Nos. 07-984 & 07-990

IN THE

# Supreme Court of the United States

COEUR ALASKA, INC.,
*Petitioner*,

*v.*

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR THE NONDALTON TRIBAL COUNCIL, THE NEW STUYAHOK TRADITIONAL COUNCIL, THE KOLIGANEK VILLAGE COUNCIL, THE EKWOK TRIBAL COUNCIL, THE CURYUNG TRIBAL COUNCIL, NUNAMTA AULUKESTAI, NAKNEK FAMILY FISHERIES, ALASKA INDEPENDENT FISHERMEN'S MARKETING ASSOCIATION, BRISTOL BAY DRIFTNETTERS' ASSOCIATION, AND RENEWABLE RESOURCES COALITION AS *AMICI CURIAE* SUPPORTING RESPONDENTS


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## INTEREST OF *AMICI CURIAE*

This case concerns one particular mine—the Kensington Mine in southeast Alaska—but the impacts of the precedent set by the Court's decision will be felt by communities throughout Alaska and the rest of the Nation whose lives may be affected by other mining projects much larger than the Kensington Mine.[1] The Pebble Mine, for example, which likely will be one of the largest open-pit mines ever constructed, is being proposed for the Bristol Bay region in southwest Alaska—home to some of the world's most valuable salmon runs, spawning habitat and fisheries. *Amici* are Alaskan Native villages and corporations, commercial fishermen, and sport fishermen who depend on the unique aquatic ecosystem of Bristol Bay for their livelihood, their subsistence way of life, or, for the villages, their survival.[2] If Pebble Mine is permitted to dis-

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[1] No counsel or party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] *Amici* Nondalton Village, New Stuyahok Village, Koliganek Village Council, Curyung Tribal Council, and Ekwok Village are federally-recognized Alaska Native tribes in the Bristol Bay region who have relied for thousands of years on the region's rich salmon resources to maintain their traditional subsistence culture; Nunamta Aulukestai, "Caretakers of Our Lands," is an association of eight Bristol Bay Native Village Corporations dedicated to sustainable economic development while preserving the region's natural resources and cultural heritage; Naknek Family Fisheries is an Alaska Native-run commercial fishery located along the Naknek River, at the northern end of Bristol Bay; Alaska Independent Fishermen's Marketing Association and Bristol Bay Driftnetters'

charge its toxic wastewater and tailings directly into the lakes and headwater streams of the Bristol Bay watershed, the renewable natural resources on which *amici* depend will be severely threatened.

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. Section 306 of the Clean Water Act (CWA), 33 U.S.C. § 1316, requires the U.S. Environmental Protection Agency (EPA) to adopt strict effluent limitations for new sources of water pollution. In 1982, EPA promulgated a new source performance standard for ore processing mills that use the froth-flotation process,[3] one that categorically prohibits the discharge of wastewater produced by that process into waters of the United States.[4] *See* 40 C.F.R. § 440.104(b)(1) ("there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation proc-

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Association are two associations of commercial fishermen committed to protecting and promoting Bristol Bay's world class salmon fisheries, spawning habitat and other fish resources; and Renewable Resources Coalition is a non-profit 501(c)(6) corporation—a trade organization—whose members include commercial fishermen, Native Alaskans and lodge owners, and whose mission is to preserve the viability of Alaska's abundant fishing and hunting resources. The *amici* are described in greater detail in the Appendix.

[3] For a description of the froth-flotation process, see SEACC's Resp. Br. 2-3.

[4] The terms "navigable waters" and "waters of the United States" are used interchangeably in the statute to refer to all rivers, streams, lakes, wetlands, and other water bodies that are covered by the CWA. *See* 33 U.S.C. § 1362(7); *see generally Rapanos* v. *United States*, 547 U.S. 715, 723 (2006).

ess … for the beneficiation of copper … gold … or molybdenum ores or any combination of these ores").

For decades, EPA and the U.S. Army Corps of Engineers (Corps) agreed that new mines using the froth-flotation method could not, consistent with EPA's zero-discharge rule, discharge wastewater directly into waters of the United States. SEACC's Resp. Br. 10-11. Mine designers employed a variety of other waste disposal techniques and engineering solutions in order to avoid discharging into waters of the United States. Indeed, as one of the bases for promulgating the rule, "EPA found that the zero-discharge standard was practicable because the majority of facilities existing at the time [had] already achieved zero discharge through recycling and evaporation processes." JA 537a; *see also* 47 Fed. Reg. 25,682, 25,697 (June 14, 1982).

2. In 2005, the Corps changed positions and, in an unprecedented decision, granted the Kensington Mine a permit under Section 404 of the CWA, 33 U.S.C. § 1344, to discharge its wastewater and tailings from the froth-flotation process directly into Lower Slate Lake, a water of the United States. The Corps reasoned that it had authority to issue the permit because the toxic pollutants discharged into the lake would have the effect of raising the bottom elevation of the lake and could therefore be treated as "fill material" over which the Corps has permitting jurisdiction.

