

404(C)

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404 Permitting: Overview

- 404 permits needed for “the discharge of dredged or fill material into the navigable waters”
- Standard Process
 - ARNI & 404(q) elevation process
- 404(b)(1) Guidelines
 - (compensatory mitigation)
- NEPA

404(c)

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an **unacceptable adverse effect** on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

- “garbled”
- “awkwardly written and extremely unclear.”

Further Guidance?

- Regs define “unacceptable adverse effect”:

“[i]mpact on an aquatic or wetland ecosystem which is likely to result in significant degradation of municipal water supplies or **significant loss** of or **damage** to **fisheries**, shellfishing, or **wildlife habitat** or **recreation areas**.” 40 C.F.R. § 231.2(e).

Not defined:

- “fisheries” / “fishery areas”
 - “significant”
 - “wildlife habitat”
 - “recreation areas”
- Previous veteos?

May 26, 2022 Proposed Veto

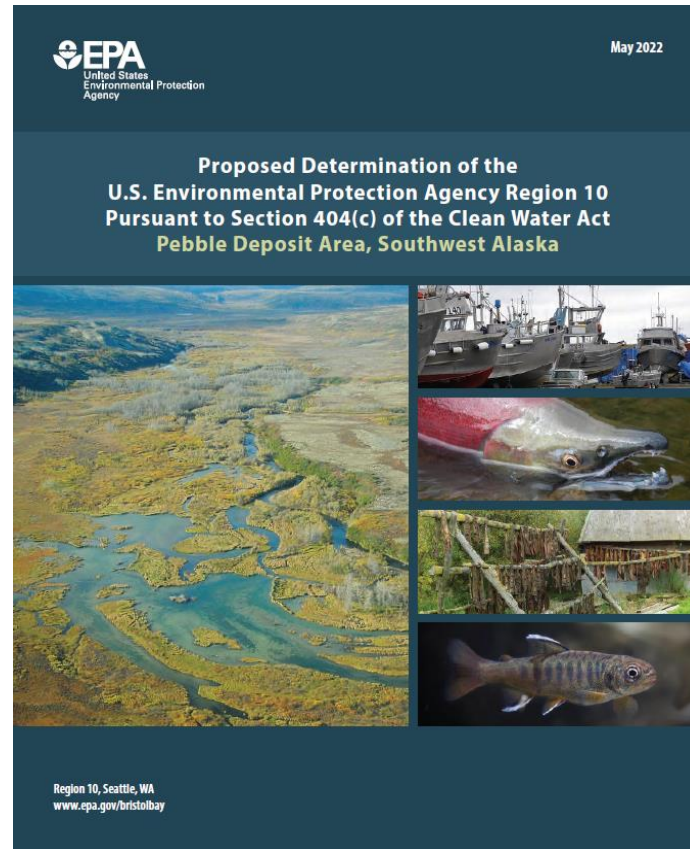


Figure ES-1. The Bristol Bay watershed, composed of the Togiak, Nushagak, Kvichak, Naknek, Egegik, and Ugashik River watersheds and the North Alaska Peninsula. Only selected towns and villages are shown on this map.

