



June 28, 2013

Attn: Docket # EPA-HQ-ORD-2013-0189
U.S. Environmental Protection Agency
Office of Environmental Information (OEI)
Mail Code 2822-T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Comments of the National Mining Association on EPA's Revised Draft Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska

To Whom It May Concern:

The National Mining Association (NMA) appreciates the opportunity to submit these comments on the U.S. Environmental Protection Agency's (EPA) April, 2013 revised draft report, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*. NMA is a national trade association whose members include the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA incorporates its previous comments on the first draft assessment, filed July 23, 2012, into these comments.

NMA would like to reiterate its strong opposition to the process that EPA is undertaking with respect to the draft assessment. The Pebble Partnership has already invested over \$500 million to research and perform field work for a potential mining project that would entail capital costs in the billions of dollars and create thousands of jobs both inside and outside the state of Alaska. It is incumbent upon both federal and state decision makers to afford such project proponents the ability to have any eventual proposal considered in the context of rigorous but fair and legally promulgated permitting processes. The process currently being undertaken, however, threatens to preclude such fair and unbiased consideration.

The draft assessment, with its reliance on a fictitious mining scenario, is an unprecedented and premature document that does not appear to rely on sound science and seriously threatens to prejudice, if not completely bypass, proper Clean Water Act (CWA) permitting processes. Under the existing lawful permitting processes, EPA has the opportunity to raise objections to CWA permits not supported by the best available science. Thus, there is simply no environmental reason for EPA to be conducting this draft assessment, and the concepts of due process, fundamental fairness, sound public policy, economic stability, the rule of law, and common sense mandate that EPA

abandon this misguided exercise and focus on performing its specified regulatory duties. NMA also submits the following comments:

EPA Cannot Bypass the CWA Section 404 Permitting Process in Favor of the Draft Assessment

While EPA claims that it is acting pursuant to its authority under Section 104 of the CWA, EPA inappropriately initiated the assessment in response to a petition requesting that EPA exercise its CWA Section 404(c) authority “to prohibit or restrict discharges of dredged or fill materials associated with metallic sulfide mining within the headwaters of the Bristol Bay watershed.”¹ EPA indeed states that the assessment is intended to “enable state or federal permitting authorities to make informed decisions to grant, deny, or condition permits.”²

However, the CWA Section 404 permitting process – not a Section 104 study – is the appropriate process in which to assess the issues addressed in the draft assessment. Importantly, that process is intended to ensure that both U.S. Army Corps of Engineer and EPA agency personnel consider permit applications in an unbiased fashion and apply the best available science to realistic scenarios in order to make requisite, well-established regulatory determinations. The draft assessment, on the other hand, proposes multiple hypothetical mining scenarios and includes unlikely assumptions that are not placed in proper context.

The U.S. Court of Appeals for the 3rd Circuit made clear in the case of *Minard Run Oil Company v. U.S. Forest Service* that the government should not “apply a general provision when doing so would undermine limitations created by a more specific provision.”³ With the draft assessment, however, that is exactly what EPA is doing – conducting a general, questionable Section 104 study to address the exact issues that are expressly addressed in the statutory and regulatory language of the Section 404 permitting process.

As EPA Regional Administrator Dennis J. McLerran explained to Alaska’s Attorney General, “many of your legal concerns would only be relevant and can only be addressed in the context of a specific regulatory action.”⁴ The same logic can and should be applied here – the potential impacts to a particular watershed where mining may be conducted in a specific area that is open to mineral exploration are best and most fairly considered once actual mine plans and scenarios have been submitted

¹ Apr. 5, 2012 letter from Regional Administrator Dennis J. McLerran to Alaska Attorney General Michael C. Geraghty.

² *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (Apr. 30, 2013 revised draft), U.S. Environmental Protection Agency, at ES-2.

³ *Minard Run Oil Company et als. V. United States Forest Service et als.*, 670 F.3d 236, 252 (3d Cir. 2011), citing *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 307 (3d Cir. 2012).

⁴ Apr. 5, 2012 letter from Regional Administrator Dennis J. McLerran to Alaska Attorney General Michael C. Geraghty at pg. 2.

during the permitting process. EPA will have ample opportunity to object to a mine site well in advance of any development activity and before any adverse environmental impacts could occur in the normal course of the Section 404 permitting process. There is no reason for EPA to expend time and funds on a rushed assessment that is of questionable legal and scientific merit.