The Corps permit for Kensington Mine was upheld by the district court, but set aside by the court of appeals, which held (correctly) that the Corps' decision to issue the permit was contrary to the plain language of the statute, and that the Section 404 permitting process could not be used to circumvent EPA's new source performance standards under Section 306. Thus, as the

court of appeals held, new mines using the froth-flotation process must comply with EPA's zero-discharge standard, and may not bypass that standard regardless of whether the solids in the wastewater discharged by the mine have sufficient size and mass to be considered "fill material."[5]

3. If the court of appeals is reversed and the Corps' interpretation of the CWA upheld, new mining projects will inevitably seek to reduce costs whenever possible by obtaining Section 404 permits from the Corps to discharge their wastewater directly into rivers, streams and lakes, rather than paying for more expensive waste disposal alternatives. The Corps' willingness to grant such permits is evidenced by the instant case, where the Corps readily approved a plan calling for the "filling" of Lower Slate Lake with toxic wastewater and tailings that are expected to wipe out most of the lake's aquatic life and all its fish. The potential ramifications of the Corps' current position, however, are even greater with respect to the proposed Pebble Mine, which dwarfs the Kensington Mine in size and scope.[6]

a. Whereas Kensington estimates that its mine will yield about 1.352 million ounces of gold mineral re-

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[5] Since 2002, the Corps has defined "fill material" as any material that "has the effect of … [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1)(ii).

[6] Like the Kensington Mine, the Pebble Mine will use the froth-flotation mill process to segregate valuable minerals (gold, copper and molybdenum) from rock. *See* Northern Dynasty Minerals Ltd., *The Pebble Project: The Future of U.S. Mining and Metals* 3 (Oct. 2008).

serves,[7] officials estimate that the Pebble deposit contains 86.2 million ounces of gold, 73.7 billion pounds of copper and 4.15 billion pounds of molybdenum, making the proposed Pebble Mine the largest of its kind on this continent, and second worldwide only to Indonesia's Grasberg Mine.[8]

Pebble's footprint will also be far more expansive than Kensington's, covering at least 15 square miles; the open pit itself will cover more than two square miles and be at least 1,600 feet deep. Pemberton, *Jewelers Being Asked to Boycott Gold From Alaska Mine*, Anchorage Daily News, Jan. 3, 2007. Moreover, where Kensington will pipe "210,000 gallons of process wastewater, including 1,440 tons of tailings each day," for a total of "approximately 4.5 million tons of tailings [slurry]," to the bottom of Lower Slate Lake, (JA 519a), Pebble has proposed to build two tailings storage facilities that together will store 2.5 *billion* tons of tailings—which by some estimates is less than half of the mine's expected waste. Chambers, *Pebble Engineering Geology* 9-11 (2007) (concluding "that the required waste storage space for the mine will have to be approximately three times that which was indicated in the Tailings Impoundment Applications made by [Pebble's developer] to the Alaska Department of Natural Resources in 2006.").[9] The two Pebble storage facilities

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[7] *See* Coeur Alaska, Overview, http://kensingtongold.com/overview.html#economics (last visited Nov. 14, 2008).

[8] *See* Pebble Partnership, Project Information & History, http://www.pebblepartnership.com/pages/project-information/project-overview.php (last visited Nov. 14, 2008).

[9] *Available at* http://www.renewableresourcescoalition.org/ChambersSep07.pdf.

for tailings waste would require gargantuan dams, one *740 feet high* and the other *450 feet high*—giants compared to Kensington's 90-foot-high dam. *See* Northern Dynasty, *Tailings Impoundment A Initial Application Report* 14 (Sept. 5, 2006) and Northern Dynasty, *Tailing Impoundment G Initial Application Report* 14 (Sept. 5, 2006); JA 519a (size of Kensington dam).[10]

b. Pebble Mine is not only massive in scale—it is also situated in the headwaters of the world's greatest commercial salmon fishery and many internationally-renowned salmon and trout streams that attract anglers the world over. The Bristol Bay region's lakes and rivers teem with fish: five species of Pacific salmon, including one-third of the country's sockeye, and numerous species of trout, char, pike, grayling, and whitefish. The two main drainages where the Pebble deposit is situated are particularly significant: the Kvichak River and Nushagak River are home to the largest sockeye and king salmon runs, respectively, in Alaska. Bluemink, *Mining Restrictions Lifted Across Southwest Alaska*, Anchorage Daily News, Dec. 9, 2007.

Moreover, for centuries, the watershed has supported the subsistence of Alaska Natives, including the Yup'ik Eskimos, Aleuts, and Athabascan Indians. Bristol Bay is a rare natural treasure that generates profitable and sustainable industries, integral both to Alaska's economy and Alaska Natives' traditional hunting and fishing grounds.

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[10] Northern Dynasty's 2006 water rights applications and associated filings are available at http://www.dnr.state.ak.us/mlw/mining/largemine/pebble/waterapp.htm (last modified Oct. 3, 2008).