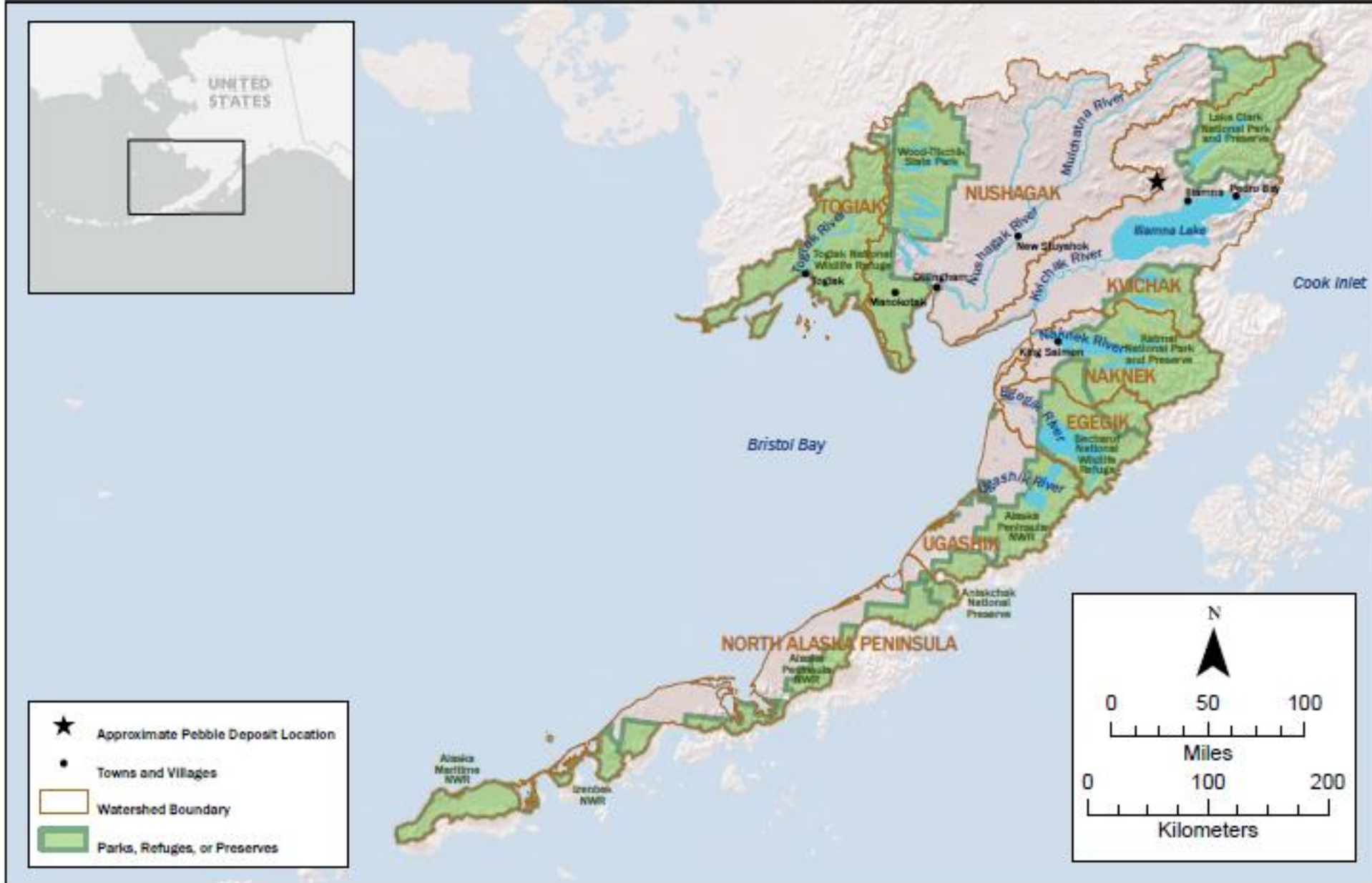
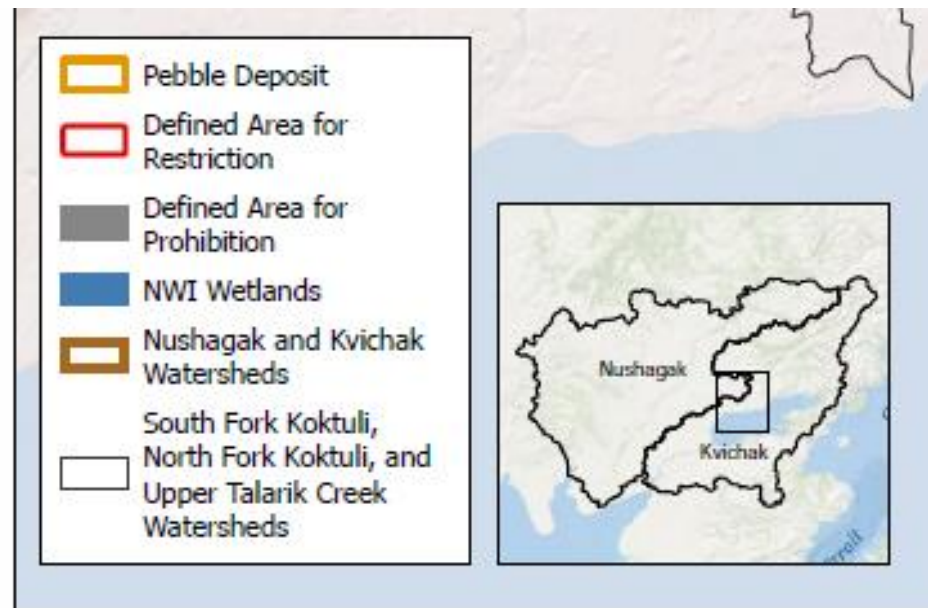
