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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PEBBLE LIMITED PARTNERSHIP,

Plaintiff,

vs.

ENVIRONMENTAL PROTECTION AGENCY, *et al*.,

Defendants.

/

MOTION FOR PRELIMINARY INJUNCTION

CIVIL ACTION NO. 3:14-cv-00171 HRH

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Pursuant to Fed. R. Civ. P. 65, Pebble Limited Partnership ("Plaintiff" or "PLP") moves for a preliminary injunction to enjoin Defendants United States Environmental Protection Agency ("EPA") and EPA Administrator Gina McCarthy from (1) proceeding any further with EPA's ongoing, unlawful effort preemptively to veto mining activities in the Bristol Bay Watershed or, alternatively, (2) using the Bristol Bay Watershed Assessment, or any part of it, to support or justify its ongoing Section 404(c) proceeding. The essence of preliminary relief is to maintain the status quo so that a party does not lose its remedy during the pendency of the litigation. That is the precise situation presented here. Courts have held that relief under FACA is only available *before* an agency makes a final decision. Unless EPA is enjoined from making a final decision while this litigation is pending, Plaintiff may lose it remedy for the FACA violations that the Agency has committed.

INTRODUCTION

The Pebble Deposit, located within the Bristol Bay Watershed in Southwest Alaska, is one of the world's largest deposits of copper and gold. Since 2001, Plaintiff has been studying the Bristol Bay Watershed area in conjunction with local, state, and federal authorities for the purpose of undertaking mining activities in the Pebble Deposit. As is often the case, mining activities of this kind are expected to involve the discharge of certain materials into waterways. Accordingly, before any discharge can take place, Plaintiff must obtain a permit from the U.S. Army Corps of Engineers under Section 404 of the federal Clean Water Act. Plaintiff has spent nearly $150 million in conducting environmental studies and detailed evaluations of alternative mining options, but it has not yet submitted an application for its Section 404 permit. It intended to do so once it settled on its mining plan, but EPA inserted itself into the process in a wholly

unprecedented manner and, consequently, has derailed the normal procedures by which mine permits are sought.

In January of this year, after holding scores of secret meetings with and relying heavily on the work of three *de facto* advisory committees, EPA published an assessment of hypothetical mining activities in the Bristol Bay Watershed (the "Bristol Bay Watershed Assessment" or the "BBWA"). The BBWA is a biased, scientifically unsound report that did not consider or use the best available data, and which suffers from flawed methodologies, erroneous assumptions, and faulty conclusions. Nonetheless, relying exclusively on the BBWA, and before any Section 404 permit application has been submitted, EPA announced in July 2014 that, pursuant to Section 404(c), it intended to determine that the discharge of mining materials into neighboring waterways would "have an unacceptable adverse effect" on certain categories of natural resources and thus could not occur.

Never in the history of the Clean Water Act has EPA invoked Section 404(c) to prohibit a major mining project *before* a development plan has been proposed or an application has been submitted. Not surprisingly, EPA's unprecedented action has proven to be both highly controversial and hotly contested.

But this case is not about EPA's authority under Section 404(c); that is the subject of an ongoing, related case. *See Pebble Ltd. P'ship v. U.S. Envtl. Prot. Agency*, Case No. 3:14-cv-00097 HRH (D. Alaska). Rather, this case is about EPA's patent violations of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II § 1 *et seq*. This case is about the EPA's establishment and utilization of *de facto* advisory committees that worked behind the scenes, and out of the public eye, not only to assist the Agency in developing its strategy to use Section 404(c) in a way that it has never done before, but also to implement that strategy by helping to

prepare the BBWA and by populating it with—and there is no other way to put it—biased, junk science.

This case is, at bottom, about requiring EPA to follow basic rules of open government as mandated by FACA. But Plaintiff cannot wait until a full trial on the merits of its claims to seek a remedy under FACA. It must seek relief *now* because, notwithstanding the obvious importance of complying with FACA, courts appear unwilling to force compliance (or to invalidate final agency action) once the agency has concluded its proceedings. Here, EPA has not yet issued its final determination under Section 404(c), although it is moving full-steam ahead to do so. If EPA is ever to be compelled to comply with FACA, *now* is the time for the Court to do so. "FACA can and should be enforced by injunctive relief *during the process* . . . ." *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1309 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996) (emphasis added).

I. STATUTORY BACKGROUND

Congress enacted FACA in 1972 in response to the growing influence that special interest groups had been exerting over Executive Branch agencies, most frequently out of the public eye and with little or no public accountability. Congress found that "the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees . . . ." 5 U.S.C. App. II § 2(b)(5), (6). As the Supreme Court has held, FACA was enacted "to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures" on "worthless committee meetings and biased proposals." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 453, 459 (1989); *see Idaho Wool Growers Ass'n v. Schafer*, 637 F. Supp. 2d 868, 880 (D. Idaho 2009) (stating that Congress wished to "counter[] the fear that advisory committees would be dominated by

representatives of industry and other special interest groups seeking to advance their own agendas.") (citing *Pub. Citizen*, 491 U.S. at 453)).

FACA, 5 U.S.C. App. II § 3(2), defines an "advisory committee" as:

> *any* committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . *established or utilized* by one or more agencies, *in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government*, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government . . . . (Emphasis added.)

Congress sought to enhance accountability by providing for public scrutiny of the activities of advisory committees and by setting out "standards and uniform procedures" to govern their establishment and operation. *See id.* § 2(b). Thus, when a federal agency establishes or uses outside advisory committees to conduct research, develop data, and make recommendations to the agency regarding the formulation of governmental policy and strategy, FACA imposes several requirements to ensure that the committees are open to the public, scrutinized, fairly balanced:

- No advisory committee shall be established unless it is determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law. *Id*. § 9(a)(2).

- Advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by an officer of the Federal Government. *Id*. § 9(b).

- No advisory committee shall meet or take any action until an advisory committee charter has been filed with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. *Id.* § 9(c).

- The committee's charter shall contain, *inter alia*: the committee's objectives and the scope of its activity; the period of time necessary for the committee to carry out its purposes; a description of the duties for which the committee is responsible; the estimated annual operating costs in dollars and man-years for such committee; and the estimated number and frequency of committee meetings. *Id*.

- The membership of the advisory committee must be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee, and the advice and recommendations of the advisory committee must not be inappropriately influenced by the appointing authority or by any special interest, but are instead the result of the advisory committee's independent judgment. *Id*. § 5(b)(2), (3).

- Advisory committees must provide adequate public notice of, and conduct, open meetings, and must make transcripts of meetings available to the public. *Id*. §§ 10(a), (b) and 11(a). In addition, all documents made available to, or prepared by, an advisory committee must be publicly accessible. *Id*. § 10(b). A federal employee must chair, or attend, each advisory committee meeting. *Id*. § 10(e).

FACA does not expressly provide for a private remedy. However, its requirements are enforceable through the Administrative Procedure Act, 5 U.S.C. §§ 704-06, which permits parties to bring claims for violations of FACA. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 736 F. Supp. 2d 24, 30 (D.D.C. 2010); *Idaho Wool Growers*, 637 F. Supp. 2d at 872.

II. FACTUAL BACKGROUND

A. The Pebble Deposit

The Pebble Deposit is located southwest of Anchorage on land that the United States granted to the State of Alaska pursuant to federal statutes expressly conveying "all the minerals" and the "right" to lease the land. *See* Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

Plaintiff obtained mineral claims for the Pebble Deposit in 2001 and has invested some $730 million—of which $150 million has been dedicated to environmental baseline studies—to

evaluate potential development of the Deposit. *See* "Pebble's Promise" *available at* http://corporate.pebblepartnership.com/publications.

The economic potential of the Pebble Mine is immense. The mine is projected to create up to 15,000 U.S. jobs, contribute $64 billion to U.S. gross domestic product, and generate approximately $18 billion in federal, state, and local tax revenues. *See The Economic and Employment Contributions of a Conceptual Pebble Mine to the Alaska and United States Economies*, at iv (IHS Global Insights, May 2013), *available at* http://corporate.pebblepartnership.com/files/documents/study.pdf. This would provide much-needed economic relief to Southwest Alaska, a region plagued by low employment and a high cost of living. *Id.* at 21. The Lake and Peninsula Borough, where the deposit is located, could see the local tax base expand by as much as 700%. *Id.* at 25.

B. EPA Established and Utilized *De Facto* Advisory Committees To Develop And Implement Its Strategy To Use Section 404(c) Preemptively To Block The Pebble Mine

By 2008, Phil North, an ecologist in the Aquatic Resources Unit at EPA Region 10 (which includes Alaska); Richard Parkin, EPA Region 10's Director of the Environmental Justice; and others at EPA began developing EPA's Section 404(c) strategy to block Pebble Mine before any Section 404 application could even be filed. Indeed, by July of that year, North was already working on his "404 review" (Compl. ¶ 67); by August, North made clear to EPA's Patricia McGrath, EPA Region 10 Mining Coordinator, that "[t]he 404 program has a major role" (Compl. ¶ 70); and by July 2009, North told Marcia Combes, EPA's Alaska Chief, and Michael Szerlog, EPA Region 10 Aquatic Resources Unit Manager, that EPA officials should discuss EPA's Section 404(c) position and "appropriate action in response to our position" at an upcoming retreat, stating: "As you know, I feel that both of these projects [Chuitna and Pebble]

merit consideration of a 404C veto." (Compl. ¶ 86.) (*See* Exhibit B for a chart correlating the complaint paragraphs cited in this motion to the exhibits submitted herewith.)

To assist it in developing and implementing its scheme to use Section 404(c) preemptively, EPA established and utilized *de facto* advisory committees. The first of these—what Plaintiff calls the Anti-Mine Coalition Federal Advisory Committee ("FAC")—was established and utilized to provide EPA with advice and recommendations needed to assess the strategic, legal, policy, and political underpinnings of the Agency's Section 404(c) scheme. As the Section 404(c) veto plan evolved through 2010-11, EPA established and utilized two more *de facto* advisory committees: the Anti-Mine Scientists FAC, which provided the Agency with advice and recommendations on the Bristol Bay Watershed Assessment, including study design and methodologies, as well as scientific and technical information; and the Anti-Mine Assessment Team FAC, which provided substantial assistance in developing and writing the BBWA and in producing its conclusions about ecological risk and environmental impact. *See infra* Sections II.B.1., B.2., & B.3.

1. <u>The "Anti-Mine Coalition" FAC</u>

The Anti-Mine Coalition FAC consisted of members of Environmental Non-Governmental Organizations ("ENGOs"), as well as anti-mine activists, lawyers, lobbyists, and Alaska Native Tribal representatives, who, starting in 2009, began to coordinate amongst themselves, and thereafter to collaborate secretly with EPA to provide strategic, legal, policy, and political support that EPA used to proceed with its Section 404(c) plan. EPA established and utilized the Anti-Mine Coalition FAC essentially as an auxiliary EPA. Under EPA's oversight, the Anti-Mine Coalition performed critical functions at the behest and in support of EPA.

