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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

PEBBLE LIMITED PARTNERSHIP,
Plaintiff,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and GINA
MCCARTHY, in her official capacity as
Administrator of the United States
Environmental Protection Agency,
Defendants.

Case No. 3:14-cv-00171-HRH

**JOINT BRIEF OF AMICI CURIAE IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS AND
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION**

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CORPORATE DISCLOSURE STATEMENTS OF AMICI
Pursuant to Federal Rules of Appellate Procedure 29(c)(1) and 26.1

Nunamta Aulukestai discloses that it is an Alaska nonprofit corporation. It has no parent company, no subsidiary or subordinate company, and no affiliate company. No publicly held company owns 10% or more of Nunamta Aulukestai stock, or any lesser portion of Nunamta Aulukestai stock, since Nunamta Aulukestai has never issued any stock or other securities.

Bristol Bay Native Corporation discloses that it has no parent corporation and that no publicly-held corporation holds 10% or more of its stock.

INTRODUCTION

The ecological integrity of Bristol Bay’s world-class salmon fishery is of the utmost importance for Bristol Bay’s vibrant Alaska Native cultures and its economically valuable commercial fishing, sport fishing, and tourism industries. For the past 10 years, mine developers have been discussing plans to build one of North America’s largest metallic sulfide mines at the Pebble mineral deposit.¹ Since this deposit sits at the headwaters of key salmon-supporting watersheds in Bristol Bay, local communities have found themselves at the epicenter of a severe resource conflict. In response to this threat, numerous Alaska Native Tribes, tribal organizations, commercial fishermen, public interest organizations, and others have filed petitions urging the U.S. Environmental Protection Agency (“EPA”) to exercise its authority under Section 404(c) of the Clean Water Act (“CWA”),² and establish heightened protections for water and salmon resources near the Pebble deposit.³

In its second of three related lawsuits against EPA,⁴ Pebble Limited Partnership (“PLP”) alleges, erroneously, that EPA has violated the Federal Advisory Committee Act (“FACA”)⁵ in

¹ See U.S. ENVTL. PROT. AGENCY, PROPOSED DETERMINATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 10 PURSUANT TO SECTION 404(C) OF THE CLEAN WATER ACT: PEBBLE DEPOSIT AREA, SOUTHWEST ALASKA 2-3 to 2-4 (2014) [hereinafter PROPOSED DETERMINATION], available at http://www2.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf; Letter from Sen. Lisa Murkowski to John Shively et al., Pebble Ltd. P’ship (July 1, 2013), available at http://www.pebblewatch.com/images/stories/pdfs/LAM_Letter.pdf. The former document is one focus of the complaint and is thus appropriately considered by the Court. The latter document, and other documents cited in this brief, are subject to judicial notice. See *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). To avoid redundancy, web citations have been simplified. All weblinks provided herein were last accessed November 6, 2014, unless otherwise specified.

² 33 U.S.C. § 1344(c).

³ See generally PROPOSED DETERMINATION, *supra*, at 2-4 to 2-5; see, e.g., Joint Letter from Six Federally-Recognized Tribes to Lisa P. Jackson & Dennis J. McLerran, EPA (May 2, 2010), available at <http://www.ourbristolbay.com/pdf/tribes-letter-to-epa-on-404-c.pdf>.

⁴ See Order on Mots. Dismiss, *Pebble Ltd. P’ship v. U.S. Env’tl. Prot. Agency (Pebble I)*, Civ. No. 3-14-00097-HRH (D. Alaska, Sept. 26, 2014) (Dkt. 257); Appellants’ Br., *Pebble Ltd. P’ship v. U.S. Env’tl. Prot. Agency*, No. 14-35845 (9th Cir. Oct. 7, 2014) (Dkt. 28); Plaintiff’s Notice of Related Case, *Pebble Ltd. P’ship v. U.S. Env’tl. Prot. Agency (Pebble III)*, No. 3:14-cv-00199-HRH (D. Alaska Oct. 16, 2014) (Dkt. 4). Consistent with Alaska Local Civil Rule 10.1(i), citations to pleadings, motions, and documents previously filed are to the page number assigned by the CM/ECF System.