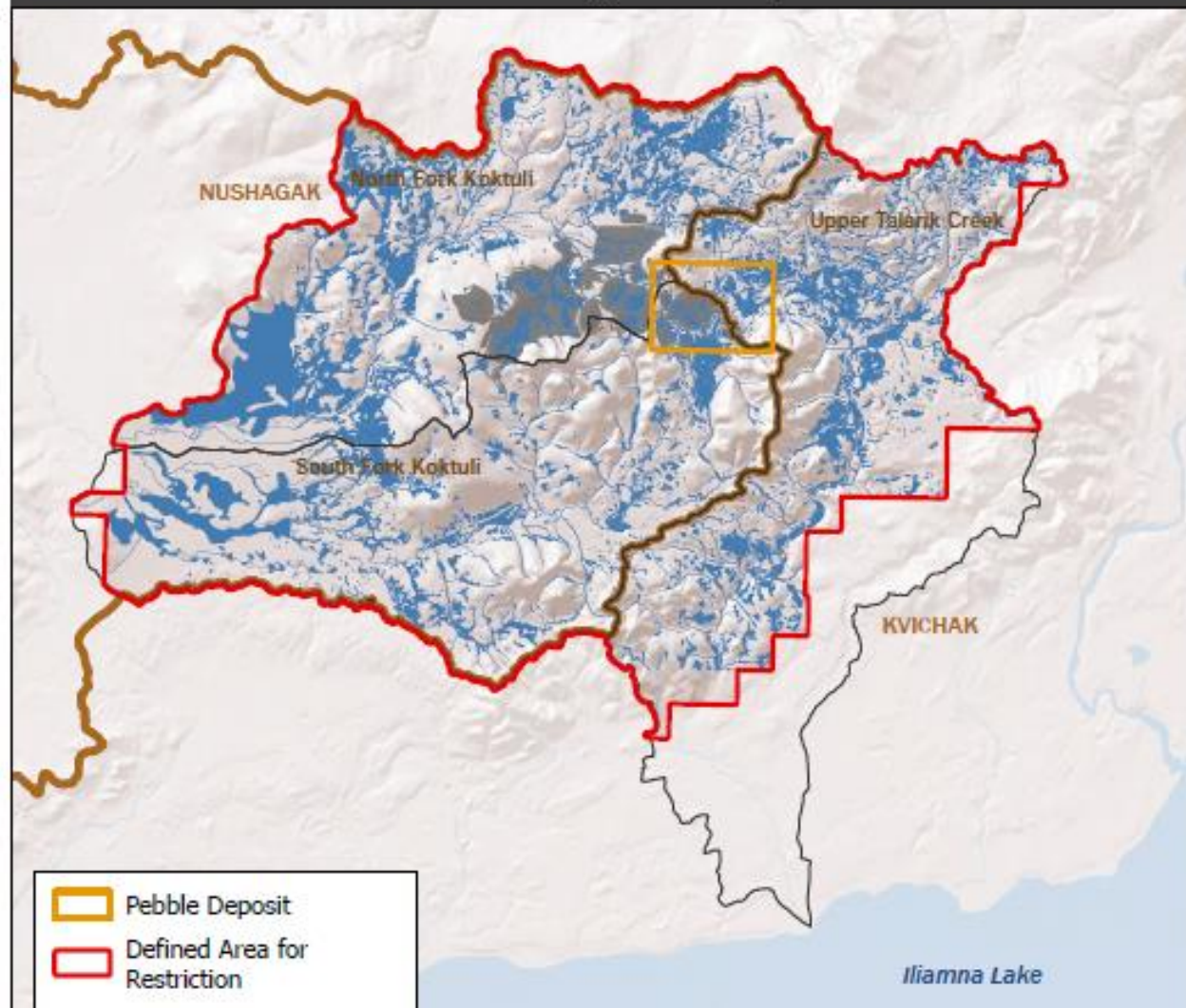


