insufficient and did not comply with the Corps’ CWA regulations.<sup>10</sup> Despite the fact that the onerous compensatory mitigation requirement – if implemented – would necessitate the encumbrance of approximately 112,000 acres of state lands, the District did not involve the State in its review of the CMP and did not provide notice to the State that it decided to reject the CMP. In fact, the State only learned of the Permit

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<sup>8</sup> ROD at 2-1.

<sup>9</sup> See Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning Mitigation Sequence for Wetlands in Alaska under Section 404 of the Clean Water Act (June 15, 2018).

<sup>10</sup> See ROD at B2-4.

Denial on November 25, 2020, when the District released its decision to the general public.

The District's approach to this permit raises serious concerns for the State; specifically, that the District will not carefully consider CMPs submitted by future applicants and will ignore real public benefits associated with future projects, effectively eliminating the State's ability to make natural resource management decisions for its lands. It also raises cooperative federalism concerns, as the District issued the Permit Denial before the State completed its water quality certification under Section 401 of the CWA. The District's preemptive disregard for the State's Section 401 certification demonstrates the District's willingness to ignore the State's input with respect to projects that may affect water quality and sets a dangerous precedent for future projects in Alaska. For these reasons, in addition to the State's substantial legal and sovereign interest both in the mineral and surface estate of the property within the project boundary and in developing the State's natural resources through future projects, the State asks the Division to reverse and remand the decision.

### **REASONS FOR APPEAL**

#### **I. Corps regulations provide the State with the right to appeal the Permit Denial.**

The State's interest in this case is to ensure that when a federal agency reviews a permit application for a project impacting State resources, the agency issues a reasoned decision that is supported by the record and complies with applicable law. Moreover, the State, as landowner and sovereign, has an obligation under federal law and the Alaska



Constitution to participate in any proceeding that threatens to lock up large swaths of state lands and resources. In short, the State cannot sit on the sidelines when a federal agency, in an unprecedented decision, establishes new broad standards for significant degradation and compensatory mitigation, and conducts a flawed public interest review, especially when that decision disregards federal law and would effectively end most large-scale projects in Alaska.

The State is an “affected party” given its substantial and identifiable legal interests in the property in question and in the precedent the Permit Denial sets for all future projects in Alaska requiring individual Section 404 permits. The Permit Denial limits the State’s ability to comply with the Alaska Constitution’s mandate to responsibly manage state lands for the socioeconomic benefit of its citizens and undermines the CWA’s cooperative federalism framework.

**A. The State has identifiable and substantial legal interests in the project area and is an “affected party.”**

Under 33 C.F.R. part 331, “affected parties” can administratively appeal a permit denial. Affected parties are expressly defined to include both applicants and landowners.<sup>11</sup> In defining an “affected party” to include these two categories of individuals or entities, the Corps intended to allow those with “an identifiable and substantial legal interest in the property” to participate in administrative appeals of permit

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<sup>11</sup> See 33 C.F.R. § 331.2.

denials.<sup>12</sup> The State has substantial and identifiable legal interests as the surface and mineral estate owner within most of the proposed project boundary. As discussed in detail below, it also has a substantial interest in maintaining its autonomy to develop its natural resources in the future, which the Permit Denial threatens by setting a dangerous new precedent. With respect to the project area at issue, Alaska weighed competing interests and goals for its land and mineral holdings and determined that a mineral deposit in this area could be appropriate for development.<sup>13</sup> In doing so, the State noted that mineral development projects can provide important public benefits to local communities and the State as a whole while simultaneously balancing the need for environmental protection. Likewise, the District acknowledged the public interest benefits associated with the proposed project in the FEIS issued in July 2020.<sup>14</sup> The project’s significant

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<sup>12</sup> *Id.*

<sup>13</sup> *See* Bristol Bay Area Plan for State Lands, 3-106 (2013) *available at* [dnr.alaska.gov/mlw/planning/areaplans/Bristol/2013/pdf/bbap\\_amend2013\\_complete.pdf](http://dnr.alaska.gov/mlw/planning/areaplans/Bristol/2013/pdf/bbap_amend2013_complete.pdf) (“2013 Area Plan”); *see generally* Alaska Stat. § 38.04.005 (policy for allocating state land for private use and public retention); Alaska Stat. § 38.04.015(2) (identifying mining and mineral leasing as a primary public interest in retaining state land surface in public ownership); Alaska Stat. § 38.04.065 (establishing land use planning process); Alaska Stat. § 38.05.300 (establishing land classification requirement).

<sup>14</sup> *See, e.g.*, FEIS Executive Summary at 47 (“Communities near the mine site would see a beneficial impact of higher employment rates.”); FEIS Executive Summary at 47-48 (“The project would generate \$25 million annually in state taxes through construction, and \$84 million annually in state taxes and royalty payments during the operations phase.”); FEIS at 4.3-10 (“the project would provide long-term beneficial impacts to the economy from employment and income in the region and state.”); FEIS at 4.3-6 – 4.3-7 (“local employment opportunities could . . . provide service fee revenue to maintain or even improve community infrastructure.”).

public benefits, which the District effectively ignored in issuing the Permit Denial, demonstrate the State's substantial and identifiable legal interests in the decision. The State should be permitted to appeal as of right.

The State's right of appeal as a landowner is not inconsistent with the Corps' statement, in 33 C.F.R. part 331, that there is to be "no third-party involvement in the appeal process."<sup>15</sup> The Corps suggested that "[e]xpanding the appeal rights to third parties would potentially increase the number of appealable actions by an order of magnitude or more," which the Corps described as "unworkable."<sup>16</sup> This concern is not triggered when the appellant is the owner of the project land and mineral estates, and particularly when the owner is a sovereign. Such non-applicant landowners have an interest unlike any other appellant or third party. Here, the State owns the surface and mineral estate within the proposed project boundary and owns much of the land in the greater Bristol Bay watershed.<sup>17</sup> The State understands that PLP also will appeal the District's decision. Therefore, the State's appeal as the affected landowner will not require review that would not already be undertaken in the course of PLP's appeal, and the Corps' concern over expanding administrative appeal rights is not implicated here.

Moreover, the Division should accept the State's appeal as an "affected party" because not doing so would eliminate any involvement of non-applicant landowners in

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<sup>15</sup> 64 Fed. Reg. 11,708, 11,711 (Mar. 9, 1999).

<sup>16</sup> *Id.*

<sup>17</sup> 2013 Area Plan at 3-13.

the administrative appeal process. The permissive participation provisions of the regulations suggest that “adjacent property owners”—not owners of the mineral and surface estates at issue—could be involved in the appeal conference.<sup>18</sup> Reading 33 C.F.R. §§ 331.2 and 331.7(e)(3) as excluding non-applicant landowners would lead to the absurd result of denying these landowners any substantive involvement in an administrative appeal.

While 33 C.F.R. § 331.7(e)(3) allows adjacent property owners and state agency personnel to be involved in the appeal conference to clarify elements of the record, where the State is the sovereign non-applicant surface and mineral owner within the project boundary, its ability to participate should not be limited to clarifying elements of the administrative record. The State has substantial legal interests in the property at issue that are distinct from PLP’s interests; therefore, the Division should accept the State’s appeal as an affected party. However, if the Division determines that the State is not an affected party,” at the very least the State should be permitted to participate in the appeal conference associated with PLP’s appeal to “clarify elements of the administrative record,” either in its capacity as the state regulatory agency or as an “adjacent property owner” pursuant to 33 C.F.R. § 331.7(e)(3).

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<sup>18</sup> *See* 33 C.F.R. § 331.7(e)(3). The State notes that it is also an “adjacent property owner” to the project lands, and therefore qualifies to participate in the appeal conference on those grounds.

**B. Alaska’s Constitution, its Statehood Act, and the Cook Inlet Land Exchange require the State to responsibly manage state lands for the benefit of all Alaskans.**

The State’s interest in these proceeding goes far beyond the interests of a typical private landowner. Its interest stems from Congress’ mandate that the State manage its lands and resources for the socioeconomic benefits of its citizens. To understand why, it is necessary to discuss the terms under which Alaska achieved statehood.

Alaskans’ desire to control Alaska’s lands and resources became a coalescing force that motivated many to support the statehood effort after World War II.<sup>19</sup> Opponents to statehood raised several compelling objections, including Alaska’s small population, narrow tax base, and the questionable financial means to govern itself.<sup>20</sup> To overcome these objections, advocates of statehood argued that Congress should convey significant lands to the new state in the hope that the lands would generate enough revenue so the State could govern itself. As the Alaska Supreme Court explained, this argument won the day.

That Congress recognized the financial burden awaiting the new state is clear from its debates. It is equally clear that the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden. Congress, then, granted Alaska the mineral estate with the intention

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<sup>19</sup> See, e.g., *Sturgeon v. Frost*, 587 U.S. \_\_\_, 139 S. Ct. 1066, 1073-1076 (2019); *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45, 47 (1962); see generally Terrance Cole, *Fighting for the Forty-Ninth Star: C. W. Snedden and the Crusade for Alaska Statehood* (U. of Alaska Press, 2010) (“The quest for statehood in the 1950s was fueled by growing dissatisfaction with federal management of the territory.”).

<sup>20</sup> *Trustees for Alaska v. State*, 736 P.2d 324, 335-36 (Alaska 1987).

that the revenue generated therefrom would help fund the new state's government.<sup>21</sup>

Congress eventually agreed to admit Alaska into the Union on terms set out in the Statehood Act.<sup>22</sup> The Act's passage, however, did not complete the statehood process; before Alaska could enter the Union, the Act required ratification by the "State and its people."<sup>23</sup> Based on the promises provided by the Statehood Act, Alaskans ratified statehood on August 26, 1958.<sup>24</sup>

Importantly, the United States Supreme Court has characterized the land grant provisions of statehood acts as a "solemn agreement" which in some ways may be analogized to a contract between private parties,<sup>25</sup> and as "an unalterable condition of the admission, obligatory upon the United States."<sup>26</sup> In Alaska, the centerpiece of the compact between the State of Alaska and the United States is the State's right to select lands and manage these lands for the public's benefit.<sup>27</sup> The Statehood Act expressly provided the State with the right to select over 103-million acres of federal land, along

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<sup>21</sup> *Id.* at 337.

