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September 6, 2022

Regional Administrator Casey Sixkiller
Environmental Protection Agency - Region 10
Water Docket
Mail Code 2822T
Pennsylvania Avenue NW
Washington, DC 20460

Re: *Region 10's Proposed Determination at Dkt. No. EPA-R10-OW-2022-0418*

Dear Regional Administrator Sixkiller:

The States of Alaska, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Montana, Nebraska, South Carolina, Texas, Utah, West Virginia, and Wyoming ("States") submit this letter in opposition to the Environmental Protection Agency ("EPA") Region 10's proposed determination at Dkt. No. EPA-R10-OW-2022-0418.[1] Region 10 is proposing to subjectively and unreasonably target a project in Alaska and pre-emptively veto the federal permitting of that project in an unprecedented abuse of its perceived authority pursuant to Clean Water Act ("CWA") § 404(c).[2] If finalized, this proposed determination would: (1) prevent the permitting of a proposed Alaska mining project before the Army Corps of Engineers ("Corps") has determined to issue a § 404 permit; and (2) impose a blanket prohibition on all future, similar mining projects over a 309-square-mile area, which is 23 times the size of the proposed project footprint and comprises lands owned by the State of Alaska. Due primarily to its lack of discernible standards or uniform application, this veto sets a dangerous precedent. If Region 10's proposed determination is adopted, it will affirm an expansive, unconstrained interpretation of EPA's § 404(c) power—effectively creating a § 404(c) wild card, playable at whim to stop projects. Such a power introduces profound uncertainty into the § 404 permitting process and, by extension, the investment climate; and undermines steps taken by Congress and President Biden to lessen our Nation's mineral dependence on other countries, like China, in pursuit of a renewable energy economy of our own.

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[1] May 26, 2022 Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to § 404(c) of the Clean Water Act, Pebble Deposit Area, Southwest Alaska (87 FR 39091) (hereinafter *Proposed Determination*).

[2] To exercise a § 404(c) veto, EPA must establish that a project's proposed "discharge[s]" "will have an unacceptable adverse effect on" one of four resources, including "shellfish beds and fishery areas (including spawning and breeding areas)." 33 U.S.C. § 1344(c).

Signed into law by President Biden on August 16, 2022, the Inflation Reduction Act[3] is aimed in part at stimulating a national transition to a domestic renewable energy economy.[4] As the Senate Democratic Majority explains, the Act

> [i]ncreases American energy security through policies to support energy reliability and cleaner production coupled with historic investments in American clean energy manufacturing to lessen our reliance on China, ensuring that the transition to a clean economy creates millions of American manufacturing jobs, and is powered by American-made clean technologies.[5]

To this end, the Act offers grants to improve energy infrastructure, tax incentives for the mining industry, and an increased tax credit for electric vehicles if mineral sourcing requirements are met.[6]

This Act follows President Biden's explanation earlier this year of his Administration's policy goals:

> It is the policy of my Administration that ensuring a robust, resilient, sustainable, and environmentally responsible domestic industrial base to meet the requirements of the clean energy economy, . . . is essential to our national security and the development and preservation of domestic critical infrastructure.[7]

Congress and President Biden alike are urging a transition to a domestic renewable energy economy, to lessen our energy dependence and increase our national security.

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[3] *Inflation Reduction Act of 2022*, H.R. 5376, Pub. Law No. 117-169, 117th Cong. 2d Sess. (signed Aug. 16, 2022) (hereinafter *IRA*).

[4] Senate Democratic Majority, *Summary: The Inflation Reduction Act of 2022* (Aug. 11, 2022) (hereinafter *Summary: IRA*) (stating that Act is intended to encourage "invest[ment] in domestic energy production and manufacturing").

[5] Senate Democratic Majority, *Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022* (Aug. 2022) (hereinafter *Summary: IRA - Energy Security*) at 1, retrieved from https://www.democrats.senate.gov/imo/media/doc/summary_of_the_energy_security_and_climate_change_investments_in_the_inflation_reduction_act_of_2022.pdf.

[6] *IRA*.

[7] WhiteHouse.Gov, Briefing Room, *Memorandum on Presidential Determination Pursuant to Section 303 of the Defense Production Act of 1950, as Amended*, Presidential Determination No. 2022-11 (Mar. 31, 2022).

Mineral supply chains will drive this transition. The mineral deposit that Region 10's proposed determination would foreclose from development includes copper, gold, molybdenum, silver, rhenium, and palladium. While not presently designated as a critical mineral, copper is integral to green energy technologies like wind farms, solar panels, and electric vehicles (including EV batteries).[8] Alaska is also home to other important minerals like Graphite, Zinc, and Tungsten. Known as the "The Treasure State," Montana is home to critical minerals like zinc, palladium, platinum, tellurium, tin, and tungsten. These and other rare earth elements are essential components of a resilient, and renewable, American mineral economy.