The Anti-Mine Coalition FAC consisted of a discrete group of staunch mine opponents, including: Geoffrey ("Jeff") Parker, counsel to six of the anti-mine Alaska Native Tribes and to Robert Gillam, who provided funding to the Anti-Mine Coalition; Shoren Brown and other representatives of Trout Unlimited ("TU"); Bob Waldrop, formerly of the Bristol Bay Regional Seafood Development Association ("BBRSDA"); Rick Halford, anti-mine activist and former state legislator; David Chambers and other representatives of the Center for Science in Public Participation ("CSP2"); Wayne Nastri, former EPA official turned lobbyist; Jason Metrokin, Peter Van Tuyn and other representatives of the Bristol Bay Native Corporation ("BBNC"); Tim Troll and other representatives of The Nature Conservancy ("TNC"); Jan Goldman-Carter and other representatives of the National Wildlife Federation ("NWF"); Susan Flensburg and other representatives of the Bristol Bay Native Association ("BBNA"); representatives of Bristol Bay United ("BBU"), a group composed of Metrokin, Brown, Waldrop, Van Tuyn and others; Lydia Olympic and other representatives of The Wilderness Society ("TWS"); Sam Snyder and other representatives of the Conservation Foundation ("ACF"); and Alaska Native Tribal members such as Tom Tilden, Bobby Andrew, and Luki Akelkok. (*E.g.*, Compl. ¶¶ 130, 132, 134, 136, 140, 141, 147, 151, 158, 162, 165, 171, 173, 175, 176, 182, 184, 185, 203, 208, 217, 218, 219, 222, 224, 226, 228, 235, 239.)

Based on evidence produced thus far by EPA in its redacted (and incomplete) response to Plaintiff's Freedom of Information Act requests, EPA established and utilized the Anti-Mine Coalition FAC in countless ways[1]:

[1] Based on EPA's limited FOIA production to date, direct contacts, meetings, briefings, calls, etc. between EPA and the FACs totaled over 500 from 2008 to 2014. *See* Ex. A, Declaration of Andrew Sloniewsky ("Sloniewsky Decl.") ¶¶ 2-7. For instance, between 2009 and 2014, EPA officials were in contact regarding Pebble Mine more than 200 times with TU's Shoren Brown and more than 100 times with Jeff Parker. *See id*.

1. EPA coordinated with Anti-Mine Coalition members, frequently through private conferences, briefings, presentations, and closed-door meetings, to discuss strategy, planning, and implementation of the Section 404(c) strategy and development of the BBWA as the scientific vehicle to support its Section 404(c) determination. (*E.g.*, Compl. ¶¶ 85, 92, 97-98, 100, 101, 111, 113, 115, 128, 134, 139, 140, 143, 151, 161, 162, 171-73, 182, 184-85, 203, 206, 208, 218, 220, 222, 224, 226, 228, 230, 232, 235, 243, 247, 260-62, 271, 286, 296, 325, 370-72, 394, 439-41, 443-44.)

2. EPA convened and coordinated many of these meetings. (*E.g.*, Compl. ¶¶ 93, 94, 96, 97, 98, 100, 111, 113, 115, 131, 134, 139, 140, 143, 158, 161, 171, 173, 180, 185, 203, 206, 218, 220, 222, 224, 226, 228, 229, 239, 256, 261, 274, 279, 300, 306, 325, 339, 345, 359, 360, 370-72, 394, 439-41, 444.)

3. EPA routinely solicited advice and recommendations from Anti-Mine Coalition members. (*E.g.*, Compl. ¶¶ 118, 123, 126, 131, 147, 180, 224, 234, 241, 292, 319-23, 326, 328, 403-07.)

4. Through these strategy sessions and communications, EPA received advice and recommendations from Anti-Mine Coalition FAC members—all of which was geared toward the common goal of a preemptive Section 404(c) action, including through the preparation of the BBWA. (*E.g.*, Compl. ¶¶ 101, 113, 116, 126, 131, 136, 142, 157, 162, 178, 180, 184, 203, 235, 242, 247, 264, 274, 294, 342.)

5. Briefings on Section 404(c) by Anti-Mine Coalition FAC members to EPA and by EPA to Coalition members were routine. (*E.g.*, Compl. ¶¶ 88, 113, 129, 139, 140, 143, 146, 203, 218, 232, 249, 256, 288, 294, 351, 361, 376, 381, 423, 447.)

6. EPA sought and received advice and recommendations on scientific data and analyses from Anti-Mine Coalition FAC members (and the Anti-Mine Scientists FAC). (*E.g.*, Compl. ¶¶ 113, 123, 129, 131, 143, 155, 201, 219, 221, 234, 243, 247-48, 261, 266, 289, 298, 299, 307-08, 313-14, 327, 329, 331, 333, 339, 342, 357, 358, 367, 373, 386, 387-88, 400-01, 425, 428-34.)

7. EPA sought and received specific legal advice and strategy on Section 404(c) and how EPA could use Section 404(c) proactively. (*E.g.*, Compl. ¶¶ 92, 113, 116, 125, 131, 136, 142, 149, 157, 180, 183, 201, 245, 274, 316, 319-23, 353, 366, 368, 374, 437.)

8. EPA also received public relations and political advice and recommendations from Anti-Mine Coalition FAC members, including on how to develop support among the anti-mine Native Tribes, used to implement its Section 404(c) strategy. (*E.g.*, Compl. ¶¶ 85, 92, 130, 149, 151, 152, 153, 154, 160, 165, 166, 167, 173, 207, 209, 212, 259, 270, 276, 280, 281, 294, 309-11, 337, 375, 377-80.)

9. EPA shared internal strategy with the Anti-Mine Coalition FAC and received advice and recommendations on strategy from Anti-Mine Coalition FAC

members in its formulation and implementation of its Section 404(c) strategy. (*E.g.*, Compl. ¶¶ 130, 182, 199, 176, 199, 218, 234, 264, 277, 313-15, 446-47.)