4. The Pebble Mine's unprecedented size and complexity brings unprecedented risk to Bristol Bay's vital natural renewable resources, and underscores the need to continue to enforce EPA's zero-discharge performance standard for froth-flotation ore processing mills. Should Pebble Mine be allowed to bypass that standard and obtain a Section 404 permit to discharge froth-flotation wastewater and tailings as "fill material" directly into the lakes and headwater streams of the Bristol Bay watershed, the risks posed to the unique fish and wildlife resources of Bristol Bay, and all those who depend on them, would be substantial. Indeed, using waters of the United States as dumping grounds for toxic mining waste is antithetical to the fundamental purposes of the CWA, which are to reduce and eliminate (not to create) water pollution and to clean up (not to contaminate) the nation's aquatic ecosystems. *See* 33 U.S.C. § 1251(a) (purpose of CWA is "to restore and maintain the chemical, physical, and biological integrity" of the nation's waters); *see also* S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 3668, 3674 ("The use of any river, lake, stream or ocean as a waste treatment system is unacceptable.").

## ARGUMENT

### I. MANY TIMES LARGER THAN THE KENSINGTON MINE, THE PROPOSED PEBBLE MINE IS SITUATED IN THE HEADWATERS OF BRISTOL BAY, HOME TO ALASKA'S MOST VALUABLE SALMON HABITAT AND FISHERIES

1. The Pebble Mine deposits are surrounded by the headwaters of two major Bristol Bay drainages—

the Nushagak River and the Kvichak River.[11] Both drainage systems are pristine, with very few roads or extractive resource development. Duffield et al., *Revised Final Report, Economics of Wild Salmon Watersheds: Bristol Bay, Alaska*, University of Montana and Bioeconomics, Inc. 23 (Feb. 2007) (*Economics of Wild Salmon*).[12]

Directly south of the proposed mine site is Frying Pan Lake and the headwaters of the South Fork of the Koktuli River. Frying Pan Lake and the North and South Forks of the Koktuli are rich in sockeye (red salmon), coho (silver salmon), Northern Pike, Arctic grayling, sculpin, whitefish, burbot, stickleback, and Dolly Varden. McLarnon, *Protecting Water Resources, Fish Essential to Alaskan Development* 1 (2006). The Koktuli River flows into the Mulchatna River, a major tributary of the Nushagak River. The Nushagak drainage hosts a diversity of fish and wildlife, including greater numbers of four species of Pacific salmon than any other system in the region. Minard, *Effort and Catch Statistics for the Chinook Salmon*, Fishery Data Series No. 15, at 1 (1987).

Directly to the east of the Pebble deposit lies Upper Talarik Creek, "a national treasure for [Americans]

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[11] A map depicting the location of the proposed mine is provided at App. 1a. For an interactive map of the Bristol Bay region and photos of its wetlands and wildlife, see http://www.aktrekking.com/pebble/PhotoMap.html (last modified Feb. 11, 2007).

[12] *Available at* http://www.savebristolbay.org/atf/cf/%7BE729E68D-22F3-4596-9503-54FE676F2264%7D/REVISED%20Final%20Economics%20of%20Wild%20Salmon%20Ecosystems%20in%20Bristol%20Bay%202-23-2007.pdf.

and … trout fisherman from all over the world."[13] The Upper Talarik Creek is a "catch and release special management area," and Lower Talarik Creek is a "fly-fishing only catch and release special management area," designed to ensure sustainable uses of the region's world-famous wild rainbow trout stocks.[14] Upper and Lower Talarik Creeks flow into Lake Iliamna, Alaska's largest lake, which feeds the Kvichak River. Approximately 50% of the sockeye salmon caught in Bristol Bay spawn in the lakes and rivers of the Kvichak watershed, representing 33% of the entire U.S. sockeye salmon catch.[15]

2. In 2002, Northern Dynasty Minerals, Ltd. (Northern Dynasty) began exploring 153 square miles in the Bristol Bay watershed for mineral deposits. Initially it discovered what is now called Pebble West, a 4.1 billion ton deposit of copper, gold, and molybdenum. In 2005, it discovered a deeper but richer deposit, called Pebble East. The exact extent of the deposits is not yet known, but Northern Dynasty estimates that Peb-

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[13] Press Release, Trout Unlimited, *Trout Unlimited and Allies Oppose Proposal to Remove Water From Critical Bristol Bay Salmon and Trout Rivers* (July 20, 2006) (statement of RP Van Gytenbeek, President and CEO of the International Federation of Fly Fishers), *available at* http://www.savebristolbay.org/atf/cf/%7BE729E68D-22F3-4596-9503-54FE676F2264%7D/TU_PR_Water_Withdrawals_6-20-06.pdf.

[14] Alaska Dep't of Fish & Game, Division of Sport Fish, *Southwest Alaska Rainbow Trout Management Plan* 1, 5, 8-9 (Alaska Board of Fisheries, Feb. 1990), *available at* http://www.sf.adfg.state.ak.us/region1/trout/wildtrout/rbtmgt1990bof.pdf.