Mining projects require substantial up-front investment.[9] In Alaska, the typical timeframe between a mineral deposit's discovery and its development is 15 years.[10] In 2021, investors in Alaska projects contributed approximately $393 million to development alone.[11] If the United States is to successfully transition to a domestic renewable energy economy, mining projects in the United States must be attractive investments. Whether a mining project is an attractive investment depends on its likelihood of securing the necessary permits, which typically include a § 404 permit from the Corps. The greater the uncertainty in the § 404 permitting process, the greater the financial risk—and the less attractive the investment.[12]

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[8] *See* Copper Development Ass'n Inc., *How Copper Drives Electric Vehicles* (2017), retrieved from https://www.copper.org/publications/pub_list/pdf/A6192_ElectricVehicles-Infographic.pdf.

[9] An investment into Alaska's Bokan Mountain-Dotson Ridge exploration project, which contains rare earth elements, has an estimated initial capital cost of $221.3 million, with an operating cost of $636.0 million. McDowell Group, *The Economic Benefits of Alaska's Mining Industry (Mar. 2018)*, at 20, retrieved from https://www.mcdowellgroup.net/wp-content/uploads/2021/01/2017-ama-ei-final-report.pdf.

[10] *Id.* at 21.

[11] McKinley Research Group, LLP, *The Economic Benefits of Alaska's Mining Industry (May 2022)*, at 21, retrieved from https://www.mcdowellgroup.net/publications/; *id.* ("Between 1982 and 2021, about $7.7 billion was spent on mine development in Alaska.").

[12] *See* David Sunding, The Brattle Group, *Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal* (May 30, 2011) (demonstrating how uncertainty in the § 404 permitting process freezes investment into projects requiring § 404 permits).

With this proposed veto, EPA introduces unwarranted uncertainty into the § 404 permitting process. Section 404(c) itself contains little in the way of criteria guiding EPA's exercise of this power,[13] and EPA's regulations are hardly more specific.[14] As a result, States and the regulated community must rely on EPA's past exercises of this power for guidance. But EPA's previous § 404(c) vetoes reveal no discernable pattern. The veto at issue here only adds to the confusion.

In this veto, Region 10:

- considers factors that Congress, in enacting § 404(c), clearly did not intend EPA to consider (including a hypothetical expanded mine scenario, secondary and indirect effects not resulting from point-source discharges, unlikely scenarios of spills and accidents, and previous commentor disapproval);[15]
- fails to seriously consider the costs of its veto (including costs of the project's loss to local, state, and national economies);[16] and
- departs from EPA's previous assurances about when it would exercise this power (i.e., EPA's statements that this veto power is "reactive"[17] in nature and should

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[13] Section 404(c) requires EPA to establish that proposed "discharge[s]" "will have an unacceptable adverse effect on" one of four resources, including "shellfish beds and fishery areas (including spawning and breeding areas)." 33 U.S.C. § 1344(c).

[14] *See* 40 C.F.R. § 231 [Section 404(c) Procedures]. *E.g.*, 40 C.F.R. § 231.2(e) (defining "unacceptable adverse effect" as "significant loss of or damage to fisheries" without defining "significant" or "fisheries").

[15] Region 10's proposed determination additionally considers topics such as the "cultural stability" of Alaska Native populations; "behavioral disorders" and "mental health degradation" potentially resulting from the mine; "dietary" considerations, including the mine's effect on the intake of "processed simple carbohydrates and saturated fats" and "protein and certain nutrients" by locals; "tension and discord" that could be "provoked" among Alaska Natives by the mine; "stress and anxiety"; "language" including the "defin[ition of] a 'wealthy person'"; "spirituality"; "social relations"; "family cohesion"; "rituals"; "folklore"; "equitable fishing opportunities"; and "people with disabilities,"—among others. *See Proposed Determination* at 6-18–6-24. These factors are not listed or alluded to in the text of § 404(c), nor in § 404(c)'s implementing regulations.

[16] *See Proposed Determination* at 6-25 (incorporating by reference separate costs analysis).

[17] *See* Oversight Hearings on Section 404 of the Clean Water Act: Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, 99th Cong. 41 (1985) (statement of Josephine Cooper, Assistant Administrator for External Affairs, EPA) (proposing that Congress make "404(c) . . . a much more effective device" by allowing EPA to use it "in advance of permit requests" which would "mov[e] the program from a reactive to a proactive one").

only be used as a "tool of last resort"[18] after the regular permitting process has been "exhausted"[19]).[20]

This veto, if finalized, signals that virtually any § 404 project—for reasons entirely out of the control of the project proponent, and unidentifiable at the outset of a project—may be unilaterally terminated by EPA.