10. EPA also (a) received secret reports from the Anti-Mine Coalition FAC that the Agency agreed to withhold from the public (*e.g.*, Compl. ¶¶ 202, 333-34, 336, 339, 364, 423); (b) colluded with Anti-Mine Coalition members to rig events to be anti-mine friendly (*e.g.*, Compl. ¶¶ 212, 286-87, 301, 391); and (c) tipped off Anti-Mine publications (*e.g.*, Compl. ¶ 296, 377), while Anti-Mine Coalition FAC members tipped off EPA about media coverage (*e.g.*, Compl. ¶ 166).

11. EPA received Anti-Mine Coalition propaganda and circulated their news and event announcements internally and to others, including at the U.S. Fish & Wildlife Service. (*E.g.*, Compl. ¶¶ 259, 270, 279, 297, 309-11, 337-38, 375, 378-80.)

12. EPA also utilized the Anti-Mine Coalition FAC (and the Anti-Mine Scientists FAC) as a resource to guide the Agency's responses to the independent external Peer Reviewers, who sharply criticized the EPA's work product in the drafts of the BBWA. (*E.g.*, Compl. ¶¶ 408-11.)

13. The Anti-Mine Coalition FAC provided public support for EPA at critical forums in Alaska. (*E.g.*, Compl. ¶ 391.)

14. EPA was also given advice and recommendations by the Anti-Mine Coalition FAC on talking points to address the public, the media, and critics. (*E.g.*, Compl. ¶¶ 149, 154, 166-67, 207, 209, 294.)

By 2011, the Anti-Mine Coalition FAC had been firmly established and was utilized in the following years to advise on the direction of EPA's Section 404(c) strategy, the Watershed Assessment, the Assessment drafting team, and the EPA's Intergovernmental Technical Team, which itself was advising the Assessment drafting team on the scope and direction of the BBWA. (*E.g.*, Compl. ¶¶ 272, 277, 280, 281, 293, 298, 300, 313, 314, 336, 342, 351, 360, 366, 368, 370-372, 376, 388, 437, 443, 444, 446-47.)

Anti-Mine Coalition FAC members collaborated with each other, including the Anti-Mine Scientists FAC, to provide collective strategic, legal, policy, and scientific advice and

recommendations to EPA directed toward a single endpoint—a preemptive Section 404(c) veto.[2] (*E.g.*, Compl. ¶¶ 92, 101, 113, 114, 116, 130, 134, 136, 143, 152, 158, 162, 177, 182, 184, 202, 212, 219, 226, 228, 230, 235, 247, 260, 339, 351, 360, 370-372, 376, 423, 446-47.)

Key EPA officials responsible for establishing, organizing, coordinating, and utilizing the Anti-Mine Coalition FAC included: North, Stoner, McLerran, Sussman, Pavitt, Steiner-Riley, McGrath, Szerlog, Fordham, Hough, and Parkin. (*E.g.*, Compl. ¶¶ 130, 132, 134, 136, 140, 141, 147, 151, 158, 162, 165, 171, 173, 175, 176, 182, 184, 185, 203, 208, 217, 218, 219, 222, 224, 226, 228, 235, 239.)

At no time did EPA comply with FACA in either establishing or utilizing the Anti-Mine Coalition FAC, although the Agency acknowledged the risk in its September 8, 2010, "Bristol Bay 404(c) Discussion Matrix" for "HQ Briefing" when it cited "*[p]ossible FACA complications*" as a "Con" for its Section 404(c) action. (Compl. ¶¶ 186, 189 (emphasis added).) EPA went even further in noting that the "process could be structured to alleviate those concerns" about "FACA complications." (Compl. ¶ 189.)

2. <u>The "Anti-Mine Scientists" FAC</u>

EPA established and utilized its second *de facto* advisory committee, the Anti-Mine Scientists FAC, to provide the Agency with scientific analysis, study design, data, and drafting assistance in connection with the Section 404(c) strategy, the BBWA and its Appendices, and responses to the Peer Reviewers' criticisms of preliminary drafts of the BBWA. The Anti-Mine Scientists FAC also coordinated closely with the Anti-Mine Coalition FAC and Anti-Mine Assessment Team FAC, effectively operating as the EPA's auxiliary "science arm."

[2] The Anti-Mine Coalition FAC and Anti-Mine Scientists FAC also provided advice and recommendations to the U.S. Fish & Wildlife Service ("FWS"), which acted in tandem with EPA. (*E.g.*, Compl. ¶¶ 88, 144-46, 212, 221, 262, 268, 271, 363.) FWS personnel also participated in contributing to and drafting the BBWA. (*E.g.*, Compl. ¶¶ 75, 138, 221, 343-44, 355, 363, 365, 414-15, 418.)

The Anti-Mine Scientists FAC as established by EPA consisted of a discrete group of specialists including: David Chambers (CSP2); Kendra Zamzow (CSP2); Stu Levit (CSP2); Bretwood Higman (CSP2/Ground Truth Trekking); Carol Ann Woody (Fisheries Research and Consulting); Sarah O'Neal (Fisheries Research and Consulting); Ann Maest (Stratus Consulting), Cameron Wobus (Stratus Consulting); Thomas Quinn (University of Washington/The Nature Conservancy); Alan Boraas (Kenai Peninsula College); Daniel Rinella (University of Alaska Anchorage); Michael Wiedmer (University of Washington/The Nature Conservancy); David Albert (The Nature Conservancy); Marcus Geist (The Nature Conservancy); David Athons (Kenai River Center); Jim Kuipers; William Riley (former EPA scientist); and Thomas Yocom (former EPA scientist).