<sup>22</sup> *Id.*

<sup>23</sup> Alaska Statehood Act, Pub. L. 85-508, § 8(b), 72 Stat. 339, 344 (1958) ("Statehood Act").

<sup>24</sup> *State v. Lewis*, 559 P.2d 630, 639 (Alaska 1977).

<sup>25</sup> *Andrus v. Utah*, 446 U.S. 500, 507 (1980).

<sup>26</sup> *Beecher v. Wetherby*, 95 U.S. 517, 523 (1877).

<sup>27</sup> *See Trustees for Alaska*, 736 P.2d at 335 ("The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state.").

with the underlying mineral resources. Congress allowed the State to select lands that would fund State government and provide economic benefits to State residents.<sup>28</sup> It also gave the State all right and title to the selected lands and provided that “mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct.”<sup>29</sup> The conveyance of mineral rights was deemed so essential to the State’s ability to provide for itself that, should the State convey the surface estate of selected lands, it was required to reserve all mineral rights or forfeit those rights back to the federal government.<sup>30</sup> It was left to the new state to make the most of its selection options and to fully utilize these lands in order to satisfy the State’s budgetary obligations and the needs of Alaskans.

For these reasons, the State guards the rights conferred under the Statehood Act and views the management of its lands, and access to them, as an essential aspect of its sovereignty. Indeed, these lands provide the revenues necessary to support state and local governments and sustain Alaska’s economy, culture, and way of life.<sup>31</sup> The commitments

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<sup>28</sup> *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968); *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1016 & 1021 n.47 (D. Alaska 1977).

<sup>29</sup> Statehood Act, § 6(i); *see also*, S. Rep. No. 1028, 83rd Cong. 2d Sess. 6 (1954) (“the State is given the right to select lands known or believed to be mineral in character”).

<sup>30</sup> Statehood Act, § 6(i).

<sup>31</sup> *See, e.g.*, Alaska Const. art. VIII, §§ 1, 2, 6; Alaska Stat. §§ 38.04.005 - .015 (setting out the State’s land management policies); Alaska Stat. § 44.99.100(a) (declaring the state economic development policy to “further the goals of a sound economy, stable employment, and a desirable quality of life, the legislature declares that the state has a commitment to foster the economy of Alaska through purposeful development of the state’s abundant natural resources and productive capacity.”); Alaska Stat. § 44.99.110

made in the Statehood Act, therefore, mandate that the State must vigorously contest any expansion of federal authority that challenges the State’s management and use of Alaska’s lands and resources. Likewise, under Alaska’s Constitution, the State has the obligation to ensure that Alaska’s lands and resources benefit its citizens and are developed and conserved in a responsible manner.<sup>32</sup> The rights granted to the State of Alaska in the Statehood Act, and reflected in its constitution, cannot – and should not – be unilaterally diminished by any federal agency.<sup>33</sup>

For the foregoing reasons, the State is not simply a landowner. It is a sovereign that has an obligation under state and federal law to protect its property and defend the rights of its citizens. The State therefore has a right to participate in this appeal.

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(“The legislature, acting under art. VIII, sec. 1 of the Constitution of the State of Alaska, in an effort to further the economic development of the state, to maintain a sound economy and stable employment, and to encourage responsible economic development within the state for the benefit of present and future generations through the proper conservation and development of the abundant mineral resources within the state . . .”).

<sup>32</sup> Alaska Const. art. VIII, § 1 (“It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.”); *id.* § 2 (“The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people”).

<sup>33</sup> *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009) (“[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event to suggest that subsequent events somehow can diminish what has already been bestowed’ []. And that proposition applies *a fortiori* where virtually all of the State’s public lands . . . are at stake.”) (quoting, in part, *Idaho v. United States*, 533 U.S. 262, 284 (2001) (Rehnquist, C.J., dissenting)); *see also Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404, 1406 (9th Cir. 1989).



**C. The Permit Denial undermines the Clean Water Act’s cooperative-federalism framework and upsets a deliberate balancing of state and federal interests.**

State participation in this appeal is also necessary to ensure that the executive branch does not upset the system of cooperative federalism embodied in our constitutional structure. The Framers intended that Congress serve as a bulwark against federal encroachment into traditional areas of state regulation. Here, the District is attempting to circumvent Congress and ignore the CWA’s explicit reservation to the states of the power to regulate land use. The District’s poorly reasoned decision risks upsetting the carefully crafted federal-state balance of power.

The CWA is legislation that exemplifies cooperative federalism. It provides: “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .”<sup>34</sup> Indeed, much of the Supreme Court’s CWA jurisprudence has been dedicated to protecting the carefully crafted balance of federal and state interests.<sup>35</sup>

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<sup>34</sup> 33 U.S.C. § 1251(b).

<sup>35</sup> See, e.g., *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality opinion) (“We ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority. . . . The phrase ‘the waters of the United States’ hardly qualifies.”); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (discerning whether the executive branch’s interpretation of the Clean Water Act “alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power”).

If the District were permitted to ignore the express will of Congress, the State would be unprotected from executive overreach, which would, in turn, erode the State's sovereignty.

The Supreme Court has long held that “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”<sup>36</sup> Congress' purpose here could not be more clear: to protect states' regulation “of land use [which is] a function traditionally performed by local governments.”<sup>37</sup> Thus, the Division should interpret the CWA in a manner that avoids “intrusion into traditional state authority” and reinforces Congress' role as the federal representative of states' interests.<sup>38</sup>

If the District's decision stands, it will raise serious doubts about the durability of the cooperative-federalism framework. This is disconcerting in any context, but the District's disregard for the CWA's explicit language protecting the State's interests makes the ramifications of this appeal far reaching. Indeed, under the Permit Denial, the District has, in effect, granted itself authority to dictate land use policies in Alaska. This is simply unacceptable.

The State possesses undeniable and significant interests in the project area and the far-reaching implications of the Permit Denial for development of natural resources in

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<sup>36</sup> *United States v. Bass*, 404 U.S. 336, 349 (1971).

<sup>37</sup> *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

<sup>38</sup> *Rapanos*, 547 U.S. at 738.

Alaska; thus, the State should be permitted to appeal as a matter of right – or at minimum participate in the appeal conference under 33 C.F.R. § 331.7.

**II. The District’s “significant degradation” conclusion under Section 404(b)(1) is unprecedented, unsupported by the record, and threatens all future projects in Alaska.**

The District purportedly made its decision pursuant to its authority in the CWA, which authorizes the District to issue permits for the discharge of dredged or fill material into the navigable waters of the United States only if certain conditions are met.<sup>39</sup> “The Section 404 permit process is governed simultaneously by Corps Regulations, 33 C.F.R. Parts 320-29, and by EPA guidelines, 40 C.F.R. Part 230. Both sets of rules must be observed.”<sup>40</sup>

The 404(b)(1) Guidelines at 40 C.F.R. part 230 are the substantive environmental standards by which all Section 404 permit applications are evaluated. They require that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”<sup>41</sup> The Guidelines further provide that “no discharge of dredged or fill material shall be permitted which will cause or contribute to a *significant*

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<sup>39</sup> 33 U.S.C. § 1344(d).

<sup>40</sup> *Friends of the Earth v. Hintz*, 800 F.2d 822, 830 (9th Cir. 1986).

<sup>41</sup> 40 C.F.R. § 230.10(a).

*degradation* of the waters of the United States.”<sup>42</sup> Although the Guidelines do not define the term “significant degradation,” they make clear that the “effects contributing to significant degradation considered individually or collectively include” *significantly adverse effects* on human health and welfare, *significantly adverse effects* on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, *significantly adverse effects* on aquatic ecosystem diversity, productivity and stability and *significantly adverse effects* on recreational, aesthetic and economic values.<sup>43</sup> The Guidelines further make clear that the District’s determinations regarding significant degradation must be “based upon appropriate factual determinations, evaluations, and tests,” as reflected in the substantive factors outlined in other subparts of the Guidelines.<sup>44</sup> Additionally, a permit may not issue unless “appropriate and practicable steps have been taken which will minimize *potential adverse impacts* of the discharge on the aquatic ecosystem.”<sup>45</sup>

Here, the District found that the Pebble project would cause “significant degradation” of waters of the United States in the Kaktuli watershed, presumably having assumed that there would be *no compensatory mitigation* for impacts given the District’s

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<sup>42</sup> *Id.* § 230.10(c) (emphasis added).

<sup>43</sup> *Id.* § 230.10(c)(1)-(3).

<sup>44</sup> *See id.* §§ 230.20-230.25 (Subpart C (physical and chemical characteristics such as substrate)); §§ 230.30-230.32 (Subpart D (biological characteristics such as fish and other wildlife)); §§ 230.40-230.45 (Subpart D (special aquatic sites such as wetlands)); §§ 230.50-230.54 (Subpart F (human use characteristics such as recreation)).

<sup>45</sup> *Id.* § 230.10(c)(d)(emphasis added).

corresponding summary rejection of the CMP, as addressed more fully below.<sup>46</sup> The District applied an unsupported “greater than trivial” impacts standard in its determination of significant degradation that, if upheld, could potentially foreclose a wide range of future projects in Alaska,<sup>47</sup> and would have prevented large resource development projects that it has previously approved. This standard is not consistent with the plain language of the Guidelines or with the Corps’ own guidance, relevant court decisions, and general practice. Moreover, the District’s decision – far from being based on the detailed analysis expressly required by the Guidelines – is based on unsupported summary conclusions that are inconsistent with the factual record developed in the FEIS. The District’s “significant degradation” finding should therefore be remanded.

**A. The District imposed an unsupported “greater than trivial impact” standard that could effectively foreclose any development in Alaska.**

For purposes of its “significant degradation” determination, the District defined “significant” as “more than trivial,” and explained that the magnitude of the direct, indirect, and cumulative impacts would be based upon this unreasonably low bar as applied against the impact factors outlined in the Guidelines.<sup>48</sup> Though the Permit Denial itself is devoid of any detailed analysis or justification for the use of this broad standard,

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<sup>46</sup> ROD at 6-5.