⁵ 5 U.S.C. App. §§ 1–16.

various ways.⁶ Throughout EPA’s Bristol Bay scientific assessment process and ongoing 404(c) review, however, EPA has shown an extraordinary commitment to public participation, including engagement with PLP and its affiliates. EPA’s numerous meetings, workshops, webinars, public hearings, and other interactions are emblematic of appropriate agency dialogue with the parties most likely to be affected by an agency decision. EPA has never established or utilized a federal advisory committee (“FAC”) in connection with its Bristol Bay scientific assessment or 404(c) policy deliberations. EPA has addressed PLP’s flawed legal claims in detail in its briefing.⁷

As a supplement to EPA’s arguments, amici curiae (“Amici”) focus on three key topics in this brief.⁸ First, Amici describe the stark contrast between the Executive branch’s management and oversight of FACs, and EPA’s standard open government practices conducted in Bristol Bay. Second, Amici explain why, even assuming any FAC ever existed in connection with Bristol Bay (which is not the case), PLP’s claims are moot and must be dismissed due to this Court’s lack of subject matter jurisdiction. This is so because (1) EPA has cured any conceivable FACA violation by providing abundant opportunities for public comment and submission of technical information prior to its issuance of the final Bristol Bay Assessment (“BBA”) and at multiple points during its ongoing 404(c) deliberations, and (2) any such violation would have occurred in the distant past, precluding any meaningful prospective injunctive or declaratory relief. Finally, even if PLP’s claims could survive the EPA’s Motion to Dismiss, Amici demonstrate that the public interest weighs heavily against an injunction of either the EPA’s 404(c) process or its use of the Bristol Bay Assessment.

⁶ See generally Compl. for Declaratory & Injunctive Relief at 128–38, *Pebble Ltd. P’ship v. U.S. Envtl. Prot. Agency (Pebble II)*, No. 3:14-cv-00171-HRH (D. Alaska Sept. 3, 2014) (Dkt. 1) [hereinafter Compl.].

⁷ See Mem. in Supp. of Defs.’ Mot. to Dismiss & Opp’n to Pl.’s Mot. for a Prelim. Inj., *Pebble II*, No. 3:14-cv-00171-HRH (D. Alaska Nov. 7, 2014) (Dkt. 71) [hereinafter Mem. in Supp. of Mot. to Dismiss]; see also Opp’n to Pl.’s Mot. for Expedited Disc., *Pebble II*, No. 3:14-cv-00171-HRH (D. Alaska Oct. 28, 2014) (Dkt. 63) [hereinafter Opp’n to Expedited Disc.].

⁸ Amici curiae are Nunamta Aulukestai and Bristol Bay Native Corporation. See Mot. for Leave to File Br. of Amici Curiae in Supp. of Defs.’ Mot. to Dismiss & Opp’n to Mot. for Prelim. Inj., *Pebble II*, No. 3:14-cv-00171-HRH (D. Alaska Nov. 11, 2014) (submitted concurrently herewith).

EPA'S PUBLIC PROCESS IN BRISTOL BAY

EPA has employed an array of mechanisms to promote public engagement during its scientific assessment and 404(c) deliberations in Bristol Bay. From the earliest stages of its involvement in the region, EPA has engaged in extensive dialogue with PLP and its affiliates. For instance, in anticipation of PLP's submission of mining permit applications, from July 2007 through November 2009, EPA staff participated in over 20 technical working group ("TWG") meetings⁹ as a means to "facilitate pre-application state and federal agency discussions with the project proponent."¹⁰ The TWG meetings included representatives from PLP, technical consultants, staff from several State of Alaska agencies, staff from other federal agencies, and members of the public.¹¹ PLP unilaterally withdrew from this voluntary process on January 12, 2010,¹² enhancing the frustration and concerns of local communities and serving as the backdrop for the submission of numerous 404(c) petitions to EPA starting in May 2010.¹³

In response to the petitions, EPA commenced a scientific assessment in Bristol Bay in February 2011,¹⁴ and throughout every step of the process thereafter, EPA provided PLP and other mining interests with numerous opportunities for participation and information exchange. The following are a few examples:

⁹ See Div. of Mining, Land & Water, Alaska Dep't of Natural Res., Pebble Project Archive—Technical Working Groups [hereinafter Pebble Project Archive], <http://dnr.alaska.gov/mlw/mining/largemine/pebble/twg/> (compiling meeting minutes from a total of 30 TWG meetings); see also PROPOSED DETERMINATION, *supra*, at 2-3 to 2-4 (describing EPA's meetings, communications, and information exchange with PLP and its affiliates from 2004 through 2011).