As reflected in EPA's own documents, the Agency established and utilized the Anti-Mine Coalition FAC in the following ways:

1. EPA convened and coordinated numerous private meetings and briefings with the Anti-Mine Scientists FAC to receive strategic advice and scientific analyses and data in support of EPA's Section 404(c) strategy and the BBWA. (*E.g.*, Compl. ¶¶ 143, 219, 228-29, 230, 243, 247-49, 260-61, 298, 300, 329, 331, 339, 351, 361, 367, 373, 376, 400-01, 425.)

2. EPA utilized the Anti-Mine Scientists FAC to provide strategic advice, scientific analyses, and data. (*E.g.*, Compl. ¶¶ 219, 221, 224, 234, 248, 266, 289, 298, 299, 304, 306, 316, 326, 327, 329, 333, 338, 342, 357, 358, 373, 387-88, 399, 403, 406-08, 410-11, 425.)

3. EPA organized the Anti-Mine Scientists FAC to draft and provide scientific authority for the BBWA. (*E.g.*, Compl. ¶¶ 227, 243-44, 267, 291, 305, 332, 404, 414-20, 428-30, 432, 434, 481.)

4. EPA also utilized the Anti-Mine Scientists to critique Plaintiff's data, submissions to EPA, and scientific methodologies (*e.g.*, Compl. ¶¶ 289, 329, 357, 358, 386, 401 & Sloniewsky Decl. Ex. 209); and to draft and guide the Agency's responses to the independent external Peer Reviewers' criticisms of the drafts of the BBWA and provide advice and recommendations for revision to the BBWA (*e.g.*, Compl. ¶¶ 408-11, 420 & Sloniewsky Decl. Ex. 209).

Key EPA officials responsible for establishing, organizing, coordinating, and utilizing the Anti-Mine Scientists FAC included: North, Hough, Dunbar, and Parkin. (*E.g.*, Compl. ¶¶ 219, 221, 226, 228, 243, 247, 248, 260, 261, 289, 292, 304, 326-27, 328, 329, 339, 360, 403, 407.)

3. The "Anti-Mine Assessment Team" FAC

EPA's third *de facto* advisory committee, the Anti-Mine Assessment Team FAC, consisted of members of the EPA Bristol Bay Assessment Team, several of whom were not government employees. This FAC provided advice and recommendations to EPA, helped develop the Bristol Bay Watershed Assessment, and contributed to and drafted the Assessment and its supporting Appendices.

The Anti-Mine Assessment Team FAC worked closely with the Anti-Mine Coalition FAC and the Anti-Mine Scientists FAC to help craft the strategic guidance that would shape the Watershed Assessment. The Anti-Mine Assessment Team FAC was responsible for drafting the three iterations of the BBWA (the 1st and 2nd external drafts and the final BBWA) and for responding to Peer Reviewers' criticisms.

The Anti-Mine Assessment Team FAC as established by EPA was comprised of a discrete group of non-governmental specialists, including: Greg Blair, Ralph Grismala, Jim Rice, Steve Seville and other representatives of ICF International; Daniel Rinella; Michael Wiedmer; David Athons; Alan Boraas; John Duffield; Christopher Frissell; Chris Neher; David Patterson; Catherine Knott; Rebecca Shaftel; Jeff Parker, and members of the Intergovernmental Technical Team (the "IGTT").

Based on EPA's own documents, EPA established and utilized the Anti-Mine Assessment Team FAC in the following ways:

1. EPA designated the Anti-Mine Assessment Team as of January 26, 2011 (Compl. ¶ 247), announced the initiation of the Watershed Assessment (Compl. ¶ 251),

announced the project to the Anti-Mine Coalition (Compl. ¶ 254), and named EPA's Parkin as the Team leader (Compl. ¶ 264).

2. Thereafter, EPA organized the IGTT, including coordinating with key Tribal representatives of the Anti-Mine Coalition to be on the IGTT, which provided strategic and scientific guidance to the Anti-Mine Assessment Team on the direction that the BBWA should take. (*E.g.*, Compl. ¶¶ 293, 272, 280, 300, 313, 314, 345-46.)

3. EPA set the agenda and organized the Anti-Mine Assessment Team (*e.g.*, Compl. ¶¶ 282-85, 300, 395) and led the meetings (*e.g.*, Compl. ¶¶ 300, 345, 394).

4. EPA organized presentations for the Anti-Mine Assessment Team FAC and provided it with the one-sided advice and recommendations of the Anti-Mine Coalition and Anti-Mine Scientists during its deliberations. (*E.g.*, Compl. ¶¶ 304, 312, 331-32, 333, 338, 339, 351, 359, 367, 376, 380, 400, 401, 423.)

Key EPA officials responsible for establishing, organizing, coordinating, and utilizing the Anti-Mine Assessment Team FAC included: North, Parkin, Fordham, Hough, and Frithsen. (*E.g.*, Compl. ¶¶ 281, 286, 300, 304, 306, 313, 314, 333, 339, 342, 346, 359, 383, 394, 395, 400, 408, 413.)

III. ARGUMENT

"Preliminary injunctive relief is proper if the plaintiff establishes that 'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Small v. Operative Plasterers' & Cement Masons' Int'l Ass'n Local 200, AFL-CIO*, 611 F.3d 483, 493-94 (9th Cir. 2010) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008)).

Plaintiff satisfies these requirements.