<sup>47</sup> This potential is especially acute because PLP modified its proposed project application to reflect all aspects of the least environmentally damaging practicable alternative analysis conducted by the District. FEIS at 4-3.

<sup>48</sup> ROD at B2-2.

the District appears to rely on an out-of-context reference to the 1980 Federal Register preamble to the Section 404(b)(1) Guidelines as requiring its application.<sup>49</sup> The District’s interpretation and application of this sentence is inconsistent with the plain language and operation of the Guidelines and Section 404, and would effectively prohibit the issuance of a 404 permit for any major project with impacts to wetlands.

Application of a “more than trivial” standard for “significant degradation” determinations runs contrary to the very language of 40 C.F.R. § 230.10(c), which notes repeatedly that the magnitude of effects contributing to significant degradation is “significantly adverse effects” resulting from the discharge of pollutants.<sup>50</sup> The word “trivial” appears nowhere in these very detailed requirements for factual analyses to support degradation determinations, and the term itself is antonymous to the language of those requirements.

Given that Alaska is covered by approximately 175 million acres of wetlands – encompassing more than 43% of Alaska’s surface area – the District’s “more than trivial” standard would effectively foreclose most, if not all, future resource development projects in the Alaska, and indeed would have foreclosed other major projects that the

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<sup>49</sup> *Id.*; 85 Fed. Reg. 85,336, 85,343-344 (Dec. 24, 1980) (“In this context, ‘significant’ and ‘significantly’ mean more than ‘trivial’, that is, significant in a conceptual rather than a statistical sense. Not all effects which are statistically significant in the laboratory are significantly adverse in the field.”). A plain reading, placed in its context, demonstrates an intent to *raise*, not lower, the threshold for finding an effect significant.

<sup>50</sup> 40 C.F.R. § 230.10(c)(1)-(4).

District has previously approved. In practice, every major project in Alaska impacting wetlands and requiring an individual 404 permit likely results in “more than trivial” effects. Thus, if the District’s definition is upheld as the standard for future Section 404 permits, natural resource development projects in Alaska would effectively be foreclosed. Yet the District has not made such conclusions in the context of past development projects.

For instance, the District’s 2019 permit approval for the Alaska Stand-Alone Pipeline discusses, analyzes, and categorizes project impacts as “moderate,” “low,” or “minor,” none of which are characterized “significant.”<sup>51</sup> Despite some impacts being identified as “moderate,” the District found the project complied with 40 C.F.R. § 230.10(c) and issued the permit. Similarly, the District’s decision for the Greater Mooses Tooth Two project documents extensive “more than trivial” effects but relies on compensatory mitigation to conclude that the project nonetheless complied with 40 C.F.R. § 230.10(c).<sup>52</sup> Finally, although the District’s 2018 decision for the Donlin Gold Mine project documented significant impacts to the Kuskokwim River, the District found

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<sup>51</sup> Bureau of Land Mgmt. & U.S. Army Corps of Eng’rs, Alaska Stand Alone Pipeline Project Joint Record of Decision (Mar. 2019).

<sup>52</sup> Bureau of Land Mgmt. & U.S. Army Corps of Eng’rs, Proposed Greater Mooses Tooth Two Development Project Joint Record of Decision and Permit Evaluation (Oct. 2018), *available at* [https://eplanning.blm.gov/public\\_projects/nepa/65817/160123/195768/Record\\_of\\_Decision\\_with\\_cover\\_page.pdf](https://eplanning.blm.gov/public_projects/nepa/65817/160123/195768/Record_of_Decision_with_cover_page.pdf).

no significant degradation given the protective measures and compensatory mitigation proposed by the applicant.<sup>53</sup>

The District's new "more than trivial" definition would undoubtedly have resulted in contrary conclusions for these projects, just as it would any future natural resource development project in Alaska. Such an absurd result prohibiting the issuance of permits is inconsistent with the language and intent of the Guidelines and CWA Section 404(b)(1).

**B. The District's stringent application is unsupported by Corps guidance, reported court decisions, or the Corps' general practice.**

The District's "more than trivial" definition and its resulting conclusion of "significant degradation" for the Pebble project is inconsistent with Corps guidance, reported court decisions, and general Corps practice. Current Corps guidance makes clear that the "significant degradation" threshold is not set as low as the "more than trivial" level imposed by the District; rather, significant degradation should only be found when a project's impacts will be "major." The Corps 404(b)(1) Guidelines provide the following options: no effect, negligible, minor (short term and long term), and major (significant) effects.<sup>54</sup> Under the Guidelines, an impact that is "more than trivial" could best be

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<sup>53</sup> See U.S. Army Corps of Eng'rs & Bureau of Land Mgmt., Donlin Gold Project Joint Record of Decision and Permit Evaluation, B2-13 (Aug. 13, 2018) ("Donlin ROD"), available at <https://www.donlingold.com/wp-content/uploads/2018/08/Donlin-Gold-Corps-BLM-Joint-Record-of-Decision.pdf>.

<sup>54</sup> U.S. Army Corps of Engineers, *Guidelines for Preparation of Analysis of Section 404 Permit Applications Pursuant [sic] to the Section 404(b)(1) Guidelines of the Clean*



classified as negligible or minor effects, which the guidance makes clear are not “significant.” A 2018 Memorandum of Agreement between the EPA and the Corps supports this position, noting that negligible or “trivial impacts” include “small discharges to construct individual driveways.”<sup>55</sup>

Consistent with this regulatory guidance, no court decision regarding the Section 404(b)(1) Guidelines supports the District’s overly broad definition of significant, and at least one federal circuit court has expressly rejected an attempt to apply a similarly broad definition. In *Sierra Club v. U.S. Army Corps of Engineers*, the Sierra Club challenged the issuance of a Section 404 permit where the draft EIS had found that the project would result in “significant loss of habitat to Hudson River juvenile striped bass[.]”<sup>56</sup> However, in the final EIS, the Corps found that the long-term decline in stock would only have minor impacts on the fishery, and later decided to issue the permit. The district court found that the Corps “failed adequately to support [its] conclusion that the impact on the striped bass fishery would be minor.”<sup>57</sup> To address the discrepancy, the Corps argued that the language the draft EIS and the final EIS meant same thing and that, in the draft, the

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*Water Act*, available at [https://www.sas.usace.army.mil/Portals/61/docs/regulatory/IP\\_SAS\\_404\\_b\\_1\\_Guidelines.pdf](https://www.sas.usace.army.mil/Portals/61/docs/regulatory/IP_SAS_404_b_1_Guidelines.pdf).

<sup>55</sup> See U.S. Env’tl. Prot. Agency, *et al.*, *Memorandum: Appropriate Level of Analysis Required for Evaluating Compliance with the CWA Section 404(b)(1) Guidelines Alternatives Requirements*, available at <https://www.epa.gov/cwa-404/memorandum-appropriate-level-analysis-required-evaluating-compliance-cwa-section-404b1>.

<sup>56</sup> 772 F.2d 1043, 1047 (2d Cir. 1985).

<sup>57</sup> *Id.* at 1048.

Corps was using “significant” as a term of art that meant “measurable but minor.”<sup>58</sup> The Second Circuit disagreed, and concluded that “[p]lainly, the word ‘significant’ as used in the regulatory context under which the Corps operates means *important, major or consequential*.”<sup>59</sup> The only court decision to cite the “more than trivial” standard does so only in dicta without any analysis of the “significant degradation” section because it was not a central issue in the outcome.<sup>60</sup>

A finding of significant degradation despite extensive measures and compensatory mitigation like that made by the District on the Pebble project is a rare outcome. Indeed, every reported court decision involving the significant degradation standard addresses a situation where the Corps found *compliance* with 40 C.F.R. § 230.10(c) despite the projects clearly having “more than trivial” impacts. For instance, in *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, the Ninth Circuit upheld the permit issuance and associated conclusion that a gold mine near Nome would not result in significant degradation where the Corps had concluded that the impacts would be localized or limited in time and that the wetlands that would be filled were not unique to the site but were ““common habitat in the Alaska and the Nome

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<sup>58</sup> *Id.* at 1052.

<sup>59</sup> *Id.* at 1053 (emphasis added).

<sup>60</sup> See *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58 (D.D.C. 2010) (citing 45 Fed. Reg. at 85,343 but holding that the Corps’ decision must be reversed due to a flawed practicable alternatives analysis), *aff’d in part rev’d in part* 661 F.3d 1147 (D.C. Cir. 2011).

region,’ exceeding forty percent of the land in the State of Alaska.”<sup>61</sup> Accordingly, the Corps concluded that the project would likely have no impact on the greater ecosystem beyond the project site. Because the Corps thoroughly and rationally considered the relevant factors under 40 C.F.R. § 230.10, the court held that its determination was not arbitrary and capricious, or contrary to law.<sup>62</sup> The First, Fifth, and Sixth Circuits have upheld similar Corps conclusions under 40 C.F.R. § 230.10(c).<sup>63</sup> Given the lack of any legal precedent for the District’s application of the overly broad “more than trivial” definition, the “significant degradation” determination for the Pebble project should be reversed.

**C. The District’s conclusions about degradation are unsupported by detailed analysis and contradicted by the FEIS.**

Having interpreted “significant” to mean “more than trivial,” the District then proceeds in the Permit Denial to summarily identify theoretical impacts that it concludes meet this broad standard for the Pebble project, and thereby preclude issuance of the

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<sup>61</sup> 524 F.3d 938, 949 (9th Cir. 2008).

<sup>62</sup> *Id.* at 957.

<sup>63</sup> *See, e.g., Olmsted Falls v. U.S. Env’tl. Prot. Agency*, 435 F.3d 632, 635, 638 (6th Cir. 2006) (upholding Corps’ issuance of permit for airport expansion where it “concluded that the proposed project would not sufficiently degrade the waters of the United States, as prohibited by 40 C.F.R. § 230.10(c)” after balancing the environmental harm against the benefits of the proposed compensatory mitigation); *Shoreacres v. Waterworth*, 420 F.3d 440 (5th Cir. 2005) (upholding 40 C.F.R. § 230.10(c) determination for shipping terminal project); *Norfolk v. U.S. Army Corps of Eng’rs*, 968 F.2d 1438, 1454 (1st Cir. 1992) (upholding Corps conclusion for a proposed landfill under 40 C.F.R. § 230.10(c) where it conducted a lengthy evaluation and concluded that “the risk to drinking water supplies from the landfill is minor”).

permit.<sup>64</sup> These purported “findings,” however, find no support in the record and are contrary to established Corps guidance.