The Draft Assessment Lacks Scientific Credibility

EPA has given no reason for the rushed nature of the assessment, and the speed at which EPA is conducting the review itself may call into question the scientific validity of EPA's findings. Additionally, failing to provide the public with adequate time to review the lengthy, complex document deprives the process of important public input on technical and scientific matters and undermines the conclusions reached. Likewise, depriving the peer reviewers of adequate time to review the public comments received inappropriately limits the scope and undermines the scientific integrity of their review.

Furthermore, the revised assessment continues to unfairly overstate the potential impacts of any proposed mine by failing to adequately address the types of mitigation and impact avoidance activities that would inevitably be included in any mine plan as required by law. While EPA, presumably in response to criticisms over the lack of reference to mitigation, added two appendices purporting to discuss potential mitigation measures, EPA is quick to dismiss the effectiveness of such measures. Notably, in the compensatory mitigation appendix, EPA uses a scant 16 pages to reach the conclusion that there are significant "questions as to whether sufficient compensation measures exist that could address impacts of this type and magnitude."⁵ However, mitigation measures to minimize and compensate for potential adverse impacts are required by law and are a *substantial* aspect of modern mining plans. Mining companies often work for years with agencies to develop appropriate mitigation plans for proposed mines. To ignore this reality by excluding an appropriate assessment of such measures in the text of a document studying the potential impacts of modern day mining on a watershed is simply inexcusable.

EPA's reliance on papers by environmentalist organizations in the draft assessment also compromises the value of the document, particularly in light of issues raised by several peer reviewers. Specifically, EPA cites to an Earthworks report throughout the assessment in sections concerning probability of contaminant releases, failures of water collection and treatment, water quality degradation, and aquatic exposures from pipeline spills. As an initial matter, Earthworks' stated goal is to "mobiliz[e] the public, and governmental and corporate decision makers to take action against the destructive impacts of extraction."⁶ Indeed, in recent Congressional testimony before the House Subcommittee on Energy and Mineral Resources, Earthworks Executive Director

⁵ Appendix J at 16.

⁶ Earthworks website, at www.earthworksaction.org/about.

Jennifer Krill stated that Earthworks had never “supported or endorsed a single mine.”⁷ It is generally inappropriate for EPA to rely on unsubstantiated claims from such an advocacy group when conducting a scientific assessment of mining impacts.

Even more importantly, several of EPA’s own peer reviewers call into question the scientific soundness of EPA’s use of the Earthworks report in the draft assessment. One peer reviewer stated that he found “the report, by its nature, to be very biased,”⁸ and criticized that “such reports...attempt to paint the world as either black or white” and “come across as one-sided because they are.”⁹ That reviewer noted that “most of the report is based on guilt by association.”¹⁰ Another peer reviewer pointed out that “an innocent reader might conclude that safe copper porphyry mining operations are not possible”¹¹ when that is “not the case.”¹²

Three of the four peer reviewers also criticized reliance on the report due to its references to older operations and failure to contain important information necessary to meaningfully apply any of its conclusions to the scenarios in the draft assessment. For example, one peer reviewer noted that “most of the mines considered are quite old facilities with operations often initiating in the 1880s,”¹³ that “the report presents some issues...related to facilities that were designed and constructed before modern environmental regulation, and thus have limited relevance to modern operations,”¹⁴ and that “the type of ore processing of the mines evaluated...are different from that proposed in the EPA assessment.”¹⁵ That reviewer found that “the implied conclusion that similar or worse accidents and failures will occur at all mines and that accordingly impacts could be severe, is not well supported”¹⁶ and that “the legacy of past operations, age of the infrastructure and type of processing for each mine presented make extrapolation of presented results to other projects difficult. In addition, a release does not always result in environmental impact.”¹⁷ Another reviewer pointed out that “incidents are not classified...[and] the authors do not take into account that the mining business is in constant change and each incident results in improvements in engineering technology and in many cases modifications of legislation.”¹⁸ He concluded that “just listing failures might result in a bias of the reader, assuming that those

⁷ March 21, 2013 Oversight Hearing on “America’s Mineral Resources: Creating Mining and Manufacturing Jobs and Securing America” before the Subcommittee on Energy and Mineral Resources, *available at* <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=323498>.

⁸ Findings of Robert Kleinmann, *External Peer Review of Kuipers et al. 2006 (Comparison of Predicted and Actual Water Quality at Hardrock Mines) and Earthworks 2012 (U.S. Copper Porphyry Mines Report)*, Nov. 15, 2012, at 20.