[15] A map depicting observed fish habitats in relation to the proposed Pebble Mine is provided at App. 2a.

ble West has a "near-surface resource of 4.5 billion tons" and will likely be an open-pit mine. Chambers, *Pebble Engineering Geology* 11. It contains an estimated 24.7 billion pounds of copper, 42.1 million ounces of gold, and 1.35 billion pounds of molybdenum. Pebble East, with approximately 3.9 billion tons of resources, will likely be an underground bulk-tonnage mine, like Kensington. Deeper and richer than its western neighbor, it contains 49 billion pounds of copper, 45 million ounces of gold and 2.8 billion pounds of molybdenum.[16]

Like Kensington, the Pebble Mine will employ a froth-flotation mill to separate the valuable minerals from the rock. Northern Dynasty Minerals Ltd., *The Pebble Project: The Future of U.S. Mining and Metals* 3 (Oct. 2008). And, like Kensington, the Pebble Mine plans to store the waste from its froth-flotation mill underwater.[17] Overall, the mine is expected to generate up to an estimated 8.1 *billion* tons of waste, *Pebble Engineering Geology* 11, compared with Kensington's 4.5 *million* tons, (JA 522a).

In 2006, Northern Dynasty submitted applications for state water rights, which included plans for constructing two large tailings disposal facilities. One facility would have required constructing a 450-foot high

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[16] Pebble Partnership, Project Information, http://www.pebblepartnership.com/pages/project-information/project-overview.php (last visited Nov. 14, 2008).

[17] Annual Meeting, Bristol Bay Regional Advisory Council, Federal Subsistence Board, transcript 160 (Feb. 21, 2006), *available at* http://alaska.fws.gov/asm/racdetail.cfml?rac=04.

dam, the other a 740-foot high dam.[18] In October 2006, Northern Dynasty withdrew its water rights applications, presumably until the full extent of the Pebble deposit has been explored. The Pebble Partnership, a joint venture between Northern Dynasty and Anglo-American PLC formed in 2007, expects to reinitiate the permitting process for Pebble Mine in 2009.[19]

## II. ALASKAN NATIVES CRITICALLY DEPEND ON THE RENEWABLE NATURAL RESOURCES OF THE BRISTOL BAY WATERSHED TO SUSTAIN THEIR SUBSISTENCE WAY OF LIFE

"Subsistence is a way of life in rural Alaska that is vital to the preservation of communities, tribal cultures, and economies." Bureau of Land Management, Anchorage Field Office, *Bay Proposed Resource Management Plan/Final Environmental Impact Statement* 3-130 to 3-140 (Dec. 2007) (*Bay RMP*) (quoting Alaska Federation of Natives).[20] In the Bristol Bay region,

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[18] *See supra* n.10. The tallest dam in the United States is currently the Oroville Dam in California, at 770 feet. Lake Oroville, About, http://www.lakeoroville.water.ca.gov/about/stats/orodam.cfm.

[19] Pebble Partnership, Project Information: Pebble Facts, http://www.pebblepartnership.com/pages/project-information/pebble-facts.php (last visited Nov. 14, 2008).

[20] *Available at* http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.81674.File.dat/bay_feis_ch3.pdf. In the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), Congress found that: "the continuation of the opportunity for subsistence uses" by rural Alaskans "is essential to Native … and non-Native physical, economic, traditional, and social existence," 16 U.S.C. § 3111(1), and that there is a "national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska," *id.* § 3111(5).

about 70 percent of the 7,600 residents are Alaskan Natives, representing three primary indigenous cultures: Aleuts, Yup'ik Eskimos, and the Dena'ina Athabaskan Indians. *Economics of Wild Salmon* 10-11. For thousands of years they have all practiced a subsistence way of life, sharing the rivers, lakes, fish and wildlife on which they rely for sustenance and spiritual communion. *See* Branson, *Readings from Southwest Alaska* 1-3 (1998).

Today, "[s]ubsistence harvests still provide important nutritional, economic, social, and cultural benefits to most Bristol Bay households[.] Many residents continue to preserve large quantities of fish through traditional methods such as drying and smoking[.]" *Alaska Subsistence Fisheries 2003 Annual Report*, Division of Subsistence, Alaska Department of Fish & Game (Sept. 2005) (*Alaska Subsistence*).[21]

Salmon stands out as the most important subsistence food to Bay region residents. *Bay RMP* 3-24. About 2.4 million pounds of salmon—or 315 pounds per person—is harvested for subsistence uses annually, amounting to an estimated $78 million in net economic value. *Economics of Wild Salmon* 107.[22] For the resi-

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[21] *See also Bay RMP* 3-24; Dobbyn, *Old Foes Form Alliance Over Pebble*, Anchorage Daily News, Apr. 6, 2006; Salomone et al., *Fishery Management Report No. 07-22: Bristol Bay Area Annual Management Report* 3-24 (Alaska Dep't of Fish & Game Apr. 2007).

[22] Between 1983 and 2003, about 155,000 salmon, the majority of which were sockeye, were harvested annually for subsistence use. *Alaska Subsistence* 76-77, 81-87; *see also* Sands, *Overview of the Bristol Bay Salmon Fishery 2001-2003*, at 2 (Alaska Dep't of Fish & Game Dec. 2003).

dents of Nondalton, the community closest to the proposed Pebble Mine, salmon accounts for 65% of the subsistence diet, with other freshwater fish compromising another 15%. Nondalton Tribal Council, *Nondalton Long-Range Environmental Plan* 12 (Oct. 6, 2006). Besides salmon, subsistence users depend on Arctic grayling, burbot, Dolly Varden, lake trout, Northern pike, Rainbow smelt, Rainbow trout, whitefish, herring, halibut, Pacific cod, and sculpin. *Alaska Subsistence* 78, 82.