The Guidelines provide that findings of significant degradation are to be “based upon appropriate *factual* determinations, evaluations, and tests . . . with special emphasis on the persistence and permanence of the effects.”<sup>65</sup> The preamble to the 404(b)(1)

Guidelines likewise provides that:

Specific documentation is important to ensure an understanding of the basis for each decision to allow, condition, or prohibit a discharge through application of the Guidelines. Documentation of information is required for (1) facts and data gathered in the evaluation and testing of the extraction site, the material to be discharged, and the disposal site; (2) factual determinations regarding changes that can be expected at the disposal site if the discharge is made as proposed; and (3) findings regarding compliance with § 230.10 conditions. This documentation provides a record of actions taken that can be evaluated for adequacy and accuracy and ensures consideration of all important impacts in the evaluation of a proposed discharge of dredged or fill material.<sup>66</sup>

The preamble also recognizes that the level of documentation under Section 404(b)(1) will vary based on the severity of expected impacts for a project, with less analysis required for projects with little potential for significant impacts:

The specific information documented under (1) and (2) above in any given case depends on the level of investigation necessary to provide for a reasonable understanding of the

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<sup>64</sup> ROD at B2-2 – B2-4.

<sup>65</sup> 40 CFR § 230.10(c) (emphasis added).

<sup>66</sup> 45 Fed. Reg. at 85,343.

impact on the aquatic ecosystems. . . . The level of documentation should reflect the significance and complexity of the proposed discharge activity.<sup>67</sup>

In light of this guidance, the record simply does not support a finding of significant adverse effects; to the contrary, the FEIS is replete with examples contradicting the District's cursory conclusions on the same topics in the Permit Denial. The Permit Denial summarily concludes that the project: (1) "causes significant effects through pollutants on human health or welfare, municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites"; (2) "causes significant adverse effects through pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems"; (3) "causes significant adverse effects through pollutants on aquatic ecosystem diversity, productivity, and stability to the loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy"; and (4) "causes significant adverse effects through pollutants on recreational, aesthetic, and economic values." The Permit Denial further concludes that for all significant adverse effects, "the proposed avoidance, minimization, or compensatory mitigation measures would not reduce the impacts to aquatic resources from the proposed project to below a level of significant degradation."<sup>68</sup> The Factual Determination Matrix that supposedly supports these conclusions is merely a spreadsheet that includes rows listing purported effects for each of the Guideline subparts, but includes very little factual

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<sup>67</sup> *Id.*

<sup>68</sup> ROD at B2-6.

detail and almost no analysis supporting the Permit Denial’s “significant degradation” conclusion.<sup>69</sup> For some factors it lists the amount of impacted wetland acreage or stream miles<sup>70</sup> or includes a general description of the anticipated impacts,<sup>71</sup> but the balance of the rows include only a terse reference to the factor subparts and an unsupported conclusion.<sup>72</sup>

These unsupported conclusions run contrary to conclusions on the same topics in the FEIS that were backed up by more detailed analysis. For instance, while the Permit Denial finds significant impacts to recreational and commercial fisheries, the FEIS conversely concludes that while the project “would result in loss of fish habitat in the upper North and South Fork Kaktuli rivers[,] [t]his disturbance would not be expected to have measurable effects on the number of adult salmon returning to the Nushagak and Kvichak district . . . . The mine site area is not connected to the Togiak, Ugashik, Naknek, and Egegik watersheds and is not expected to affect fish populations or harvests from these [Bristol Bay] watersheds.”<sup>73</sup> It further concludes that “[t]he mine site is not expected to affect Cook Inlet commercial fisheries.”<sup>74</sup> Another example is the Permit Denial’s unsupported conclusions regarding purported significant impacts to water-

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<sup>69</sup> ROD, Attachment B7.

<sup>70</sup> *See, e.g.*, ROD, Attachment B7 at 1, 5, 121.

<sup>71</sup> *Id.* at 101, 121.

<sup>72</sup> *Id.* at 7-19, 17-31, 38-50, 141-152.

<sup>73</sup> FEIS at 4.6-4.

<sup>74</sup> *Id.*

related recreation. While the Matrix concludes impacts to regional sport fishing would be significant,<sup>75</sup> the FEIS found that such use in the project area was limited and that any associated impacts to recreational use to be insignificant.<sup>76</sup>

Regardless of the merits of the District’s “significant degradation” conclusion for the Pebble project, the lack of required detail in the record supporting this unprecedented conclusion, combined with wholly conflicting detailed analyses in the FEIS, sets a troubling precedent for future resource projects in Alaska. A federal regulatory agency with significant power over the development of state land like the District cannot be permitted to vacillate between disparate factual and legal conclusions. Such unfettered discretion would inhibit all project development in Alaska and is wholly contrary to federal law.<sup>77</sup> The District’s decision-making on “adverse degradation” is unsupported by either precedent or facts and must be reversed.

**III. Compensatory mitigation must be predictable, reasonable, and practicable; the district’s requirements were not and would impose impossible standards for projects within Alaska.**

The Corps and EPA have repeatedly acknowledged that compensatory mitigation requirements must be applied flexibly in Alaska, recognizing that in a state dominated by

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<sup>75</sup> ROD, Attachment B7 at 141-144.

<sup>76</sup> FEIS at 4.6-4 – 4.6-6.

<sup>77</sup> See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (where there is no “rational connection between the facts found and the choice made,” and the agency’s “explanation for its decision [is] counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise[.]” decision must be reversed).

untouched wetlands, opportunities for compensatory mitigation in and adjacent to the project area may be limited – or nonexistent. Yet the District seems to have abandoned that recognition in the Permit Denial. The District dictated where compensatory mitigation must occur, but then faulted PLP for proposing preservation, the only type of compensatory mitigation available in that area. The District’s decision raises significant concerns for future development of any kind in this wetlands-rich state because the Permit Denial and supporting documentation lack a detailed analysis that might form the basis for determining why this project did not merit the flexibility promised by the Corps and EPA over decades of guidance and outreach in Alaska.

**A. The District failed to consider Alaska’s unique environment.**

For almost 30 years, the Corps and the EPA have recognized that wetlands mitigation in Alaska presents unique complexities. Based on this recognition, EPA and the Corps have developed Alaska-specific guidance for mitigation sequencing under Section 404. The District, however, not only did not apply that guidance, it made no mention of it in the Permit Denial or any of its analysis of PLP’s proposed compensatory mitigation. The District’s silence on the Alaska-specific guidance raises serious questions about the District’s continued commitment to applying mitigation requirements in Alaska in an appropriate and reasonable manner.

Wetlands mitigation in Alaska is fundamentally different than in the lower 48 states because of the sheer quantity of untouched wetlands in Alaska. Alaska holds more wetlands (approximately 175,000,000 acres of wetlands, comprising about 43% of the



surface area of the State) than the rest of the Nation combined (103,000,000 acres, comprising about 5% of the surface area).<sup>78</sup> EPA and the Corps have long recognized that the goal of achieving “no net loss” of wetlands acreage may not be met on an individual permit basis, and “may not be practicable in areas where wetlands are abundant.”<sup>79</sup> EPA and the Corps expressly noted that Alaska posed specific mitigation complexities in their January 1992 joint guidance emphasizing that compensatory mitigation may not be required in areas where “it may not be practicable to restore or create wetlands.”<sup>80</sup> To further understand how to best apply the Guidelines in Alaska, the agencies convened a detailed study – the Alaska Wetlands Initiative – with a broad range of stakeholders, including the State.<sup>81</sup> The Alaska Wetlands Initiative resulted in several policy refinements and goals, the most relevant of which for this appeal was the intent to issue a “written statement that recognizes the flexibility to consider circumstances in Alaska in implementing alternatives analyses and compensatory mitigation requirements under the Section 404 regulatory program,” which was intended to provide “greater predictability to the Section 404 program.”<sup>82</sup> The statement was attached to the Summary Report, and

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<sup>78</sup> Alaska Wetlands Initiative Summary Report, 2 (May 13, 1994), *available at* [archive.epa.gov/water/archive/web/pdf/alaska.pdf](http://archive.epa.gov/water/archive/web/pdf/alaska.pdf).

<sup>79</sup> *Id.* at 1 (describing February 1990 EPA and Department of the Army Memorandum of Agreement on Mitigation).

<sup>80</sup> Clarification of the Clean Water Act Section 404 Memorandum of Agreement on Mitigation (January 11, 1992).

<sup>81</sup> Alaska Wetlands Initiative Summary Report at 7.

<sup>82</sup> *Id.* at iii, 11.

“recognize[d] that . . . restoring, enhancing, or creating wetlands through compensatory mitigation may not be practicable due to limited availability of sites or technical or logistical issues.”<sup>83</sup>

Recently, the agencies reiterated their understanding that mitigation in Alaska is unique with an updated Memorandum of Agreement (“2018 MOA”) on mitigation sequencing.<sup>84</sup> The 2018 MOA repeats the agencies’ continuing acknowledgement that “[r]estoring, enhancing, or establishing wetlands for compensatory mitigation may not be practicable due to limited availability of sites and/or technical logistical limitations.”<sup>85</sup> It also reiterated four important points regarding compensatory mitigation that are relevant to the District’s decision here:

- “Compensatory mitigation options over a larger watershed scale may be appropriate given that compensation options are frequently limited at a smaller watershed scale.”<sup>86</sup>
- “Where a large proportion of the land is under public ownership, compensatory mitigation opportunities may be available on public land.”<sup>87</sup>

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<sup>83</sup> Statements on the Mitigation Sequence and No Net Loss of Wetlands in Alaska (May 13, 1994).