Figure ES-5. The Defined Area for Restriction and the defined area for prohibition overlain on wetlands from the National Wetlands Inventory (USFWS 2021).



Project's Permitting Status

- Corps denied 404 Permit
- State has not yet permitted project
 - Fish & Game is charged by the Constitution with protecting all the fish in the state by keeping them available for future generations (“sustained yield”)
 - Fish & Game requires additional permitting to protect any fish habitat affected by a project
 - Veto exercised before Fish & Game had opportunity to permit/protect fish in Bristol Bay area
- State had not yet issued 401 cert
- 404(q) elevation process not completed

Section 404(q) Dispute Resolution Process for Individual Permits

EPA “May Affect” Letter

(within the Comment Period for the Public Notice)

EPA Region must notify Corps District Engineer by letter that the project may result in substantial and unacceptable impacts to Aquatic Resources of National Importance (ARNIs).



EPA “Will Affect” Letter

(within 25 days of the end of the Public Notice comment period)

If the issues raised in the “may affect” letter remain unresolved, the Region issues a letter stating that the project will have substantial and unacceptable impacts to an ARNI. The “will affect” letter must be signed by the EPA Regional Administrator.



Notice of Intent to Proceed

(within 5 calendar days prior to the issuance of a permit)

The Corps District Engineer notifies EPA Regional Administrator if the Corps intends to issue the permit contrary to EPA’s recommendations in the “will affect” letter. The Corps must provide the EPA Region with a copy of the draft permit and decision document.



Case Elevation

(within 15 calendar days from receipt of the notice of intent to proceed)

The EPA Regional Administrator must decide whether to request Headquarters to seek Department of the Army level review of the District’s permit decision, and subsequently notifies the Corps District of this decision. The permit is held in abeyance pending Headquarters review.



Review of Corps Decision

(within 20 calendar days of receiving the EPA Regional Administrator’s request for elevation)

The EPA Assistant Administrator decides whether to seek higher level review of the District’s permit decision by the Assistant Secretary of the Army (Civil Works).



Army Review

(within 30 calendar days from the EPA Assistant Administrator’s request for review)

EPA Headquarters case elevation is reviewed by the Assistant Secretary of the Army (Civil Works). The Assistant Secretary may either inform the District Engineer to proceed with the permit, proceed with the permit in accordance with policy guidance specific to the case, or make a final permit decision. The Assistant Secretary of the Army (Civil Works) must notify the EPA Assistant Administrator immediately of his/her decision.



Section 404(c) “Veto Process”

(within 10 calendar days from Assistant Secretary of the Army (Civil Works) decision)

If 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.

A quick foray into the weeds of Region 10's Proposed Veto



The proposed veto provides no definition of either “fishery” or “fishery area”

Compare this to...

(1) The FEIS defines “commercial and recreational fisheries”:

- [t]he Alaska Department of Fish and Game (ADF&G) Commercial Salmon Fishery Area T and Area H; ADF&G Commercial Shellfish Area H; Cook Inlet Management Area (for groundfish); and ADF&G Statewide Harvest Survey (SWHS) areas S, T, N, and P comprise the Environmental Impact Statement (EIS) analysis area for this resource.