Subsistence is more than sustenance; fishing and hunting are interwoven with traditional social and spiritual values that together constitute the core of Alaska Native culture. *See generally Alaska Native Subsistence & Fishing Rights: Hearing Before the S. Comm. on Indian Affairs*, 2002 WL 652795 (Apr. 17, 2002) (statement of Rosita Worl, Ph.D., Director, Sealaska Corp.).

### III. The Bristol Bay Watershed Also Supports One Of Alaska's Most Important Commercial Fisheries

In the late 1800's, the Bristol Bay area's salmon were discovered by the commercial market and the area "became the center of the most productive fisheries in the world." Branson, *Readings from Southwest Alaska* 8. It now produces about 39 million sockeye annually, more than any other region in the world. Fair, *Critical Elements of Kvichak River Sockeye Salmon Management*, 10 Alaska Fishery Res. Bull. 95 (2003). The region also boasts an abundance of Chinook, or king salmon, char, pike, trout, grayling, and whitefish. *Id.*

The harvesting and processing of Bristol Bay fish generates nearly $320 million a year and provides over 16,000 jobs in the summertime. *Economics of Wild*

*Salmon* 15, 18. By 2001, about 54,000 people (including non-residents) earned all or part of their annual incomes from fishing in the region, and now an estimated 5,490 full-time equivalent jobs are supported by the region's wild salmon runs alone. *Id.* at 92. Thousands of residents and visitors annually enjoy the fresh-water sport fishing offered by the region's streams, rivers, and lakes.[23] Indeed, "[t]he … mainstays of the economy in [the Bristol Bay watershed] are all wilderness-compatible and sustainable in the long run: subsistence use, commercial fishing, and wilderness sportfishing." *Id.* at 23.

## IV. THE COURT'S DECISION IN THIS CASE WILL HAVE BROAD RAMIFICATIONS FOR PEBBLE MINE AND BRISTOL BAY

As noted above, the Pebble Partnership plans to begin the permitting process for Pebble Mine in 2009. The Court's ruling in the instant case will set a precedent that will determine which of two possible legal regimes will govern that process: EPA's new source performance standard under Section 306 of the CWA, which imposes a zero-discharge limitation for process wastewater produced by froth-flotation mills; or the

[23] Sport fishermen spend approximately $58 million a year to experience the world class trout and salmon streams of the Bristol Bay watershed. *Economics of Wild Salmon* 50. King salmon and rainbow trout are the most frequently targeted species for sport fishermen. *Id.* at 46. In 2005, the region boasted 65,000 recreational visitors; nearly 1,000 resident employees hosted anglers and hunters from across the globe. *See* Renewable Resources Coalition, *The Risk From the Pebble Mine*, http://www.renewableresourcescoalition.org/risk_to_sport_fishing.htm (last visited Nov. 14, 2008).

Corps' Section 404 permitting process for discharges of "fill material."

Under the new source performance standard, which had long been the applicable legal regime until the Corps' recent change in position regarding the Kensington Mine, Pebble Mine would be prohibited from discharging any process wastewater, including tailings, directly into any waters of the United States in the Bristol Bay watershed. Like other mines, Pebble would have to undertake the expense of engineering waste disposal options that avoid discharges of wastewater into any waters of the United States.

By contrast, under the Corps' Section 404 permitting regime, Pebble could apply for a permit to discharge toxic wastewater from its ore mill into waters of the United States as "fill material," so long as the wastewater contains suspended solids sufficient in size and mass to have the effect of raising the bottom elevation of the lake, stream, or other receiving water body. There would be no legal restriction on the waters Pebble could propose to use for that purpose, which could range from small headwater streams and lakes to Lake Iliamna, the largest lake in Alaska. The Corps would evaluate any such proposal under its Section 404(b)(1) guidelines, which call for it to consider a range of factors, including the potential harm posed by the discharge and the practicability and cost of any available alternatives. *See* 33 U.S.C. § 1344(b)(1); 40 C.F.R. § 230.10(a)(2).

Thus, if applicable, the Section 404 regime would open the door to the Corps allowing Pebble Mine to use waters of the United States, in effect, as tailings disposal sites, just as the Corps did with respect to the Kensington Mine. The risks posed to aquatic life and

water quality in the Bristol Bay watershed would potentially be severe. Copper, cyanide, and other by-products of Pebble's froth-flotation process would threaten fish and other aquatic life in any lakes and streams into which the wastewater was discharged, and any other downstream waters the contaminants might reach.[24] Moreover, wastewater discharged into natural water bodies also carries the threat of groundwater contamination. *See* Chambers, Coumans & Woody Amicus Br. 24 ("Groundwater contamination is also potentially a larger problem with lake disposal, since lakes are hydrologically connected to groundwater[.]"). In addition, the eradication of headwater streams and lakes in the Bristol Bay region, including in the vicinity of Pebble Mine (*see* App. 2a (map)), would itself likely result in loss of salmon spawning habitat, among other effects. And any damage to the salmon fisheries and other renewable natural resources of the Bristol Bay ecosystem would in turn endanger the subsistence way of life of Alaska Native villages and the sustainable commercial and sport fishing industry that so many citizens of Alaska rely upon.