<sup>84</sup> Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency Concerning Mitigation Sequence for Wetlands in Alaska under Section 404 of the Clean Water Act (June 15, 2018), *available at* [https://www.epa.gov/sites/production/files/2018-06/documents/epa\\_army\\_moa\\_alaska\\_mitigation\\_cwa\\_404\\_06-15-2018\\_0.pdf](https://www.epa.gov/sites/production/files/2018-06/documents/epa_army_moa_alaska_mitigation_cwa_404_06-15-2018_0.pdf).

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.* at 2; *see also id.* at 5.

<sup>87</sup> *Id.*; *see also id.* at 5-6.

- “Out-of-kind compensatory mitigation may be appropriate when it better serves the aquatic resource needs of the watershed.”<sup>88</sup>
- “[C]ompensatory mitigation provided through preservation should be, to the extent appropriate and practicable, conducted in conjunction with aquatic resource restoration, establishment, and/or enhancement activities,” but “[t]his requirement may be waived by the Corps in cases where preservation has been identified as a high priority using a watershed approach.”<sup>89</sup>

In sum, the 2018 MOA requires a thoughtful balance between environmental conservation and the practical considerations associated with resource development in Alaska in recognition of the reality that the pristine nature of much of the state significantly limits the opportunities for compensatory mitigation.

Despite the patent relevance of the 2018 MOA to the fundamental structure of the Final CMP, the District appeared to ignore the guidance. Indeed, the District’s Permit Denial, its supporting Attachment B2 (Evaluation of the Discharge of Dredge and Fill Material In Accordance with 404(B)(1) Guidelines (40 CFR Section 230, Subparts B through H)), and its November 9, 2020 Memorandum for the Record: Compliance Review of Final Report, Pebble Project Compensatory Mitigation Plan in accordance with 33 CFR 332, POA-2017-00271 (“Compliance Review”), all fail to identify the 2018 MOA as relevant guidance. It appears that the District made the its decision as if the 2018 MOA, and its recognition of the unique mitigation challenges raised by Alaska’s

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<sup>88</sup> *Id.* at 3; *see also id.* at 6-7.

<sup>89</sup> *Id.* at 7.

abundant and largely untouched wetlands, simply did not exist. The District provided no explanation why it declined even to address the applicability of the 2018 MOA.

The Permit Denial is indeed difficult to reconcile with recent District decisions based upon the 2018 MOA and its predecessors. For example, the District has repeatedly approved out-of-kind compensatory mitigation in the form of wastewater treatment improvements,<sup>90</sup> yet the District provided no explanation of its rejection of similar wastewater treatment improvements in its August 20, 2020 direction that compensatory mitigation for the Pebble project must be in-kind. Similarly, the District recently approved the use of preservation far outside the impacted watershed (unconnected to separately proposed restoration activities) without any discussion of the applicant requesting or receiving a waiver.<sup>91</sup> Here, however, the District expressly refused to consider such mitigation apparently because PLP did not expressly request a waiver.<sup>92</sup> Taken as a whole, the available record from the District's Permit Denial raises serious questions about whether projects like these could be approved in the future.

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<sup>90</sup> See Oil Search Section 404 Permit (U.S. Army Corps of Engineers, Public Notice of Application for Permit POA-2015-00025 (2020), <https://www.poa.usace.army.mil/LinkClick.aspx?fileticket=i8sZWq05U4Y%3d&portalid=34>); Alaska LNG Project (Alaska LNG, Wetlands Compensatory Mitigation Plan (Nov. 8, 2019), <https://www.poa.usace.army.mil/Portals/34/docs/regulatory/publicnotices/2019/Attachment%206%20-%20Wetlands%20Compensatory%20Mitigation%20Plan.pdf?ver=2019-12-26-182619-223>).

<sup>91</sup> See Donlin ROD.

<sup>92</sup> ROD at Attachment B2, B2-4.

At bottom, the District’s refusal to apply the flexibility provided under the 2018 MOA, and instead to impose impossible compensatory mitigation on the Pebble project sets a dangerous precedent that effectively precludes development, even on state lands that were specifically designated for mineral development. This new, more stringent standard reverses decades of work by the State, the Corps, and EPA to ensure a reasonable path forward for future development projects in Alaska. Although the District asserts that “there are many valid mining claims in the area, and these lands would remain open to mineral entry and exploration,” its Permit Denial in this case creates significant uncertainty whether any development project would be granted a Section 404 permit in Alaska, particularly in this area.

**B. The District’s “in kind and in watershed” mitigation requirements do not serve the public interest.**

**1. “In kind and in watershed” mitigation requirements foreclose resource development in Alaska.**

In August 2020, the District informed PLP that compensatory mitigation for the project must be “in-kind” and must be completed “within the Kaktuli River watershed.”<sup>93</sup> This determination, made after PLP had already submitted five previous proposals for compensatory mitigation, was not only a significant change in the agency’s position, it is also at odds with the Corps’ and EPA’s recognition that in-kind and in-watershed compensatory mitigation is not always appropriate in Alaska. The District has not explained why it deviated from several of the principles of the 2018 MOA to instead

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<sup>93</sup> Final CMP at i (quoting August 20, 2020 District Letter).

require in-kind, in-watershed compensatory mitigation at the eleventh hour. The District’s changing positions on where and how compensatory mitigation may be required seriously undermines the agency’s previously stated goal of achieving “predictability” in Section 404 permitting and likewise threatens future development in Alaska.

**2. The District’s decision to reject out-of-kind compensatory mitigation deprived the public of projects that would have better served the public interest.**

The Corps and EPA recognized that “[o]ut-of-kind compensatory mitigation may be appropriate when it better serves the aquatic resource needs of the watershed.”<sup>94</sup> However, the District does not appear to have considered the aquatic resource needs of the watershed when it analyzed PLP’s many proposals for compensatory mitigation.

The District’s decision to require in-kind compensatory mitigation severely limited the types of mitigation possible and deprived the region of projects that would better serve the public interest. The project area is remote and is virtually undeveloped. As a result, there are few opportunities to restore, enhance, or reestablish wetlands in the project area. In its earlier compensatory mitigation plans, PLP recognized this and proposed mitigation options that would address the greatest aquatic resource needs in the area – improving water quality and restoring fish habitat. These proposals included extensive remediation to fish habitat that would otherwise not be funded, improvements

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<sup>94</sup> 2018 MOA at 3.

to multiple water treatment facilities in the region, improving water quality, and marine debris removal. The District rejected these proposals which would have undeniably benefitted the aquatic resources impacted by the project in favor of requiring in-kind mitigation that may not actually be possible in the watershed.

**3. The District required in-watershed compensatory mitigation and then rejected the only in-kind compensatory mitigation available in the watershed.**

When the District determined that compensatory mitigation would be required in the Kuktuli watershed, it mandated not only the location of mitigation, but the watershed scale to be used when analyzing compensatory mitigation opportunities. The Corps and EPA acknowledged in the 2018 MOA that “[c]ompensatory mitigation options over a larger watershed scale may be appropriate given that compensation options are frequently limited at a smaller watershed scale.”<sup>95</sup> Nevertheless, the District rejected any investigation into compensatory mitigation available at a larger watershed scale and thereby severely limited the compensatory options available to the PLP. No mitigation banks or in-lieu fee providers area available in the Kuktuli watershed, so permittee responsible mitigation is the only option.<sup>96</sup>

PLP asserted in its Final CMP that it had “evaluated the opportunity to restore, create, or enhance wetlands within the affected Project watersheds, but these opportunities are not available given the largely undisturbed nature of the area and the

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<sup>95</sup> 2018 MOA at 2.

<sup>96</sup> ROD at 6-4.

limited, isolated, and small scale of available opportunities, which are predominantly out-of-kind.”<sup>97</sup> The District does not dispute that conclusion, but instead appears to ignore it. In its review, the District asserts that “[n]o restoration, establishment and/or enhancement were proposed and justification identifying the proposed preservation as a high priority using a watershed approach was not submitted.”<sup>98</sup> Given the limits the District had already imposed on the scope of the compensatory mitigation, preservation was the *only* in-kind mitigation available. Yet the District appears to indicate that even preservation may not be sufficient because it may not be “high priority using a watershed approach.”<sup>99</sup>

The District further noted that where preservation is used, “compensation ratios shall be higher.”<sup>100</sup> This raises the question of whether PLP’s proposed mitigation ratio of approximately 8 acres preserved for every acre directly or indirectly impacted<sup>101</sup> was insufficient. PLP’s proposal appears to be squarely within the range identified by the District that “for every 6-10 acres of wetlands preserved, one credit is obtained.”<sup>102</sup> The language of the District’s decision suggests that PLP’s ratio may be insufficient but fails

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<sup>97</sup> Final CMP at 5.

<sup>98</sup> Compliance Review at 1.

<sup>99</sup> *Id.*

<sup>100</sup> ROD, Attachment B2, at B2-4.

<sup>101</sup> *See* Final CMP at 22-23 (29,059.1 acres conserved to 3,823.3 acres directly and indirectly impacted yields a ratio of 7.6:1.0).

<sup>102</sup> U.S. Army Corps of Eng’rs, Alaska District, *Alaska District Compensatory Mitigation Thought Process*, 16 (Sept. 18, 2018).



to provide a clear position on the question, leaving PLP and future applicants to guess at what might be acceptable to the District.

On the District's record, it appears that PLP made multiple good faith efforts over six different proposed compensatory mitigation plans to meet the District's requirements, but each time the District moved the goal posts, each time making it more challenging for PLP to identify compensatory mitigation requirements that would satisfy the District's new requirements. This raises the very real possibility that there is *no* compensatory mitigation that PLP could have proposed that would have been approved by the District. This type of unpredictable, and potentially impossible, regulatory scheme will obviously have a negative impact on future development in Alaska. If developers cannot be assured of clear regulatory requirements so that they can prepare orderly plans to satisfy those requirements, they are likely to seek opportunities elsewhere. If they do, the people of Alaska will be deprived of needed jobs and infrastructure, and the State will be unable to fulfill its constitutional duty to develop its resources for the benefit of its people.