¹⁰ Pebble Project Archive, *supra*.

¹¹ See *id.*

¹² See E-mail from Charlotte McCay, Manager of Permitting, PLP, to TWG Members (Jan. 12, 2010, 10:23 a.m.), available at <http://dnr.alaska.gov/mlw/mining/largemine/pebble/twg/twgsuspended.pdf>.

¹³ Joint Letter from Six Federally-Recognized Tribes to Lisa P. Jackson & Dennis J. McLerran, EPA (May 2, 2010) at 5-6, *supra* ("The magnitude of the issues and PLP's recent decision to terminate its Technical Working Groups justify an EPA decision to commence a 404(c) process at this time."); see also Declaration of Richard B. Parkin, *Pebble II* Docket No. 72, at ¶22 ("uncertainty about the future of Bristol Bay's resources remained, as evidenced by the petitions submitted to EPA in 2010.").

¹⁴ Press Release, U.S. Env'tl. Prot. Agency, EPA Plans Scientific Assessment of Bristol Bay Watershed (Feb. 7, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/0/8c1e5dd5d170ad99852578300067d3b3>.

- EPA carefully considered information regarding the Pebble Mine project released by PLP and its affiliates in the voluminous Wardrop Report,¹⁵ and the Environmental Baseline Document.¹⁶ EPA considered both sets of documents during its preparation of the BBA.¹⁷
- In February and March 2012, EPA invited the public, including PLP, to nominate candidates for the independent Peer Review Panel that would be charged with scientific and technical review of the BBA.¹⁸
- In June 2012, EPA invited the public to comment on the proposed peer review “charge questions” that would guide the Panel’s review,¹⁹ and PLP and its affiliates submitted comments on the charge questions.²⁰

¹⁵ See H. GHAFARI ET AL., WARDROP, REPORT TO NORTHERN DYNASTY MINERALS LTD.: PRELIMINARY ASSESSMENT OF THE PEBBLE PROJECT, SOUTHWEST ALASKA (Feb. 17, 2011) [hereinafter WARDROP REPORT], available at http://www.northerndynastyminerals.com/i/pdf/ndm/Pebble_Project_Preliminary%20Assessment%20Technical%20Report_February%2017%202011.pdf.

¹⁶ See PEBBLE LTD. P’SHP, ENVIRONMENTAL BASELINE DOCUMENT: 2004 THROUGH 2008 (2011), available at <http://pebbleresearch.com/download/>; Press Release, The Pebble P’ship, Pebble Releases Environmental Baseline Studies (Feb. 2, 2012), available at <http://corporate.pebblepartnership.com/news-article.php?s=pebble-releases-environmental-baseline-studies>.

¹⁷ See 1 U.S. ENVTL. PROT. AGENCY, AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY, ALASKA (2014) (Main Report) [hereinafter BBA], available at http://www.epa.gov/ncea/pdfs/bristolbay/bristol_bay_assessment_final_2014_voll.pdf (citing the Wardrop Report as “Ghaffari, et al. 2011” and the Environmental Baseline Document as “PLP 2011” throughout).

¹⁸ See Assessment of Potential Large-Scale Mining on the Bristol Bay Watershed of Alaska: Nomination of Peer Reviewers, 77 Fed. Reg. 11,111-01 (Feb. 24, 2012) (notice of call for nominations); 77 Fed. Reg. 14,011-02 (Mar. 8, 2012) (extension of the time period for nominations); see also VERSAR, INC., FINAL PEER REVIEW REPORT: EXTERNAL PEER REVIEW OF EPA’S DRAFT DOCUMENT: AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY, ALASKA 1 (2012) [hereinafter FINAL PEER REVIEW REPORT], available at <http://www.epa.gov/ncea/pdfs/bristolbay/Final-Peer-Review-Report-Bristol-Bay.pdf>.

¹⁹ An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska—Peer Review Panel Members and Charge Questions, 77 Fed. Reg. 33,213-02, 33,214 (June 5, 2012) (notice of availability and public comment period).