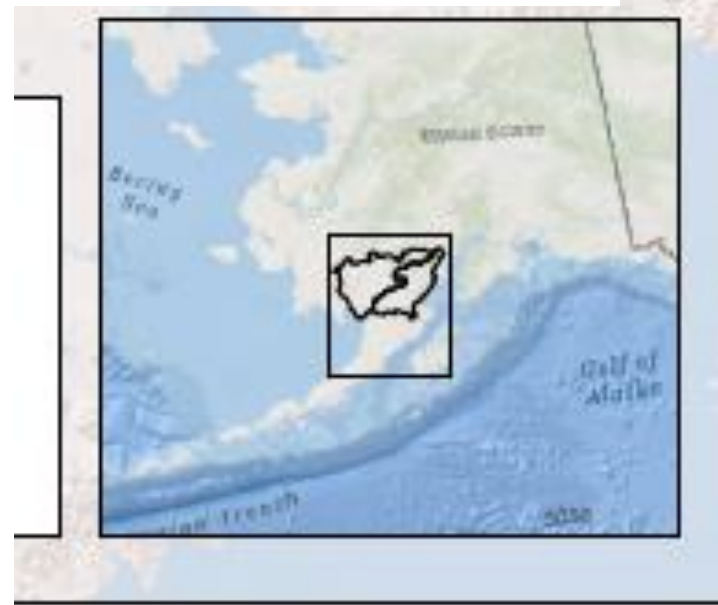
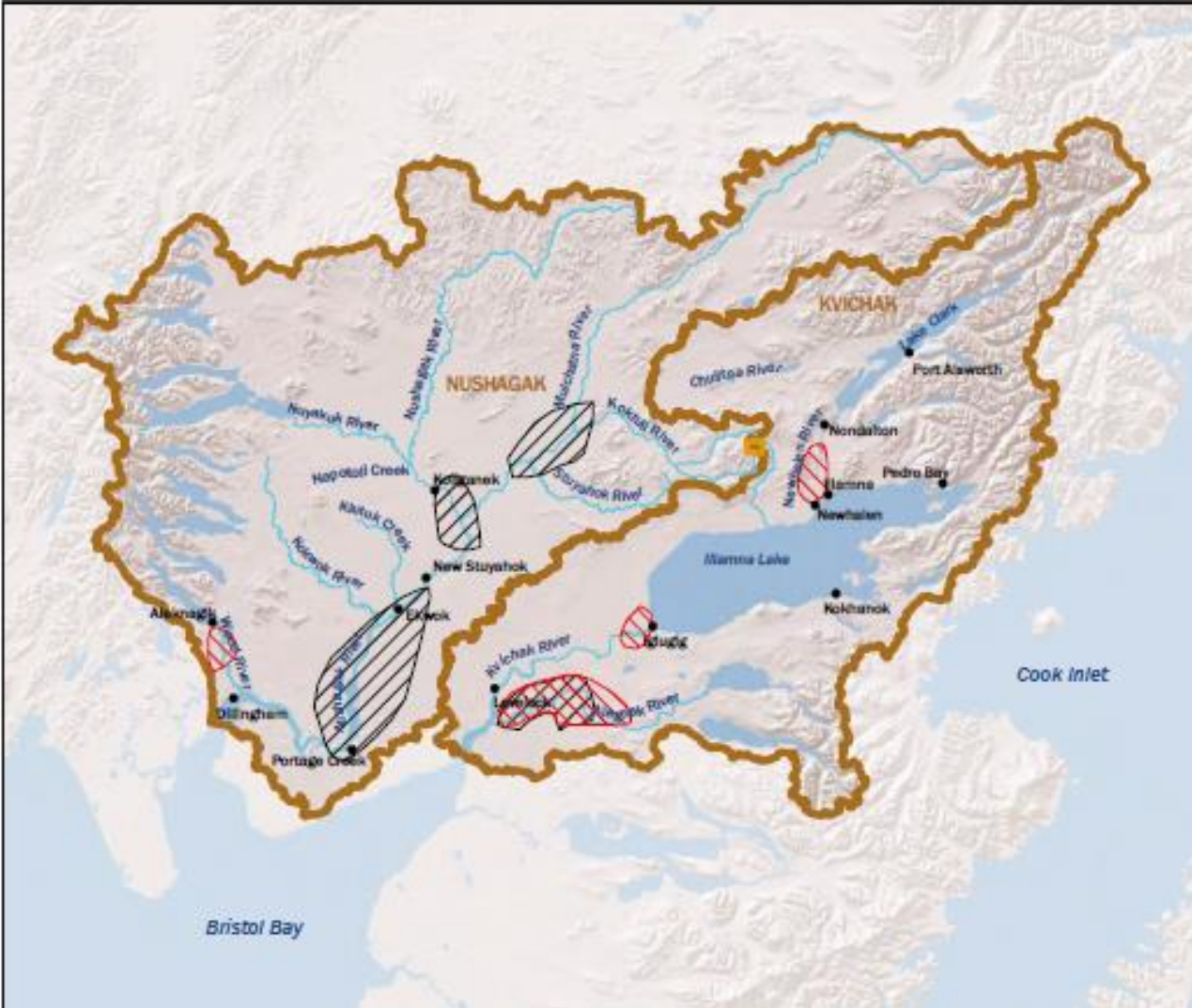
(2) The § 404(b)(1) Guidelines