**C. The Compensatory Mitigation Plan review was rushed and failed to involve the State as a cooperating agency, despite the overwhelming prevalence of state lands in the project area.**

The District and PLP actively discussed compensatory mitigation through an iterative process spanning years. Following written direction from the District mandating that the compensatory mitigation proposed must be “in-kind compensatory mitigation

within the Kaktuli River watershed,”<sup>103</sup> PLP submitted its Final CMP on Wednesday, November 4, 2020.<sup>104</sup> Despite the lengthy process leading to the Final CMP, the District afforded it just four days for review before finding it deficient: On November 9, 2020, and with no attempt to consult with the State,<sup>105</sup> the District’s “Compliance Review” was complete and its decision to reject the Final CMP was made.

The District’s “Compliance Review” totals less than one page of analysis and identifies nine alleged deficiencies in the Final CMP, all of which are so conclusory that there is no indication of what the applicant could have done to satisfy the requirements. The District’s hasty and superficial “Compliance Review” provides little confidence that compensatory mitigation plans proposed by future Alaska applicants will be carefully considered on their merits.

The District’s compensatory mitigation position also has far-reaching and ominous implications for the rights of the State to develop *its* resources for the benefit of *all* Alaskans, whether those resources are mineral deposits like the Pebble prospect, or oil and gas development on the North Slope, or other resources anywhere in the State. The

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<sup>103</sup> Final CMP at i (quoting August 20, 2020 District Letter).

<sup>104</sup> November 9, 2020 Memorandum for the Record (Compliance Review of Final Report, Pebble Project Compensatory Mitigation Plan in accordance with 33 CFR 332, POA-2017-00271) (“Compliance Review”) at 1.

<sup>105</sup> This process is particularly troublesome since the District, without any input or consent from the State required preservation as the only appropriate compensatory mitigation. The vast majority of lands within the Kaktuli River watershed are owned by the State, and this unilateral attempt by the District to “preserve” state lands, without State consultation, is flatly unacceptable.

District's Permit Denial failed to give any consideration to the State's interests. Indeed, the District is effectively precluding any development on state land, violating the statutory compromise established in the Alaska Statehood Act, which provided the State's right to select lands for the purpose of furthering development.<sup>106</sup> The District cannot use its Section 404 authority to undermine Congress' explicit intent to protect Alaska's interests in its state lands.

### **III. The District's public interest review suffered from procedural and substantive errors that mandate remand.**

The District's decision to deny the permit is also based on its public interest review ("PIR"). The PIR involves an analysis of the foreseeable impacts the proposed project would have on public interest factors, such as general environmental concerns, wetlands, economics, fish and wildlife values, land use, and the needs and welfare of the people. The District must consider the probable impacts of the proposed activity on the public interest, and balance those impacts against the reasonably foreseeable benefits before issuing a permit.<sup>107</sup> The District must "consider myriad factors in making its

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<sup>106</sup> See H.R. Rep. No. 85-624 (1957), *as reprinted in* 1958 U.S.C.C.A.N. 2933, 2937-38. ("[A]pproximately 95 million acres – more than one fourth of the total area of Alaska – is today enclosed within various types of Federal withdrawals or reservations. Much of the remaining area of Alaska is covered by glacier, mountains, and worthless tundra. Thus it appeared to the committee that this tremendous acreage of withdrawals might well embrace a preponderance of the more valuable resources needed by the new State to develop flourishing industries with which to support itself and its people.").

<sup>107</sup> 33 C.F.R. § 320.4(a)(1).

public interest determination and . . . balance carefully expected benefits against foreseeable detriments.”<sup>108</sup>

Here, the District’s PIR is littered with errors and fails to weigh carefully the PIR factors. Instead, the District improperly relies on speculative “harms” and casually dismisses the project’s significant known benefits. Among other things, the District failed to: (i) properly assess the socioeconomic benefits of mining in rural Alaska; (ii) give the State’s land management decisions deference; and (iii) consider the State’s water quality analysis prior to making conclusions.

**A. The District’s conclusions regarding economic impacts are factually incorrect and unsupported by the record.**

The State’s interest in protecting its lands and resources does not stem from abstract concerns. It is rooted in the fact that unfettered federal control has historically stifled economic growth, mismanaged Alaska’s resources, and contributed to the impoverishment of many Alaskans.<sup>109</sup> Indeed, early federal mismanagement of Alaska had devastating consequences.<sup>110</sup> For example, a 1954 health survey report on Alaska Natives prepared for the Department of the Interior (“Parran Report”) noted that “the

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<sup>108</sup> *Norfolk & Walpole v. U.S. Army Corps of Eng’rs*, 772 F. Supp. 680, 691 (D. Mass. 1991).

<sup>109</sup> See generally *Sturgeon*, 587 U.S. at \_\_\_, 139 S. Ct. at 1073-1076.

<sup>110</sup> See H.R. Rep. No. 85-624 (1957), as reprinted in 1958 U.S.C.C.A.N. 2933, 2941 (“It is apparent from the history of the last 88 years that the extreme degree of Federal domination of Alaskan affairs has not resulted in the maximum development of the Territory.”).

indigenous peoples of Native Alaska are the victims of sickness, crippling conditions and premature death to a degree exceeded in very few parts of the world.”<sup>111</sup> The Parran Report found that approximately 35,000 Alaskan Natives lived at a “marginal or sub-marginal subsistence level”<sup>112</sup> and concluded that the deplorable conditions facing Alaska Natives were caused, in part, by the federal government’s mismanagement of Alaska’s resources.<sup>113</sup> Because of this mismanagement, the infant mortality rate for Natives in 1958 was among the highest in the world while life expectancy was only 34.7 years.<sup>114</sup>

After statehood and before large scale oil development and mining began in the state, conditions barely improved for many Alaskans, particularly for those living in rural Alaska. In 1968, the President of the Alaska Federation of Natives, Emil Notti, testified before Congress that “the human needs, the suffering and deprivations that exist in the villages are beyond description and are as bad as the worst conditions anywhere in the world. The native people in many areas face a daily crisis just to exist.”<sup>115</sup> Notti added: “Controls by the Federal agencies over the resources and lives of native people in Alaska

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<sup>111</sup> Thomas Parran *et al.*, *Alaska’s Health: A Survey Report to the United States Department of the Interior*, 14 (1954), available at [http://www.dhss.alaska.gov/Commissioner/Documents/PDF/Parran\\_Report.pdf](http://www.dhss.alaska.gov/Commissioner/Documents/PDF/Parran_Report.pdf).

<sup>112</sup> *Id.* at 16.

<sup>113</sup> *Id.* at 12-15, 22-23.

<sup>114</sup> Ernest Gruening, *The State of Alaska*, 544 (Random House 1968).

<sup>115</sup> Hearings Before the Committee on Interior and Insular Affairs, United States Senate on S. 2906, 90th Cong. 31 (Feb. 8-10, 1968) (statement of Emil Notti, President, AFN).

has not met with any success though the reasons can always be rationalized away by those responsible for the failures.”<sup>116</sup>

Fortunately, once the federal government began ceding control of over 145 million acres of land to the State (pursuant to Alaska’s Statehood Act) and Alaska Native Corporations (pursuant to the Alaska Native Claims Settlement Act (“ANCSA”)), socioeconomic conditions dramatically improved in rural Alaska. Once the State and the Alaska Native Corporations were able to make land management decisions that directly benefited Alaskans, State and Native lands saw the development of Prudhoe Bay and large lode bearing mines. The wealth generated from resource development has been staggering. Indeed, between 1978 and 2016, the State of Alaska received over \$141 billion in petroleum revenue alone.<sup>117</sup>

The economic development has been transformational. According to the Journal of American Medical Association, between 1980 and 2014, life expectancy in the United States increased by 5.3 years, yet, the North Slope Borough and Northwest Arctic Borough, which benefited from mining and oil and gas development, saw much larger

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<sup>116</sup> *Id.* at 33.

<sup>117</sup> In 2019, the petroleum and mining sectors contributed \$3.15 billion and \$539 million, respectively, to state and local governments and Alaska Native corporations. McDowell Group, *The Role of the Oil and Gas Industry in Alaska’s Economy*, 30, 38 (Jan. 2020), available at <https://www.mcdowellgroup.net/wp-content/uploads/2020/01/mcdowell-group-aoga-report-final-1-24-2020.pdf>.

increases in life expectancy exceeding 10 years.<sup>118</sup> Thus, between 1958 and 2014, Native life expectancy increased from 34.7 to 76 years.<sup>119</sup>

Despite the well documented fact that resource development has provided Alaskans with significant economic, health, and education benefits,<sup>120</sup> the District dismisses, without support in the record, the socioeconomic benefits of the Pebble project. Instead, the District concludes that the economic benefits of the project are largely speculative and limited.<sup>121</sup> These findings not only conflict with Alaska's history of resource development, but they also conflict with the administrative record in this case, which demonstrates that the mine will have considerable long-term economic benefits for the State and local communities.<sup>122</sup>

In particular, the PIR arbitrarily undervalues the economic benefits of the project to the State. The Permit Denial unduly downplays the long-term benefits of the project,

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<sup>118</sup> Laura Dwyer-Lindgren, MPH, *et al.*, *Inequalities In Life Expectancy Among US Counties, 1980 to 2014*, 1005 (2017).

<sup>119</sup>*Id.*

<sup>120</sup> *See, e.g.*, Bob Loeffler, *Mining and Sustainable Communities* (Spring 2015), available at <https://pubs.iseralaska.org/media/1821f215-26a0-41ac-8d08-73f29d04d38a/2015-MiningAndSustainableCommunities.pdf> (discussing the benefits to Native communities of the Red Dog Lead and Zinc Mine); Matthew Berman, *et al.*, *Long-term Benefits of Indigenous Communities of Extractive Industry Partnerships: Evaluating the Red Dog Mine* (Feb. 21, 2020), available at <https://www.sciencedirect.com/science/article/pii/S0301420719302429> (assessing the long-term beneficial effects of the Red Dog Mine)

<sup>121</sup> ROD at B3-27.