A. Plaintiff Is Likely To Succeed On The Merits

1. The Anti-Mine Coalition, Anti-Mine Scientists, and the Anti-Mine Assessment Team Were "Advisory Committees" for Purposes of FACA

If FACA applies here, as Plaintiff claims, then the EPA's use of outside advisors and consultants in the development of the Agency's Section 404(c) strategy, the implementation of that strategy, and the preparation of the Bristol Bay Watershed Assessment plainly violated FACA. EPA did nothing whatsoever to comply with FACA's requirements (indeed, the evidence suggests that EPA sought intentionally to evade them). The only question for the Court at trial, therefore, is whether FACA has been triggered by the EPA's establishment and use of the advisory committees that Plaintiff has identified, and the answer to that question turns on whether the FACs identified by Plaintiff were "advisory committees," which are defined by statute as:

> *any* committee, board, commission, council, conference, panel, task force, *or other similar group*, or any subcommittee or other subgroup thereof . . . which is . . . *established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government* . . . .

5 U.S.C. App. II § 3(2) (emphasis added). A committee need not satisfy a strict set of criteria to be deemed a FAC. Rather, whether a group constitutes a FAC exists along a "continuum":

> At one end one can visualize a formal group of a limited number of private citizens who are brought together to give publicized advice as a group. That model would seem covered by the statute regardless of other fortuities such as whether the members are called "consultants." At the other end of the continuum is an unstructured arrangement in which the government seeks advice from what is only a collection of individuals who do not significantly interact with each other. That model, we think, does not trigger FACA.

Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton, 997 F.2d 898, 915 (D.C. Cir. 1993).

To be sure, not every group that provides input to an agency will be deemed a FAC under federal law. But, on its face, the definition is a broad one. For example, in *Cargill, Inc. v. United States*, interested experts in diesel exhaust, diesel exposure assessment, and the mining environment were invited by the agency to a single public meeting to comment on a protocol for proposed feasibility study. The invitees were deemed by the district court to be "an 'advisory committee' for purposes of FACA." *See* 173 F.3d 323, 328 (5th Cir. 1999) (noting district court's statement that "complying with FACA 'should not be that difficult'"). Likewise, in *Food Chemical News, Inc. v. Davis*, two separate "informal" meetings with consumer and distilled spirits industry representatives with respect to the drafting of proposed regulations by the Bureau of Alcohol, Tobacco, and Firearms were deemed to be meetings of "advisory committees" under FACA. 378 F. Supp. 1048, 1051 (D.D.C. 1974). The touchstone is whether the group consisted of a "consultative assembly of knowledgeable persons [who came together] for a specific purpose," *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009, 1012 (D.D.C. 1994), to aid the government in developing policy.

Here, there can be little doubt that the three *de facto* FACs that EPA established and utilized were more than a mere "collection of individuals who do not significantly interact with each other." *Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 915. Indeed, each of the three FACs was a coherent, organized group of individuals whom EPA assembled and utilized to assist it in taking preemptive action under Section 404(c). That the principal criterion for membership in these *de facto* FACs was holding an anti-mining bias only underscores how

unified and organized they were from the start and how intentional EPA was in choosing those with whom it would collaborate.[3]

There is also no question that EPA routinely utilized these *de facto* FACs and encouraged and solicited their advice and recommendations. For example, the Anti-Mine Coalition FAC secretly provided advice and recommendations on the substance, timing, and implementation of EPA's Section 404(c) scheme with regard to the Pebble Mine. FAC members counseled EPA on the purported advantages of preemptive action and coordinated resources on the ground in Alaska and in Washington, DC, to provide EPA with the public and political support needed to accelerate the Section 404(c) process in a way that would limit public involvement to the greatest degree possible. Members of the FACs drafted numerous white papers, memos, and presentations for EPA to assist it in building a sufficient case for taking action under Section 404(c), and, in multiple instances, EPA personnel co-drafted the memos with the Anti-Mine Coalition FAC. EPA also shared government strategy documents with Anti-Mine Coalition FAC to solicit its feedback. *See supra* pp. 7-11.

The Anti-Mine Coalition FAC also provided legal advice directly to EPA attorneys and staff on the propriety of a preemptive Section 404(c) action, on what findings would be necessary to substantiate Section 404(c) action, on how the Agency should pursue its plan to insulate it from a potential "takings" claim, and on how the Agency could protect its decision from a change in Administrations at the White House. *Id.*

As for the Anti-Mine Scientists FAC, EPA repeatedly leveraged it to infuse the Bristol Bay Watershed Assessment with biased justifications to support the proposed determination to

[3] EPA also intentionally chose with whom it would *not* collaborate. For example, leaders from both the Alaska Peninsula Corporation and Iliamna Development Corporation, Native organizations opposed to EPA's unprecedented action here, made multiple requests to meet with Administrator Jackson and every one of them was denied. (Compl. ¶ 463; *see also id*. ¶¶ 465-69.)

derail the Pebble Mine before any application had been filed under Section 404. EPA met regularly with these scientists and incorporated their one-sided data and analyses into the BBWA, even conducting an unannounced, eleventh-hour peer review in an attempt to legitimize seven of these scientists' contributions. EPA established the Anti-Mine Scientists FAC with the purpose of obtaining "consensus," anti-mining advice, and recommendations on various matters relating to mining in this region. The Anti-Mine Scientists FAC thereafter provided to EPA, often through members of the Anti-Mine Coalition FAC, tailor-made "science" to ostensibly establish the "unacceptable adverse effects" needed for its Section 404(c) position. *See supra* pp. 11-13. Much of these biased data and analyses were directed to one purpose: to justify a veto under Section 404(c). Beginning in late 2010 or early 2011, the Anti-Mine Scientists FAC regularly briefed EPA officials and provided scientific papers, presentations, research, data, and overall strategy advice and recommendations—the lifeblood to EPA's scheme. Members of this FAC were fixtures at EPA's private meetings, and several of them expressly made clear to EPA their pre-existing views regarding the nature of the environmental conditions in the Pebble Deposit area and the certainty of "catastrophic" outcomes from hypothetical mining activities. In some instances, members of the Anti-Mine Scientists were also members of the Anti-Mine Assessment Team FAC. *Id.*

Finally, the Anti-Mine Assessment Team FAC, which EPA established at the beginning of 2011, worked in close collaboration with the Anti-Mine Coalition and the Anti-Mine Scientists FACs to help EPA shape the Watershed Assessment's anti-mining bias. From 2012 to at least 2014, the Anti-Mine Assessment Team FAC was responsible for drafting sections of the BBWA and for responding to criticisms by Peer Reviewers and others. *See supra* pp. 13-14.