²⁰ See, e.g., Letter from John Shively, Chief Executive Officer, The Pebble P’ship, to U.S. Envtl. Prot. Agency on Peer Review Panel Members and Charge Questions (June 25, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0358-0017>; Letter from Ronald W. Thiessen, N. Dynasty Minerals Ltd., to U.S. Envtl. Prot. Agency on Peer Review Panel Members and Charge Questions (June 26, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0358-0018>.

- EPA held a 60-day public comment period on the first draft of the BBA, which commenced in May 2012.²¹ During this period, EPA held eight public hearings in six Bristol Bay communities as well as in Anchorage and Seattle, Washington.²² The hearings were attended by approximately 2,000 people, and EPA received more than 233,000 public comments.²³ PLP staff and other mining industry representatives participated in the hearings,²⁴ and PLP submitted multiple sets of written comments to EPA.²⁵
- EPA held a three-day Peer Review meeting in Anchorage in August 2012.²⁶ The first day of the meeting was open for public participation, and EPA heard testimony from approximately 95 people,²⁷ including PLP staff and other mining industry representatives.²⁸

²¹ An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, AK, 77 Fed. Reg. 31,353-01 (May 25, 2012) (notice of public comment period).

²² See 1 BBA, *supra*, at 1-5.

²³ See *id.*

²⁴ See, e.g., U.S. Evtl. Prot. Agency, Draft Bristol Bay Watershed Assessment: Record of Public Comment Meeting: Nondalton, Alaska 8 (June 7, 2012) (testimony of PLP employee Valerie Engebretsen), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-4830>; U.S. Evtl. Prot. Agency, Draft Bristol Bay Watershed Assessment: Record of Public Comment Meeting: New Stuyahok, Alaska 22 (June 7, 2012) (testimony of PLP employee Sarah McCarr), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-4154>; Transcript, Anchorage Public Hearing 30–32 (June 4, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-1289> (testimony of Bryan Clemenz, Board Member of Alaska Support Industry Alliance); *id.* at 52–53 (testimony of John Shiveley, Chief Executive Officer of PLP); Transcript, EPA Bristol Bay Watershed Assessment Public Hearing, Seattle, Washington 30–31 (May 31, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-1270> (testimony of NDM employee Sean Magee); *id.* at 48–49 (testimony of Anglo American employee Jason Brune).

²⁵ See, e.g., Letter from John Shively, Chief Executive Officer, The Pebble P’ship, to U.S. Evtl. Prot. Agency, on Comments of PLP and Various Experts (July 23, 2012) (technical), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-5419>; Letter from John Shively, Chief Executive Officer, The Pebble P’ship, to U.S. Evtl. Prot. Agency on Legal Analysis of EPA’s Bristol Bay Watershed Assessment and Authority Under Section 404(c) (July 22, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-4960>; Letter from John Shively, Chief Executive Officer, The Pebble P’ship, to U.S. Evtl. Prot. Agency, with White Papers (July 23, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-5416>.

²⁶ See Notice of Peer Review Meeting for EPA’s Draft Report Entitled An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, AK, 77 Fed. Reg. 40,037-01 (July 6, 2012).

²⁷ See FINAL PEER REVIEW REPORT at 3, *supra*.

²⁸ See, e.g., *EPA Peer Review Continues Today*, PEBBLEWATCH, Aug. 8, 2012, available at <http://www.pebblewatch.com/index.php/443-epa-peer-reviewers-hear-public-testimony>

- EPA held a 60-day public comment period on the second draft of the BBA in April through June 2013,²⁹ and EPA received more than 890,000 public comments.³⁰ Once again PLP submitted multiple sets of written comments.³¹
- EPA released the final BBA in January 2014.³² In March 2014, EPA released detailed responses to public comments submitted with respect to both the first and second drafts of the BBA (totaling 1,225 pages),³³ including extensive responses to comments submitted by PLP.³⁴

EPA's commitment to open dialogue with affected mining interests has continued during the 404(c) review process. EPA commenced its review of potential 404(c) action by sending an initial consultation letter to PLP, the State of Alaska, and the U.S. Army Corps of Engineers in

(discussing the testimony of employees of PLP, NDM, and Anglo American during August 7, 2012 peer review meeting).

²⁹ An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, 78 Fed. Reg. 25,266-01 (Apr. 30, 2013) (notice of public comment period); An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, 78 Fed. Reg. 34,093 (June 6, 2013) (extension).