<sup>122</sup> FEIS at 4.3-10 (“the project would provide long-term beneficial impacts to the economy from employment and income in the region and state.”).

including its infrastructure benefits,<sup>123</sup> tax and other fiscal benefits,<sup>124</sup> and employment and educational benefits.<sup>125</sup> The overall conclusion that the project would have “off-setting adverse and beneficial” economic impacts locally, state-wide, and nationally is completely unsupported. The economic detriments referenced in the Permit Denial are speculative, while it is well-documented that resource development projects in Alaska generate wealth, revenue, and economic activity that power the State’s economy, create high paying jobs, reduce the cost of energy, and fund state and local governments.

In contrast to the Permit Denial, the FEIS (upon which the Permit Denial should be based) finds that the overall economic benefits of the project to southwestern Alaska will be substantial, including increased income, employment, and educational attainment.<sup>126</sup> The FEIS also finds the project benefits would be more apparent in the

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<sup>123</sup> The District undervalues the benefits from the natural gas pipeline, the road, and the port, all of which will provide benefits that could extend beyond the life of the mine—the notion that the benefits associated with this infrastructure will disappear at closure is incorrect.

<sup>124</sup> The District fails to adequately consider the revenues that project construction and operations would generate, including millions in state taxes, mining licenses, yearly royalty payments, and property and severance taxes.

<sup>125</sup> FEIS at 4.3-1 – 4.3-23.

<sup>126</sup> *See, e.g.*, FEIS Executive Summary at 47 (“Communities near the mine site would see a beneficial impact of higher employment rates.”); FEIS at 4.3-10 (“the project would provide long-term beneficial impacts to the economy from employment and income in the region and state.”); FEIS at 4.3-6 – 4.3-7 (“local employment opportunities could . . . provide service fee revenue to maintain or even improve community infrastructure”).



small, rural communities closest to the mine where even small changes in their economies could have a measurable impact on overall health and well-being.<sup>127</sup>

In short, it is undisputed that Alaska's responsible management of its lands and resources have lifted many out of poverty and dramatically improved the socioeconomic well-being of Alaskans. Accordingly, the Permit Denial should be vacated because its socioeconomic findings are not supported by the record.

**B. The Permit Denial disregards the State's interest as landowner and erroneously determined that the lands have not been selected for mineral development.**

**1. The Permit Denial violates commitments made to the State in the Statehood Act and Cook Inlet Exchange.**

Most of the lands at issue here were selected by the State pursuant to two authorities: the Statehood Act and the Cook Inlet Exchange. With the Permit Denial, the District nullified the rights granted to the State in these acts and issued a decision that effectively dictates land use policy and prevents any mineral development within the entire Bristol Bay watershed. Not only does this determination violate the CWA, but it also violates commitments that the federal government has made to the State regarding the State's ability to manage its land and resources.

The Statehood Act constitutes a special compact between two sovereigns.<sup>128</sup> The Supreme Court has characterized the land grant provisions of statehood acts as a

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<sup>127</sup> FEIS at 4.10-9.

<sup>128</sup> *Lewis*, 559 P.2d at 640.

“solemn agreement’ which in some ways may be analogized to a contract between private parties,”<sup>129</sup> and as an unalterable condition of the admission, obligatory upon the United States.”<sup>130</sup> For this reason the Supreme Court does not construe compacts as normal legislation; instead the Court applies contractual rules of interpretation when interpreting these compacts.<sup>131</sup> Moreover, parties to a compact are bound by its essential terms.<sup>132</sup> The centerpiece of the Statehood Act is the State’s right to select lands and manage these lands for the public’s benefit.<sup>133</sup> Material provisions of the Statehood Act –

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<sup>129</sup> *Andrus*, 446 U.S. at 507.

<sup>130</sup> *Beecher*, 95 U.S. at 523; *see also Cooper v. Roberts*, 59 U.S. 173, 177-78 (1855); *United States v. Morrison*, 240 U.S. 192, 201-202 (1916); *cf. Alaska v. United States*, 35 Fed. Cl. 685, 698, 701 (1996) (acknowledging that essential provisions of statehood acts can be “binding and unalterable”; after analyzing Section 28(b) of the Alaska Statehood Act, the court held that particular provision was not designed to be an unalterable promise because no evidence existed that Congress intended this provision to forever bind congress).

<sup>131</sup> *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951) (construing a compact between states and the federal government as a contract).

<sup>132</sup> *See Office of Hawaiian Affairs*, 556 U.S. at 176; *Sims*, 341 U.S. at 35-36 (Jackson, J., concurring) (observing that sovereigns to a compact cannot unilaterally redefine terms; thus one party to the compact could not retroactively adopt a new interpretation of a compact after inducing Congress and other states “to alter their positions and bind themselves” to the compact).

<sup>133</sup> *See Trustees for Alaska*, 736 P.2d at 335 (“The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state.”); *Alaska*, 35 Fed. Cl. at 700 (“Of the various sources of future income [for the State], the most important source was seen [by Congress] as the land grant”).

like the right to select and develop lands pursuant to Section 6 of the Statehood Act – cannot be unilaterally amended by a federal agency.<sup>134</sup>

Similarly, under the Cook Inlet Land Exchange, the State, the Cook Inlet Region, Inc. (“CIRI”), and the federal government settled contentious litigation by entering into a contractual agreement.<sup>135</sup> Pursuant to the agreement, the State gave lands to the federal government<sup>136</sup> and agreed to not select certain other lands in the future.<sup>137</sup> As a result, the federal government was able to settle litigation, fulfill its outstanding obligations to CIRI under ANCSA, and create the Lake Clark National Park and Preserve.

In return for this consideration, the State gained the right to select lands that were previously withdrawn and designated for conservation purposes.<sup>138</sup> Congress provided that “all lands granted to the State of Alaska pursuant to this subsection shall be regarded for all purposes as if conveyed to the State under and pursuant to section 6 of the Alaska

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<sup>134</sup> *Utah v. Andrus*, 486 F. Supp. 995, 1001-02, 1009 (D. Utah 1979) (holding that the federal government does not have the authority to deprive the state of the ability to extract value from trust lands.); *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1072-73 (9th Cir. 2010) (same); *United States v. 111.2 Acres of Land in Ferry Cty.*, 293 F. Supp. 1042, 1048 (E.D. Wash. 1968) (rejecting the argument a federal agency could agree to the modification of Washington’s Enabling Act explaining “[a]dministrative practice cannot amend an act having the force of law.”) *aff’d*, 435 F.2d 561 (9th Cir. 1970); *cf. Cooper*, 59 U.S. at 177 (compact terms are “unalterable except by consent”).

<sup>135</sup> See Pub. L. 94-204 § 12(b); Terms and Conditions for Land Consolidation and Management in Cook Inlet Area (“Terms and Conditions”).

<sup>136</sup> Terms and Conditions at II.

<sup>137</sup> *Id.* at I.C.(1)(c) and VI.A.

<sup>138</sup> See Pub. L. 94-204 § 12(d)(1)(i).

Statehood Act.”<sup>139</sup> In other words, when Congress gave Alaska the right to select Exchange lands it provided that the State could classify these lands for mineral development. Consequently, the Exchange gave the State the express authority to select lands, manage the lands, and to make the lands open for mineral development.<sup>140</sup> Shortly after the Exchange was approved by Congress, the State selected the Pebble area lands. The settled expectation since that time was that the State would have the right to make land use decisions for these lands.

At bottom, the Statehood Act and the Cook Inlet Land Exchange are binding compacts that limit the federal government’s ability to dictate land use policy.<sup>141</sup> In light of these compacts, the District does not have the authority to usurp the State’s land use designations.<sup>142</sup> Moreover, to the extent that the District was confused about the land use designation made by the State for the Pebble lands, it should have sought clarification from the State so as to not run afoul of the commitments made by the federal government to the State.

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<sup>139</sup> *Id.* § 12(d)(1).

<sup>140</sup> *Id.*

<sup>141</sup> *Cf. Texas v. New Mexico*, 482 U.S. 124, 128-29 (1987) (interstate compact when approved by Congress becomes a law of the United States, but also noting that “[a] Compact is, after all, a contract” subject to contractual interpretation and enforcement).

<sup>142</sup> *Cf. Sims*, 341 U.S. at 28 (“a compact is after all a legal document. . . . It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States.”); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 632 (1989); *see also Office of Hawaiian Affairs*, 556 U.S. at 176 (Congress is without authority “to create a retroactive ‘cloud’ on the title that Congress granted to the State of Hawaii.”).

**2. Contrary to the Permit Denial’s findings, the State has designated these lands as open for mineral development.**

Here, the Permit Denial concluded that while the District normally defers to the landowner’s land use decision, “no decisions have been made, to date, by state or local governments regarding zoning or land use matters pertinent to the proposed project. . . . The State of Alaska has made no specific determinations whether the proposed project is consistent with the [Bristol Bay Area Plan].”<sup>143</sup> This finding is spurious and must be rejected.

Following the Cook Inlet Land Exchange, in 1984, the State issued its first Bristol Bay Area Plan (“Area Plan”), which outlined land use authorizations throughout the Bristol Bay region, including the project area. The 1984 Area Plan specifically designated the area that contains the Pebble deposit as open to mineral development, while balancing other land use interests on other lands.<sup>144</sup> In fact, the 1984 Area Plan expressly denoted mineral development as a “primary” use for the Pebble lands.<sup>145</sup> This plan was updated in 2005. Again, the 2005 Area Plan continued its designation that all state lands within the region are open to mineral development unless they are specifically subject to a mineral closing order.<sup>146</sup>

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<sup>143</sup> ROD at B3-15.

<sup>144</sup> *See, e.g.*, Bristol Bay Area Plan for State Lands, 3-27 - 3-30 (Sept. 1984), *available at* [http://dnr.alaska.gov/mlw/planning/areaplans/bristol/pdf/bristol\\_bay\\_area\\_plan.pdf](http://dnr.alaska.gov/mlw/planning/areaplans/bristol/pdf/bristol_bay_area_plan.pdf).

<sup>145</sup> *Id.* at 3-30.

<sup>146</sup> Bristol Bay Area Plan for State Lands, 3-99 (Apr. 2005) (“2005 Area Plan”), *available at* [http://dnr.alaska.gov/mlw/planning/areaplans/bristol/pdf/bbap\\_complete.pdf](http://dnr.alaska.gov/mlw/planning/areaplans/bristol/pdf/bbap_complete.pdf).