In short, each of EPA's three *de facto* advisory committees was a "consultative assembly of knowledgeable persons [convened by EPA] for a specific purpose"—to provide advice and recommendations on EPA's Section 404(c) preemptive strategy and the development and implementation of the Bristol Bay Watershed Assessment. Each of these groups was, therefore, an "advisory committee" under FACA. *See Nw. Forest Res. Council*, 846 F. Supp. at 1012.

B. Plaintiff Is Likely To Suffer Irreparable Harm

1. A Remedy Under FACA Is Available While the EPA's Section 404(c) Determination Is Pending

EPA plainly is on a fast-track toward finalizing a determination under Section 404(c) that could preclude development of the Pebble Deposit. Indeed, the Agency has refused to extend the 60-day period for comments that commenced July 18, 2014, when it published its *Notice of Proposed Determination under 404(c)*. (Compl. ¶¶ 457, 459, 460.)

There also is no doubt that harm immediately ensues from an agency's failure to follow the requirements set forth by FACA or that, through the Administrative Procedure Act, a private litigant is permitted to seek relief. *See Judicial Watch, Inc.*, 736 F. Supp. 2d at 30-31; *Idaho Wool Growers*, 637 F. Supp. 2d at 872.

The genuine concern here, however, is timing because, as some courts have held, once final agency action occurs, it will not be invalidated or enjoined on the basis of FACA violations. *See, e.g., Nat'l Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979); *Seattle Audubon Soc'y*, 871 F. Supp. at 1309. Thus, if the Court declines to act now—*before* EPA's determination under Section 404(c) is finalized—then the Agency will effectively have evaded FACA with impunity, and Plaintiff's and the public's right to have the Executive Branch act in accordance with FACA will be forever lost.

Now is the time for the Court to stop this runaway train. "FACA can and should be enforced by injunctive relief *during the process . . . .*" *Seattle Audubon Soc'y*, 871 F. Supp. at 1309 (emphasis added). Accordingly, the Court should either (i) enjoin EPA from proceeding any further with its Section 404(c) action until the parties' rights and obligations are decided under FACA, or, (ii) at a minimum, enjoin EPA from using the tainted Bristol Bay Watershed Assessment until the parties' rights are resolved. *See Ala.-Tombigbee Rivers Coal. v. Dep't of Interior*, 26 F.3d 1103, 1106-07 (11th Cir. 1994) (use injunction is appropriate where "the procedural shortcomings are significant and the report potentially influential to the outcome" (citation omitted)); *Cargill*, 173 F.3d at 341 ("If the courts do not enforce FACA by enjoining the work product of improperly constituted committees, FACA will be toothless, merely aspirational legislation.").

2. EPA's Violations of FACA Are Effectively Forcing Plaintiff Out of Business

EPA's decision to evade FACA and proceed under Section 404(c) before Plaintiff has even proposed a development plan or applied for a permit also will irreparably injure Plaintiff's economic interests. Plaintiff was formed to explore and develop mining opportunities in the Pebble Deposit. If EPA's Section 404(c) determination proceeds as the Agency plans, then Plaintiff's mining rights will effectively be lost before Plaintiff applies for a single permit or engages in the regulatory process whereby an objective assessment of actual project designs will be possible. Indeed, short-circuiting the normal permitting process appears to be exactly what EPA set out to achieve when it established and utilized its *de facto* advisory committees. (*E.g.*, Compl. ¶¶ 86, 126, 136, 178, 187, 214, 237, 278, 302, 325, 353, 367, 431(a-g), 474.)

Whether and under what conditions Plaintiff would be allowed to conduct mining activities should, of course, be subject to scrutiny and public comment under the procedures that

are typically followed in procuring the necessary state and federal permits to mine. Here, however, EPA's use of Section 404(c) at an unprecedented, early stage will preempt Plaintiff from proceeding on the normal, established path. As a result, and unless this Court enjoins EPA now, Plaintiff will continue to suffer serious economic harm and face probable destruction. *See* Decl. of Ronald Thiessen ¶¶ 15-19, *Pebble Ltd. P'ship v. U.S. Envtl. Prot. Agency*, Case No. 3:14-cv-00097 HRH (D. Alaska June 27, 2014), ECF No. 26. Indeed, EPA's pending action under Section 404(c) and the unpredictability it engenders have already "impeded bringing any significant new investment into the Partnership." (*Id.* ¶ 17.) Because the Pebble Project requires at least one more multi-national mining corporation as a partner, continued proceedings under Section 404(c) "could destroy the Pebble Partnership." (*Id.* ¶ 19.)

Given that a decision by the EPA to preclude mining under Section 404(c) threatens Plaintiff's existence, the Court needs to assure that that decision is made in accordance with the statute that Congress enacted to *prevent* the very kind of back-room, biased input into regulatory policymaking that has been the hallmark of EPA's conduct in this matter. The only way to do that, and the only way to ensure Plaintiff's viability, is to enjoin EPA now, before it is too late under FACA. *See Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (suggesting that the irreparable injury requirement would be satisfied if plaintiff demonstrates that it is "threatened with extinction" or with being driven out of business).