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[24] Salmon and other organisms comprising freshwater food chains are very sensitive to heavy metals, trace elements, and other contaminants found in mine wastes. Lemly, *Mining in Northern Canada*, 29 Ecotoxicology & Envtl. Safety 229, 230-234 (1994). Of particular concern here, copper concentrations just above the amount required for growth and reproduction can be highly toxic to aquatic species and cause irreversible harm. Hodson et al., *Toxicity of Copper to Aquatic Biota*, in *Copper in the Environment: Health Effects* Opt. II, 307, 307-308 (Jerome O. Nriagu ed., 1979). In addition, cyanide, another toxic chemical used in the froth-flotation process, is also highly toxic to fish at low concentrations. *See generally* Chambers, Coumans & Woody Amicus Br. 15.

In sum, it would be antithetical to the CWA to allow mines, such as the Kensington and Pebble Mines, to bypass EPA's zero-discharge rule for process wastewater by deeming the wastewater to be "fill material." As illustrated by the potential effects of the proposed Pebble Mine for Bristol Bay, the risks of such wastewater discharges to aquatic resources are unacceptable, and the use of waters of the United Sates as toxic mining waste disposal sites simply cannot be squared with the text or purposes of the CWA.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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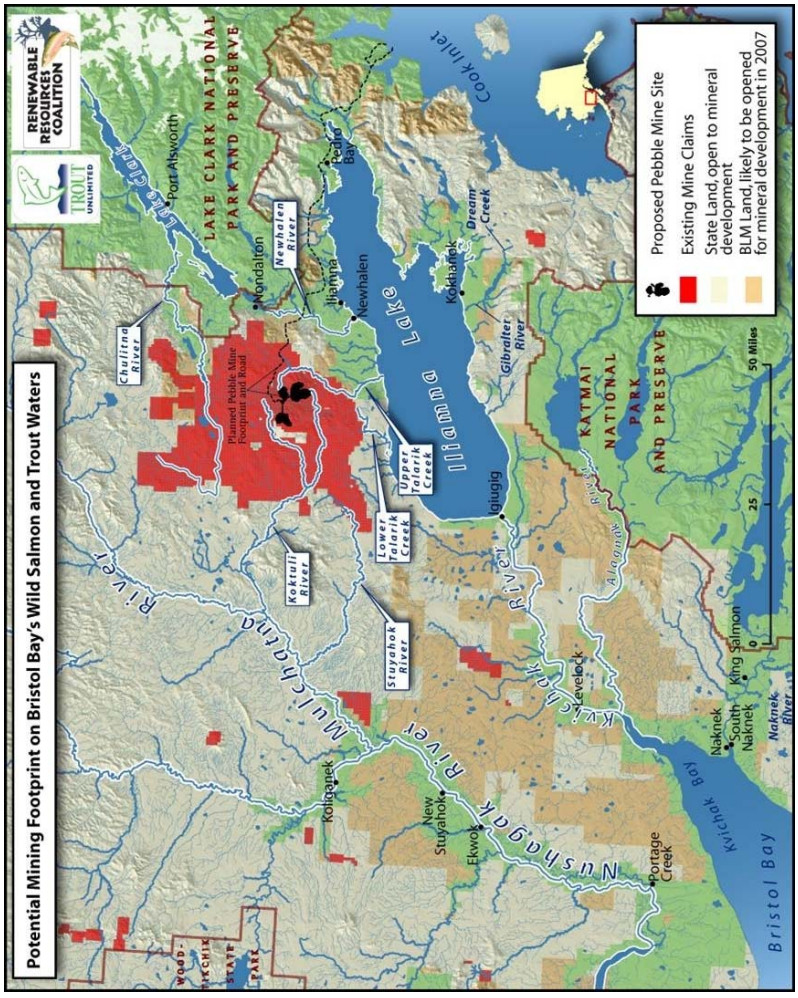
NOVEMBER 2008