⁹ *Id.*

¹⁰ *Id.* at 29.

¹¹ Findings of Christian Wolkersdorfer, *id.* at 21.

¹² *Id.* at 29.

¹³ Findings of David A. Atkins, *id.* at 22.

¹⁴ *Id.* at 24.

¹⁵ *Id.* at 29.

¹⁶ *Id.* at 23.

¹⁷ *Id.* at 20.

¹⁸ Findings of Christian Wolkersdorfer, *id.* at 21.

incidents never could be avoided,”¹⁹ that “this is not the case as many incidents are only of minor importance and modern day mining has more stringent requirements than the older mines investigated,”²⁰ and that “I cannot recommend using [the summary of the report] as a support of the EIS permitting process.”²¹ Yet another stated that “causes of the problems are unstated and...in a few cases, clear examples of successful mitigation and avoidance...are reported as if they were failures.”²² Even the peer reviewer most supportive of EPA’s use of the report stated that “the weakness of the report is that there is not an analysis of the events that could be consider[ed] accidents and those that could be produced by chronic failures, such as bad design...there is no insight into the causes for the failures.”²³

Not only do the comments of the peer reviewers therefore call into question the use of the Earthworks report itself, they also underscore the pervasive point that an accurate assessment of the potential impacts of mining near Bristol Bay must be undertaken after a realistic and specific mine plan that has been developed by qualified mining engineers and experts is complete. As one peer reviewer put it, “while it is appropriate to consider potential environmental issues and problems associated with mining when making a decision with respect to Bristol Bay, such decisions should be made based on the site-specific conditions, along with appropriate risk management analysis.”²⁴ That reviewer explained that “actual environmental impacts are dictated by many factors that, in addition to climate and distance to down-gradient streams, rivers, and wetlands and groundwater, include site-specific geology, mitigation measures, pollution abatement strategies, monitoring requirements, degree of corporate and regulatory oversight, etc.”²⁵ EPA should therefore wait to conduct its review of any proposed mining operations near Bristol Bay until a CWA permitting process has been initiated and all relevant information can be accurately assessed.

The Draft Assessment Inappropriately Addresses Water Quality Standards

EPA states in the draft assessment that the mine scenarios “would operate under a permit that would require meeting all national criteria and Alaskan standards,” and that “the Alaskan Pollutant Discharge Elimination System wastewater discharge permit for a mine would include requirements that all other potentially toxic contaminants be kept below concentrations equivalent to national chronic criteria.”²⁶ However, based in part on the Earthworks report, EPA nonetheless assumes that there will be leakage and discharges that will cause substantial impacts to aquatic life in miles and miles of streams. Likewise, EPA makes assertions such as “copper standards and criteria are

¹⁹ *Id.* at 28.

²⁰ *Id.* at 29.

²¹ *Id.* at 30.

²² Findings of Robert Kleinmann, *id.* at 26.

²³ Findings of Dina L. Lopez, *id.* at 27.

²⁴ Findings of Robert Kleinmann, *id.* at 20.

²⁵ *Id.* at 24.

²⁶ Draft Assessment at 8-18.

based on conventional test endpoints of survival, growth, and reproduction. However, research has shown that the olfactory sensitivity of salmon is diminished at copper concentrations lower than those that reduce conventional endpoints in salmon.”²⁷

Such assertions amount to the second-guessing of EPA-approved water quality standards, and it is extremely inappropriate for EPA to imply in a draft watershed assessment that state and federal water quality standards are not protective of aquatic life. There are specific regulatory processes – many of which are mentioned by EPA in the assessment – designed to develop water quality requirements. It is improper for EPA to claim that mines meeting those legally developed standards may nevertheless cause unacceptable harm to water quality. Such actions call into further question the validity and scientific soundness of the assessment.

Conclusion

EPA’s extra-regulatory actions with respect to the Bristol Bay watershed are premature and inappropriate, and will undoubtedly have a stifling effect on economic growth in Alaska and beyond. The lands in question are open to mineral exploration, and EPA should allow such exploration to proceed and wait until the proper time to evaluate any proposed mine plans. To do otherwise ignores due process and the statutory language of the CWA, and promotes bad public policy. NMA respectfully requests EPA to abandon this effort, and to evaluate any mining proposals in Bristol Bay or any other area by means of the proper regulatory channels.

Sincerely,



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National Mining Association

²⁷ Draft Assessment at 8-28,29.