In *Minard Run Oil Co. v. United States Forest Service*, 670 F.3d 236 (3d Cir. 2011), owners of mineral rights in Allegheny National Forest sued the United States Forest Service, seeking to enjoin the Service from implementing a policy that would halt owners from drilling in national forest until an Environmental Impact Study was completed. The district court found that the moratorium on new drilling irreparably harmed the owners because, in part, it threatened

closure for some businesses. On appeal, the government argued that such harm was a purely economic injury and was insufficient to establish irreparable harm. The Third Circuit disagreed:

> As a general matter, "a purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement," *Frank's GMC Truck Ctr., Inc. v. GMC*, 847 F.2d 100, 102 (3d Cir. 1988), but "an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business." *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009), *see also Doran v. Salem Inn, Inc*., 422 U.S. 922, 932, 95 S. Ct. 2561, 45 L.Ed.2d 648, (1975) (irreparable injury shown where business "would suffer a substantial loss of business and perhaps even bankruptcy" absent injunctive relief). Here, the District Court carefully considered and ultimately credited the testimony of several business owners that the new drilling moratorium had dramatically affected their business and would probably cause them to shut down or go bankrupt if it continued. *Minard Run II*, 2009 WL 4937785, at *15-16[.]

Minard, 670 F.3d at 255. As in that case, Plaintiff is facing potential demise as a direct consequence of EPA's unlawful actions under FACA, and it will suffer irreparable injury if EPA's Section 404(c) proceeding and its use of the tainted Bristol Bay Watershed Assessment are not enjoined.

C. The Balance Of Equities Tips Sharply In Plaintiff's Favor

In determining whether the balance of equities tips in the movant's favor, a court "'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (citation omitted); *accord Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009).

Here, the balance of the equities is not a close call; it tips sharply in Plaintiff's favor. Allowing EPA to proceed under Section 404(c) and to continue to rely on the tainted fruits of its FACA violations—most critically, the Bristol Bay Watershed Assessment—would run directly counter to both the letter and the spirit of FACA. And, as just argued, it would probably put

Plaintiff out of business. Because EPA has proposed to issue a Section 404(c) veto relying solely on the findings and conclusions of the flawed Watershed Assessment, there can be little doubt that denying preliminary injunctive relief would be fundamentally unfair to Plaintiff.

By sharp contrast, no harm or inequity will be visited upon EPA should a preliminary injunction be issued. Indeed, a preliminary injunction preserves the status quo, which is, after all, what they are intended to do. *See, e.g.*, *King v. Saddleback Junior Coll. Dist*., 425 F.2d 426, 427 (9th Cir. 1970) ("It is the function of a preliminary injunction to preserve the status quo pending a determination of the action on the merits."). From EPA's perspective, there is no time pressure. No application under Section 404 is pending. No decision to allow Plaintiff (or anyone else) to conduct mining activities is imminent or even close to being made. Nothing whatsoever would be unfair to EPA if the Court enjoined Defendants until Plaintiff's claims are decided on the merits.

D. <u>A Preliminary Injunction Is In The Public Interest</u>

A court considering injunctive relief for FACA violations should "inquire whether under the circumstances an injunction would promote FACA's purposes" of enhancing public accountability and reducing wasteful expenditures. *Cal. Forestry Ass'n,* 102 F.3d at 614. The fundamental purpose of FACA is to ensure that the use of advisory committees by the Executive Branch be completely open to public observation and comment. That indisputably was not done here. EPA and anti-mine activists collaborated to reject any viewpoint that contradicted their agenda, and they did so in secret. EPA's FACA violations led to just the sort of "biased proposals" that Congress sought to eliminate by enacting FACA forty years ago. *Pub. Citizen*, 491 U.S. at 453; *see Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992) ("Congress passed FACA to open the advisory committee process to the public

to prevent subjective influences not in the public interest from controlling the meetings." (internal quotation marks and citation omitted)).

The public interest requires that EPA not be permitted to proceed further under Section 404(c) and not be permitted to rely in any way, shape, or form on the Bristol Bay Watershed Assessment until the Court addresses the merits of Plaintiff's FACA claims. *See Idaho Wool Growers*, 637 F. Supp. 2d at 880 ("[T]he Court sees the benefit in ensuring that all reasons supporting any agency decision are not only in accordance with the laws speaking to the generation of those reasons, but also are based upon the best, most complete evidence available."); *Cargill*, 173 F.3d at 341 ("If FACA has no teeth, the work product of spuriously formed advisory groups may obtain political legitimacy that it does not deserve. Hence, some type of injunctive relief is appropriate." (citing *Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 913)).

Finally, EPA's FACA violations in this case are serious enough that an injunction is justified as a deterrent against future violations—an outcome that surely is in the public interest. *See Cargill*, 173 F.3d at 342 (suggesting that "deterrence benefits" are a valid, if rare, basis for a use injunction). Not only have interested parties such as Plaintiff been kept completely in the dark as a result of EPA's FACA violations, but Alaska's residents (except for certain avowed mine opponents) also have had no meaningful, *contemporaneous* opportunity to voice their opinions on the proceedings of the three FACs that will have significant impacts on their economic well being.

CONCLUSION

For these reasons, Plaintiff's motion for a preliminary injunction should be granted. Until such time that Plaintiff's FACA claims are fully and finally resolved, this Court should

either (1) enjoin Defendants from proceeding any further under Section 404(c) of the Clean Water Act, or (2) enjoin Defendants from using the Bristol Bay Watershed Assessment in any way in connection with the ongoing Section 404(c) proceedings.

Dated September 15, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 15th day of September, 2014, I electronically filed a copy of the foregoing using the CM/ECF system, which will electronically serve the attorneys of record in this case. A true and correct copy of the foregoing was served via Federal Express on the following defendants as they have not entered an appearance in the matter for electronic service:

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