³⁰ BBA, *supra*, at 1-5.

³¹ *See, e.g.*, Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. Env'tl. Prot. Agency, on Comments of Pebble Ltd. P'ship (June 28, 2013) (general), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5535>; Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. Env'tl. Prot. Agency, on Comments of Scientific and Technical Experts (June 28, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5536>; Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. Env'tl. Prot. Agency, on Submittal of Report on the Economic and Employment Contributions of a Conceptual Pebble Mine to the Alaska and United States Economies (June 28, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5534>.

³² An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, 79 Fed. Reg. 3,369-02 (Jan. 21, 2014) (notice of availability of final report).

³³ *See* U.S. ENVTL. PROT. AGENCY, RESPONSE TO PUBLIC COMMENTS ON THE MAY 2012 DRAFT OF AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY, ALASKA (Mar. 2014), *available at* http://www.epa.gov/ncea/pdfs/bristolbay/EPAs%20Response%20to%20Public%20Comments_1stERD_May2012.pdf; U.S. ENVTL. PROT. AGENCY, RESPONSE TO PUBLIC COMMENTS ON THE APRIL 2013 DRAFT OF AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY, ALASKA (2014) [hereinafter EPA SECOND ROUND RESPONSE], *available at* http://www.epa.gov/ncea/pdfs/bristolbay/EPAs%20Response%20to%20Public%20Comments_2ndERD_Apr2013.pdf.

³⁴ *See, e.g.*, EPA SECOND ROUND RESPONSE, *supra*, at 8, 22–23, 31–44, 45–46, 53–54, 73–76, 90–100, 129–45, 167–95, 256–69, 294–316, 345–68, 372–82, 388–406, 425–28, 440–44, 446–47, 451–53, 456–58, 462–63, 466–67, 478–95.

February 2014.³⁵ In response to requests from PLP and the State of Alaska, EPA extended the initial consultation period from 15 to 60 days and emphasized that the initial consultation was “just one of many opportunities” for PLP and others to submit comments and participate in the 404(c) review process.³⁶ As part of this initial consultation, PLP and the State of Alaska submitted written comments in late April 2014.³⁷ Along with the formal comment and consultation opportunities listed above EPA held at least 20 meetings with PLP during the BBA and early 404(c) processes.³⁸

Moreover, after issuing its Proposed Determination under 404(c) in July 2014,³⁹ EPA held another 60-day public comment period and public hearings in six Bristol Bay communities

³⁵ See Letter from Dennis J. McLerran, Reg’l Adm’r, U.S. Env’tl. Prot. Agency, to PLP, Alaska Dep’t of Natural Res., and U.S. Army Corps of Eng’rs (Feb. 28, 2014) (initiating consultation regarding commencement of 404(c) review), *available at* <http://www2.epa.gov/sites/production/files/2014-02/documents/bristol-bay-15day-letter-2-28-2014.pdf>.

³⁶ Letter from Dennis J. McLerran, Reg’l Adm’r, U.S. Env’tl. Prot. Agency, to Tom Collier, Chief Executive Officer, Pebble Ltd. P’ship (Mar. 13, 2014), *available at* <http://www2.epa.gov/sites/production/files/2014-03/documents/bristol-bay-15day-letter-extension-3-13-2014.pdf>.

³⁷ See Letter from Thomas Collier, Chief Executive Officer, Pebble Ltd. P’ship, to Dennis J. McLerran, Reg’l Adm’r, U.S. Env’tl. Prot. Agency (Apr. 29, 2014), *available at* <http://corporate.pebblepartnership.com/perch/resources/plp-submittal-to-epa-apr-2014.pdf>; Letter from Michael C. Geraghty, Attorney Gen., Alaska Dep’t of Law, to Dennis McLerran, Reg’l Adm’r, U.S. Env’tl. Prot. Agency on State of Alaska’s Response to EPA’s Notice of Intent to Issue a Public Notice of Proposed Section 404(c) Determination (Apr. 29, 2014), *available at*: http://dnr.alaska.gov/commis/cacfa/documents/MeetingInformation/2014Fairbanks/Executive_Directors_Report/BristolBayWatershedAssessment/14_4_30SOA_Response_to_EPA_re_Clean_Water_Act.pdf.