Finally, in 2013, the State revised the 2005 Area Plan, and once again affirmed several key issues:

- Exploration for locatable minerals is allowed on all state lands except those specifically closed to location.<sup>147</sup>
- State land in the area is to be managed for a variety of multiple uses, including mineral exploration and development.<sup>148</sup>
- While the majority of lands in the area are designated for general use, mineral exploration and development is expressly authorized for the Pebble lands.<sup>149</sup>
- The general resource management intent for the Pebble area is to consider mineral exploration and development and to allow the State the discretion to make specific decisions as to *how development may occur*, through the authorization process.<sup>150</sup>
- The 2013 Area Plan also specifically identifies potential transportation corridors to service the Pebble deposit and emphasizes the need to keep these potential corridors open.<sup>151</sup>

The State's designation of these lands for mining is not just theoretical – it has allowed the staking of mining claims within the Pebble area and authorized extensive mineral exploration and development. In short, the State selected these lands for their mineral potential, designated the area for mineral development, allowed mining claims to be staked, issued authorizations for exploration activities, and reserved potential

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<sup>147</sup> 2013 Area Plan at 2-37.

<sup>148</sup> *Id.* at 3-89 – 3-114.

<sup>149</sup> *Id.* at 3-106

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

transportation corridors to service a future mine, while also reserving the right to make a final decision on *how* mining should occur.

When considering land use decisions that affect a small portion of the Bristol Bay region, it is also critical for the Division to not view the State’s decision to designate the Pebble lands for mineral development in a vacuum – instead, the Division must understand how these land management decisions were made in relation to regional land use designations, which included extensive federal and state land conservation.

For example, the nearby Lake Clark National Park and Preserve is one of thirteen National Park System units created or expanded by the Alaska National Interest Lands Act in 1980. As a unit of the National Park System, Lake Clark National Park and Preserve is administered to “conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>152</sup> To achieve these objectives, the Lake Clark National Park and Preserve protects approximately 4 million acres of undisturbed public land; contains approximately 2,470,000 acres of designated wilderness for management under the provisions of the Wilderness Act of 1964; contains portions of three designated Wild and Scenic Rivers (Chilikadrotna, Mulchatna, and Tlikakila) to be managed in their entirety free of impoundments and diversions, inaccessible by road, with their shorelines primitive and

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<sup>152</sup> Pub. L. 64-235 § 1.

their waters unpolluted. In addition to the Lake Clark National Park and Preserve, the federal government has also preserved a vast amount of land in or near the Bristol Bay watershed, including Katmai National Park and Preserve, the Togiak National Wildlife Refuge, the Becharof National Wildlife Refuge, and the Alaska Peninsula National Wildlife Refuge.<sup>153</sup>

For its part, the State has undertaken considerable efforts to preserve vast areas of the Bristol Bay region. For example, the State created the Wood-Tikchik State Park, which is largest state park in the nation at 1.6 million acres.<sup>154</sup> In addition, the State has issued mineral closing orders in the Bristol Bay region, which prohibit mining on over 260,000 acres of additional state lands.<sup>155</sup> The State has also protected habitat and species through the creation of critical habitat areas, refuges, and it has passed laws and regulations to heavily regulate activity on or near anadromous waters.<sup>156</sup>

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<sup>153</sup> Together, parks, wildlife refuges, and mineral closing orders preserve over 13 million acres in and around the Bristol Bay region. See Nat'l Parks Serv., *Katmai*, <https://www.nps.gov/katm/learn/nature/wilderness.htm>; U.S. Fish & Wildlife Serv., *Togiak*, <https://www.fws.gov/refuge/Togiak/about.html>; U.S. Fish & Wildlife Serv., *Becharof*, <https://www.fws.gov/refuge/Becharof/about.html>; U.S. Fish & Wildlife Serv., *Alaska Peninsula*, [https://www.fws.gov/refuge/Alaska\\_Peninsula/About.html](https://www.fws.gov/refuge/Alaska_Peninsula/About.html); 2005 Area Plan Chapter 2 at 2 – 34 (listing the acreages closed to mineral entry in the Nushagak-Mulchatna river drainage and on the Alaska Peninsula).

<sup>154</sup> Alaska Dep't of Nat. Res., Div. of Parks & Outdoor Rec., *Wood-Tikchik State Park*, <http://dnr.alaska.gov/parks/aspunits/woodtik/woodtiksp.htm>.

<sup>155</sup> 2013 Area Plan at 2-38.

<sup>156</sup> See Alaska Dep't of Fish & Game, *Bristol Bay – Critical Habitat Area*, <http://www.adfg.alaska.gov/index.cfm?adfg=bristolbay.main>; Alaska Dep't of Fish & Game, *Refuges, Sanctuaries, Critical Habitat Areas & Wildlife Ranges*,



It cannot be disputed that the State and federal government have prohibited mineral development over a significant portion of the Bristol Bay region. The State balanced these conservation designations by also specifically selecting certain lands within the region for their mineral potential. After decades of study and public input, the State consciously determined, in three successive land management plans, that mineral development is an acceptable land use in the Pebble area, especially considering the extensive measures taken to protect habitat, wildlife, and subsistence. Yet the Permit Denial determined that the State has not made a specific determination on whether mining can occur on these lands.<sup>157</sup> This finding is not supported by the record and is in error.

**3. The Permit Denial failed to explain any overriding national issues that would justify nullifying the State’s land use designations.**

“If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j)(2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding

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<http://www.adfg.alaska.gov/index.cfm?adfg=protectedareas.locator>. The Alaska Department of Natural Resources has also issued numerous mineral closing orders to protect a majority of anadromous streams throughout the Bay area from mining activity. As an example, Mineral Closing Order 393 closed 213,697 acres to mineral development in the Nushagak-Mulchatna river drainage and on the Alaska Peninsula. See 2005 Area Plan at 2-24.

<sup>157</sup> ROD at B3-15.

in importance.”<sup>158</sup> “[T]he primary responsibility for determining zoning and land use matters rests with the state, local and tribal governments.”<sup>159</sup> Here, the District failed to explain the “overriding” national issue that could justify nullifying the State’s mineral use designation. Accordingly, the Permit Denial should be remanded.

**C. The District’s conclusions on water quality impacts are unsupported by the record and lack any analysis from the State’s 401 water quality certification process.**

The District issued the Permit Denial before the State completed its Section 401 water quality certification, which calls into question the District’s conclusions with respect to water quality. Section 401 of the CWA allows states to review federal projects that may result in a discharge to waters within their borders and certify to the reviewing agency that the proposed project will comply with state water quality standards.<sup>160</sup> It is an important mechanism based on the system of cooperative federalism envisioned by the CWA, giving states opportunities to regulate projects that could affect water quality and to impose stringent conditions to protect the states’ waters. By issuing the Permit Denial before the State finalized its Section 401 certification, the District disregarded the State’s authority and autonomy.

In addition, the District’s decision to issue the Permit Denial before the State completed its Section 401 is inconsistent with the District’s own recognition that the

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<sup>158</sup> 33 C.F.R. § 325.2(a)(6).

<sup>159</sup> *Id.* § 320.4(j)(2).

<sup>160</sup> *See* 33 U.S.C. § 1341; 40 C.F.R. part 121.

State’s decision on water quality is controlling.<sup>161</sup> Because the District rushed its decision without the benefit of information that would have been gleaned from the certification process, its conclusions about water quality impacts are questionable and unsupported by the record. This also calls into question the validity of the PIR, in which the District raises water quality concerns despite its acknowledgment that the State had not completed its certification.<sup>162</sup>

#### **IV. The Permit Denial threatens mining development in the area, leaving no economically viable use of these lands**

The Fifth Amendment of the U.S. Constitution forbids the taking of private property for public use without just compensation. The Supreme Court has recognized that this constitutional guarantee is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>163</sup> The Supreme Court has held that the denial of a 404 permit, when the permit denial results in no viable uses for the property, can rise to the level of a taking.<sup>164</sup> Thus, the denial of a 404 permit can rise to the level of a taking where the

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<sup>161</sup> See ROD at B3-8 (“Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the CWA are considered conclusive with respect to water quality considerations[.]”).

<sup>162</sup> *Id.* at B4-1

<sup>163</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U. S. 104, 123-24 (1978).

<sup>164</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) (observing that when a 404 permit “is denied and the effect of the denial is to prevent ‘economically viable’ use of the land in question can it be said that a taking has occurred.”); see also *United Affiliates Corp. v. United States*, 143 Fed. Cl. 257, 266-267 (2019) (recognizing regulatory takings claim of both landowner and mineral rights lessee arising from CWA

property owner had a reasonable investment backed expectation that it could develop the property and when the permit denial deprived the property owner of most of the use of its property.

Here, pursuant to the CWA, Statehood Act, and the Cook Inlet Exchange, the State has a reasonable investment backed expectation in the lands surrounding the Pebble project. Alaska selected and specifically designated the lands for mineral development. But the District's PIR, compensatory mitigation finding, and significant degradation findings, make it virtually impossible for any mineral development to occur in the area. The State, therefore, is now left with no economically viable use of these lands. For this reason alone, the Permit Denial should be vacated.

### **CONCLUSION**

For the foregoing reasons, the State requests that the District's Permit Denial decision be vacated, and consideration of PLP's Section 404 permit application be remanded to the District for reconsideration. Further, the State requests that the District be given express instructions to give due consideration to the unique legal scheme established in Alaska by the State's Constitution and statutes and the Alaska Statehood Act. Instructions should also be given to require the appropriate application of Corps' guidance on the development of compensatory mitigation measures in the Alaska.

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Section 404 permit denial); *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1329 (Fed. Cir. 2012) (“denial of a section 404 permit could amount to a taking of a cognizable property right as it deprives the landowner of a right inherent in land ownership”).

Finally, the District should be instructed to delay the issuance of its decision on reconsideration until the State completes its processing of permits that will inform an appropriate public interest review.

DATED: January 22, 2021.

ED SNIFFEN  
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