# APPENDIX

# APPENDIX

## PEBBLE MINE'S FOOTPRINT



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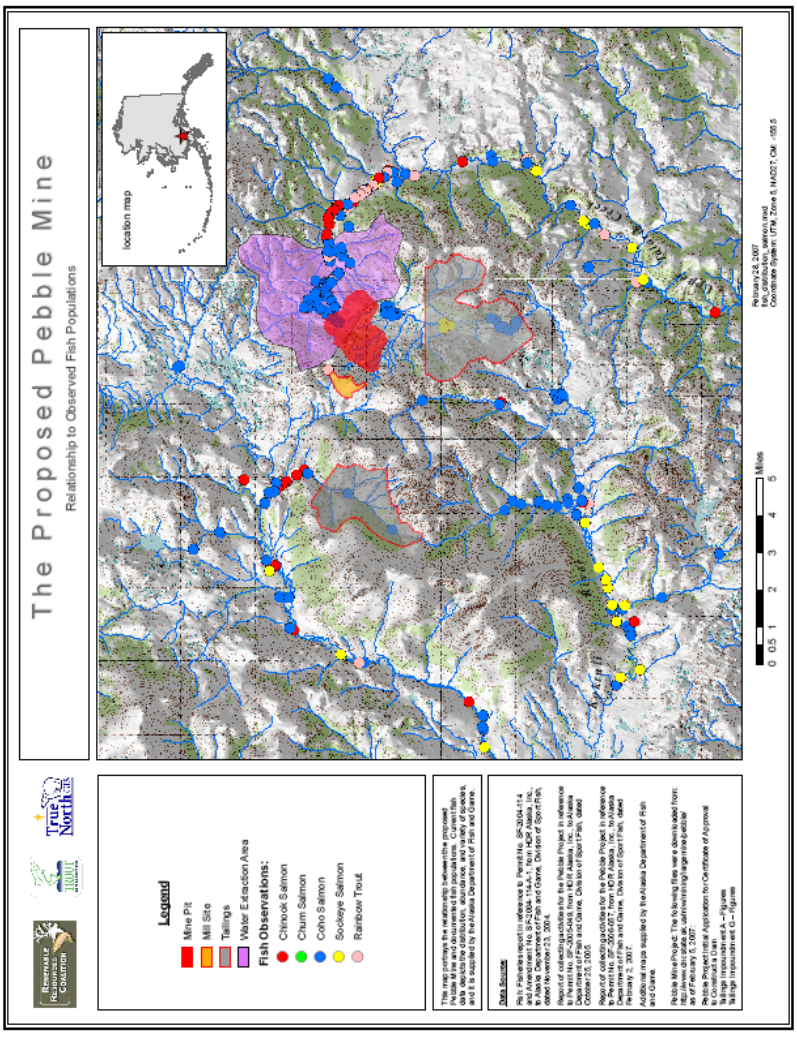

## LIST OF *AMICI CURIAE*

Nunamta Aulukestai, "Caretakers of Our Lands," is an association of eight Bristol Bay Native Village Corporations, representing hundreds of Alaska Natives and dedicated to responsible land use planning and management. The associated Villages are Ekwok, Koliganek, New Stuyahok, Saguyak, Aleknagik, Togiak, Manokotak and Curyung. Nunamta Aulukestai aims to diversify the economy of the Bristol Bay region while sustaining its natural resources and cultural heritage. It provides a forum for cooperation in matters concerning the management and protection of natural resources for subsistence uses and sustainable economic and community development.

Nunamta Aulukestai's culture depends on clean water and land. For thousands of years the Native people of Bristol Bay have subsisted from the land, relying on berries, salmon, caribou, moose, beluga whales, walrus, seals, ptarmigan, ducks, geese and many plants. To this day, many of those represented by Nunamta Aulukestai still practice a subsistence way of life. Thomas Tilden expressed it simply: "we are people of the salmon; we live off it, we make our life off of it."[1] Bobby Andrew noted before the State House of Representatives Fisheries Committee that:

> Water, as the source of life, is fundamental for the health of the area's renewable resources,

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[1] HB 134—Protection of Salmon Spawning Water, Fisheries Committee Minutes, Sept. 24, 2007, at 7:25 pm, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00308&end_line=01636&session=25&comm=FSH&date=20070924&time=1644.

> and the residents who depend upon them.... The subsistence lifestyle has sustained the people of the region, who consider themselves "rich in many ways."[2]

The Nondalton Tribal Council is the governing body of the Nondalton Village Tribe. The Nondalton Village Tribe is federally recognized, and its village of approximately 200 people—about 90% of whom are Alaska Native—is located 15 miles from the Pebble deposit, along the west shore of Six Mile Lake, between Lake Clark and Iliamna Lake. Nondalton's residents are Northern Athabascans belonging to the Dena'ina tribes of the Cook Inlet region who rely heavily on subsistence hunting and fishing. The village lies in an area integral to the Kvichak watershed, a highly productive spawning ground for sockeye and other species of Pacific salmon. Harvests of salmon are extremely important to residents' diets, accounting for 65% of the subsistence diet, with other freshwater fish comprising another 15%.

The New Stuyahok Traditional Council is the governing body of the New Stuyahok Village Tribe. The New Stuyahok Village Tribe is federally recognized, and its village of approximately 480 people is located along the Nushagak River in Southwest Alaska. Ancestors of tribal members have lived in southwest Alaska for thousands of years, and tribal members still rely heavily on the area's plentiful fish, wildlife, and

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[2] HB 134—Protection of Salmon Spawning Water, Fisheries Committee Minutes, Sept. 26, 2007, at 11:50 am, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00365&end_line=02787&session=25&comm=FSH&date=20070926&time=0900.

vegetation as the basis of their diet and culture. New Stuyahok is the first village downstream from the Pebble Mine site on the Nushagak.