³⁸ See EPA, Senior Manager Schedules, Dennis J. McLerran, Regional Administrator, EPA Region 10 (Oct. 2010 to Oct. 2014), *available at* http://yosemite.epa.gov/opa/admpress.nsf/Calendars_3?OpenView&RestrictToCategory=Dennis%20J.%20McLerran.%20Regional%20Administrator.%20US%20EPA%20Region%2010&count=10000; EPA, Senior Manager Schedules, Gina McCarthy, EPA Administrator (Aug. 2013 to Oct. 2014), *available at* http://yosemite.epa.gov/opa/admpress.nsf/Calendars_1?OpenView&RestrictToCategory=Gina%20McCarthy.%20Administrator.%20Environmental%20Protection%20Agency. See also, e.g., meetings with multiple stakeholders (Aug. 27, 2013), *available at* http://yosemite.epa.gov/opa/admpress.nsf/Calendars_3/85256CBD007E4BB785257BCE006F5727?OpenDocument.

³⁹ See PROPOSED DETERMINATION, *supra*.

and in Anchorage.⁴⁰ EPA received approximately 670,000 written comments through this process,⁴¹ including lengthy submissions from PLP.⁴² Before EPA's Proposed Determination is finalized (assuming it proceeds to that end), EPA Region 10 will issue a Recommended Determination to the EPA Administrator, and PLP will have yet another opportunity for consultation with EPA.⁴³

EPA's process here is in line with general federal executive branch and EPA-specific policies supporting public participation and transparency in its decision making processes.⁴⁴ Indeed, the wide participation of interest groups, the comment volume and the number of meetings ably demonstrates EPA's Bristol Bay process was in compliance with its policy to "provide[] the public with many avenues, including public meetings, webinars, and conferences, to learn about, participate in, and collaborate with us on our processes and meeting the Agency's mission."⁴⁵ Furthermore, EPA met its tribal consultation and coordination responsibilities, pursuant to which EPA must "ensure[] the close involvement of tribal governments and give[] special consideration to their interests whenever EPA's actions may affect Indian country or other tribal interests."⁴⁶

⁴⁰ See EPA, *Proposed Determination to Restrict the Use of an Area as a Disposal Site: Pebble Deposit Area, Southwest Alaska*, 79 Fed. Reg. 42,314 (July 21, 2014) (notice of public comment period and public hearings) and 79 Fed. Reg. 56,365 (September 19 2014) (extension). PLP representatives testified at these public hearings. See, e.g., Alaska Dispatch, *Hundreds Make Their Case on Pebble Mine to EPA in Anchorage Hearing* (Aug. 12, 2014), available at <http://www.adn.com/article/20140812/hundreds-make-their-case-pebble-mine-epa-anchorage-hearing> (discussing testimony of PLP CEO Tom Collier); KDLG, *Alaska Natives Have Strong Presence at EPA Hearing* (Aug. 18, 2014) (discussing testimony of PLP employees at Dillingham hearing), available at <http://kdlg.org/post/alaska-natives-have-strong-presence-epa-hearing>.

⁴¹ See Opp'n to Expedited Disc. at 7, *supra*.

⁴² See PLP, Comments on Proposed Determination (Sept. 19, 2014), available at <http://www.regulations.gov/#!documentDetail;D=EPA-R10-OW-2014-0505-3777>.

⁴³ See 40 C.F.R. § 231.6; EPA, Bristol Bay website, <http://www2.epa.gov/bristolbay> (404(c) process flowchart).

⁴⁴ See e.g., Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009); 40 C.F.R. pt. 25 (general EPA public process requirements); 40 C.F.R. pt. 231 (Clean Water Act section 404(c) public process requirements); U.S. Env'tl. Prot. Agency, Open Initiative Homepage, [http://www2.epa.gov/open \(EPA open government plan\)](http://www2.epa.gov/open(EPA%20open%20government%20plan)).

⁴⁵ U.S. ENVTL. PROT. AGENCY, OPEN GOVERNMENT PLAN 3.0, at 7 (2014), available at <http://www2.epa.gov/sites/production/files/2014-06/documents/epaopengovernmentplan3.pdf>.