- “[r]ecreational and commercial fisheries consist of harvestable fish, crustaceans, shellfish, and other aquatic organisms used by man.”

(3) A dictionary:

- The Cambridge Dictionary defines fishery as “an area of water where fish are caught so they can be sold.” Region 10 could, but inexplicably has not, referenced or otherwise relied on these definitions.

Figure 3-17. Approximate extents of popular Chinook and Sockeye salmon recreational fisheries in the Nushagak and Kvichak River watersheds. Areas were digitized from previously published maps (Dye et al. 2006). Recreational Rainbow Trout fisheries are also distributed throughout the watersheds.



Continuing our foray into the weeds

- “significance”
 - <0.01% of streams in Bristol Bay area affected
 - 0.008% of wetlands in Bristol Bay area affected
 - Specific headwaters/streams/waters not studied
- Rely on textbook science
- Use of “could”
- Failure to delineate WOTUS to establish their jurisdiction

EXECUTIVE SUMMARY

The U.S. Environmental Protection Agency (EPA) Region 10 is publishing for public comment this proposed determination (2022 Proposed Determination) to prohibit and restrict the use of certain waters in the Bristol Bay watershed as a disposal site for the discharge of dredged or fill material associated with mining at the Pebble deposit, a large ore body in southwest Alaska. EPA Region 10 is exercising its authority under Section 404(c) of the Clean Water Act (CWA) (Box ES-1) and its implementing regulations at 40 Code of Federal Regulations (CFR) Part 231 because of the unacceptable adverse effects on anadromous¹ fishery areas in the Bristol Bay watershed that **could result from discharges of dredged or fill material** associated with such mining. Development of a mine at the Pebble deposit and such a mine's potential effects on aquatic resources have been the subject of study for nearly two decades; the 2022 Proposed Determination is based on this extensive record of scientific and technical information. The scope of the 2022 Proposed Determination applies only to specified discharges of dredged or fill material associated with mining the Pebble deposit.

Meanwhile

Corps' FEIS found that operations under the proposed mine plan

“would **not** be expected to have a **measurable effect** on **fish numbers** or **result in long-term changes to the health of the commercial fisheries in Bristol Bay[.]**”

FEIS at 4.6-3.

Proposed Veto At pp. 6-18 through 6-24

- “cultural stability” of Native populations;
- “behavioral disorders” potentially resulting from the mine;
- “mental health degradation” resulting from the mine;
- “dietary” considerations, including the mine’s effect on “processed simple carbohydrates and saturated fats” and the intake of “protein and certain nutrients” by locals;
- “tension and discord” that could be “provoked” among natives by the mine;
- “stress and anxiety”;
- “language” including “defin[ition of] a ‘wealthy person’”;
- “people with disabilities”;
- “spirituality”;
- “social relations”;
- “family cohesion”;
- “rituals”;
- “folklore”

How does this affect other States?

- Lack of standards – unpredictable
 - No standards to be gleaned from past practice
 - Capacious statutory terms – not limited to fish
 - Municipal water supplies
 - Fishery areas
 - Wildlife
 - Recreational area
- Lack of deference to State protection of State resources (fish, for us)
 - 404(c) provides fertile ground for EPA to expand its own power
- Starting to look like a playbook for stopping projects – even if 404(c) veto is not finalized

WSWC 404(c) Resolution

Goals:

- Increase predictability in the 404 permitting process
- Increase adherence to the established processes – Corps' permit processing, appeal proceedings, and 404(q) elevation process
- Improve State's ability to protect State resources
- Improve communication between State and federal agencies
- Require analytical (WOTUS delineation) and scientific (findings tied to project area and affected resources) integrity

Thank you!