The Koliganek Village Council is the governing body of the Koliganek Village Tribe. The Koliganek Village Tribe is federally recognized, and its village of approximately 187 people is located along the Nushagak River, 65 miles from Bristol Bay. Koliganek is a Yup'ik Eskimo village where subsistence activities are an important part of life. Frances Nelson, a resident of Koliganek, described her Village's subsistence way of life:

> We, as a Native people, have lived in harmony with the land, fish and wildlife. We are the traditional stewards and caretakers of this land. Our connection to the land, fish and wildlife is an important part of our identity as Yup'ik people. For us to remain on this land, we need subsistence.[3]

The Ekwok Tribal Council is the governing body of the Ekwok Village Tribe. The Ekwok Village Tribe is federally recognized, and its village of approximately 130 people is also located along the Nushagak River, 12 miles downriver from New Stuyahok. Ekwok, which means "end of the bluff," is the oldest continuously occupied Yup'ik Eskimo village on the river. During the 1800's, the settlement was used in the spring and summer as a fish camp, and in the fall as a base for berry-picking. By 1923, it was the largest settlement along

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[3] Nelson, *No, Pebble Mine Isn't My Neighbor: Proposed Project Would Benefit Outside Interests to the Detriment of Native People*, Juneau Empire (July 14, 2006).

the river. The entire population depends on subsistence activities for various food sources including salmon, pike, moose, caribou, duck and berries.

The Curyung Tribal Council is the governing body of the Curyung Village Tribe. The Curyung Village Tribe is federally recognized, and the tribal community of approximately 1400 people is located in Dillingham, at the mouth of the Nushagak River, in Southwest Alaska.[4] Traditionally an Alaskan Native area, Dillingham now has a highly mixed population of non-Natives, Eskimos, Aleuts and Athabascans. Curyung tribal members still depend upon subsistence activities using traditional methods that have been passed on for generations. Participating in subsistence activities is crucial to the survival of their community due to limited employment opportunities, stifled wages, and the high cost of living.

Naknek Family Fisheries is the most recently-formed fish processor and the only fisherman, Native-owned seafood processing company in Naknek. The village of Naknek is located along the Naknek River, at the northeastern end of Bristol Bay. The Naknek economy is predominately based on salmon fishing and processing.

Izetta Chambers, a Naknek member who has participated in the Bristol Bay fishery since the age of 11,

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[4] *See* ACDIS, Dillingham, http://www.commerce.state.ak.us/dca/commdb/CIS.cfm?Comm_Boro_Name=Dillingham (last visited, Nov. 10, 2008); *see also* The Pebble Partnership, Regional Map, http://www.pebblepartnership.com/images/RegionalMap.jpg (last visited Nov. 14, 2008).

noted that "[w]e … have an economy and it's based on fishing, and it's been so for hundreds of years."[5]

Alaska Independent Fishermen's Marketing Association (AIFMA) has ongoing goals to protect and promote the Bristol Bay salmon resource and fishermen's livelihoods. AIFMA, comprised of and funded by fishermen memberships, has been steadfast in its commitment to fishermen and the salmon resource of the Bristol Bay region since 1966.

In response to a bill before the state legislature to protect the Bristol Bay drainages for salmon, AIFMA commented:

> In recent years the salmon industry and the State of Alaska have invested a great deal in Alaska's Wild Salmon and this investment is beginning to pay dividends throughout the state. Thousands of existing Alaskan jobs depend upon the purity of Bristol Bay's renewable and sustainable salmon fishery and the integrity of its spawning habitat. These jobs depend on protection of the pristine habitat of the Bristol Bay watershed.[6]

The mission of the Bristol Bay Driftnetters' Association (BBDA) is to enhance the Bristol Bay Drift Net Fishery by advocating for the viability of Bristol Bay's fish resources and promoting awareness of policy issues

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[5] Bauman, *Alaska Wild Salmon Finds Advocate in Oregon's New Season's Market*, Alaska Journal of Commerce (July 22, 2007).

[6] Letter from David Harsila, President, Alaska Independent Fishermen's Marketing Association, to Rep. Paul Seaton (Feb. 19, 2007), http://www.aifma.org/spawning_habitat_article.html.

that affect the well-being and businesses of the Drift Net Fishermen who use this renewable resource. BBDA has diligently worked to develop wild Bristol Bay salmon's image, which would potentially be affected by the proposed Pebble Mine. Nick Lee of the Bristol Bay Driftnetters' Association noted the importance of the marketing of the Bristol Bay Salmon when providing testimony on a state bill that would protect the Bristol Bay waters for salmon:

> Small amounts of copper, sulfuric acid, and cyanide can be detrimental to our fish stocks[.] Wild Alaska Salmon is sold as a health supplement. If there are any issues with contaminated water in Bristol Bay's streams, lakes or rivers it will be detrimental to the marketing of all Alaskan Salmon.[7]

The Renewable Resources Coalition (RRC) is an Alaskan non-profit 501(c)(6) corporation which unites a diverse membership of commercial fishermen, Alaska Natives, and sportfish lodge owners. Founded in 2005, RRC's mission is to preserve and protect the ongoing viability of Alaska's abundant fishing and hunting resources and the lands and waters they need to survive. RRC has a deep and abiding interest in protecting Bristol Bay sport fisheries. Two of RRC's six board members are sport fishing lodge owners in the Bristol Bay region. A third built and owns the only cabin on the Koktuli River in the Bristol Bay drainage, where he

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[7] HB 134—Protection of Salmon Spawning Water, Fisheries Committee Minutes, Feb. 28, 2007, at 10:34 am, *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?ch=H&beg_line=00169&end_line=01460&session=25&comm=FSH&date=20070228&time=0838.

has fished and hunted for over 25 years, and a fourth is the author of a fishing book and a fly-fishing teacher at the University of Alaska.