And this veto, unfortunately, is the latest in EPA's series of departures from the expected § 404 permitting process. In the course of this project, Region 10 has:

- failed to see the § 404(q) process[21] through to completion before bringing this veto;[22]
- failed to provide the project proponent a meaningful opportunity to work toward achieving an acceptable compensatory mitigation plan;[23] and

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[18] EPA, Final Rule, *Denial or Restriction of Disposal Sites; Section 404(c) Procedures*, 44 FR 58076–58085, at 58080 (EPA assuring the public that "[t]he fact that 404(c) may be regarded as a tool of last resort implies that EPA will first employ its tool of 'first resort' e.g. comment and consultation with the permitting authority at all appropriate stages of the permit process").

[19] *See* 40 C.F.R. § 231.3(a)(2) (comment published in EPA regulations stating that "[i]n cases involving a proposed disposal site for which a permit application is pending, it is anticipated that the procedures of the section 404 referral process will normally be exhausted prior to any final decision of whether to initiate a § 404(c) proceeding").

[20] A § 404 permit has not yet been issued by the Corps for this project. Nor has the Corps indicated an intent to issue a permit. Rather, the appeals process for the Corps' *denial* of a permit remains pending.

[21] The 1992 Section 404(q) Memorandum of Agreement ("MOA") outlines the current process and timeframes for resolving disputes that EPA has, in an effort to issue timely permit decisions. Under this MOA, EPA may request that certain permit applications receive a higher level of review within the Department of Army. This process is specifically aimed to address those situations wherein EPA believes that issuance of the permit will result in "unacceptable adverse effects" to "Aquatic Resources of National Importance." *See* EPA.gov, *Clean Water Act § 404(q) Dispute Resolution Process* (*EPA Published § 404(q) Dispute Resolution Process*), at 2, retrieved from https://www.epa.gov/sites/default/files/2016-03/documents/404q_factsheet.pdf.

[22] *See EPA Published § 404(q) Dispute Resolution Process*, at 2 (stating that "*[i]f the Assistant Secretary decides to proceed with the issuance of the permit over EPA's objections*, EPA decides whether to initiate a Section 404(c) 'veto' action" (emphasis added)), retrieved from https://www.epa.gov/sites/default/files/2016-03/documents/404q_factsheet.pdf.

[23] The Corps denied the project proponent's revised compensatory mitigation plan a mere *four days* after it was received, strongly suggesting a lack of meaningful consideration by the Corps.

- failed to allow adequate time for the State of Alaska to issue, waive, or deny a § 401 certification before acting.

Region 10 and the Corps also refused to include the State of Alaska in their § 404(b)(1) Guidelines discussions. Equally disconcerting was their cessation of communication with the State of Alaska about this project back in 2020—despite Alaska's dual interest as regulator and landowner.[24,25]

Decisions like these throw a wild card into the entire § 404 permitting process. EPA's introduction of this type of uncertainty, and corresponding financial risk, into this process will have deterrent effects on investment in precisely those projects we need most to build a resilient mineral supply chain for the renewable economy. This result is counterproductive to the Inflation Reduction Act's goal of "lessen[ing] our reliance on China" for minerals, and it undermines President Biden's vision of "a robust, resilient, sustainable, and environmentally responsible domestic industrial base[.]" At a minimum, EPA should avoid pushing mineral development projects out to foreign countries, such as China, whose environmental laws are less protective than those of the United States.

We have abundant mineral resources in the United States. What we need is a federal government united in its preference for responsibly developing our resources, under our own environmentally protective laws, pursuant to a predictable permitting process. Not an EPA that abuses its power to target projects it does not like, stacking the deck against States and permittees in a game known only to EPA. EPA must act cooperatively with States, and consistent with national policy, so that we can, as a Nation, build the secure and reliable mineral supply chains that we need—and lessen our dependence on countries like China.

The undersigned States urge Region 10 to correct course now by withdrawing this proposed veto. Please direct any questions or concerns to Assistant Attorney General Julie Pack at Julie.Pack@alaska.gov.

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[24] Alaska's Department of Natural Resources ("ADNR"), as land manager, depended on this communication to engage with the Corps' compensatory mitigation requirements, which would have required extensive restrictions on state-owned lands beyond the currently leased areas. The Corps also denied ADNR's request to participate in the project proponent's appeal of the Corps' denial of the § 404 permit. *Compare* EPA, Final Rule, *Denial or Restriction of Disposal Sites; Section 404(c) Procedures*, 44 FR 58076–58085, at 58080 (EPA assuring the public that "[t]he fact that [§] 404(c) may be regarded as a tool of last resort implies that EPA will first employ its tool of 'first resort' e.g. comment and consultation with the permitting authority at all appropriate stages of the permit process").

[25] Use of this power over lands the State received subject to protections under a statehood act, as here, is exceptionally concerning, because EPA's action amounts to a diminishment of the rights guaranteed under the statehood act—i.e., the right to select and use former federal lands as directed by state legislature.

Sincerely,

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