⁴⁶ U.S. ENVTL. PROT. AGENCY, EPA POLICY ON CONSULTATION AND COORDINATION WITH

ARGUMENT

PLP paints a picture of EPA and broad segments of the public conspiring to exclude mining proponents from EPA's scientific investigations and policy deliberations concerning Bristol Bay.⁴⁷ In light of EPA's robust, open, and transparent public process, and PLP's own vigorous involvement in that process, such allegations are absurd. As described above and in EPA's brief, throughout EPA's development of the BBA and evaluation of potential 404(c) action, EPA provided the full array of interests with many meaningful opportunities to express their views and supply technical information, and all of those interests, including PLP, took advantage of such opportunities to provide input to EPA.

To further illustrate the distinction between EPA's public engagement in Bristol Bay and the requirements of the Federal Advisory Committee Act, Amici provide here information concerning existing formal executive branch FACs established for various purposes.

Further, Amici provide information showing that EPA's exhaustive public process in Bristol Bay renders PLP's FACA claims moot. EPA's process thoroughly eliminated any theoretical harm to PLP, as well as any basis for meaningful prospective relief.

I. EPA'S PUBLIC ENGAGEMENT IN BRISTOL BAY IS CONSISTENT WITH THE FEDERAL APPROACH TO OVERSIGHT OF FEDERAL ADVISORY COMMITTEES.

All Executive Branch agencies must use the policy framework set forth in 41 C.F.R. Part 102-3 when applying FACA to advisory committees they establish and operate.⁴⁸ Under these regulations, FACA applies only when a federal agency establishes or utilizes a group that includes non-government representatives *and* does so with the purpose of obtaining *collective*

INDIAN TRIBES 4 (2011), available at <http://www.epa.gov/indian/pdf/cons-and-coord-with-indian-tribes-policy.pdf>. See generally REGION 10, U.S. ENVTL. PROT. AGENCY, TRIBAL CONSULTATION AND COORDINATION PROCEDURES (2012), available at http://www.epa.gov/region10/pdf/tribal/consultation/r10_tribal_consultation_and_coordination_procedures.pdf.

⁴⁷ Compl. at 5–12 ¶¶ 9–35, *supra*.

⁴⁸ 41 C.F.R. § 102-3.5

advice or recommendations.⁴⁹ EPA's own separate FACA regulations⁵⁰ are in line with these FACA regulations applying to all Executive Branch agencies.⁵¹

Additionally, while only some agencies have promulgated their own detailed regulations regarding FACA, most agencies use fact sheets, policies, and guidance documents to decide the threshold issue of whether FACA might apply to the agency's particular collaborative efforts. A survey of FACA guidance issued by other Executive Branch agencies shows that EPA's approach to determining whether FACA applies to a collaborative effort is in line with how other agencies go about informal stakeholder dialogue. For example, the U.S. Army Corps of Engineers ("Army Corps") FACA guidance includes a nearly identical "FACA applicability decision tree" as the one used by EPA to display how the agency determines whether FACA would apply to a collaborative stakeholder effort.⁵² PLP's allegations fail under either EPA or Army Corps interpretations of FACA and its implementing regulations.

Along with public participation and open dialogue with affected constituencies, EPA sometimes seeks formal consensus advice from FACs, and it has adopted EPA-specific regulations governing such committees.⁵³ When EPA "identifies a need for continued attention of an informed core group of citizens in relation to activities conducted with EPA financial assistance, program regulations elsewhere in this chapter will require an advisory group to be appointed by the financially assisted agency."⁵⁴ Such advisory groups are "intended to assist elected or appointed officials with final decision-making responsibility by making

⁴⁹ 41 C.F.R. § 102-3.25 (definition of advisory committee) and Appendix A to Subpart A of 41 C.F.R. § 102-3 ("Meetings between a Federal official(s) and a collection of individuals where advice is sought from the attendees on an individual basis are not subject to the Act.")

⁵⁰ 40 C.F.R. § 25.7

⁵¹ 41 C.F.R. Part 102-3

⁵² Compare U.S. Env'tl. Prot. Agency, *Collaboration and FACA at EPA 2*, available at http://www.epa.gov/ocem/faca/pdf/faca_guidelines.pdf, with U.S. Army Corps of Engineers, *Collaborative Activities and the Federal Advisory Committee Act 2*, available at http://www.iwr.usace.army.mil/Portals/70/docs/cpc/USACE_FACA_guidance.pdf. In addition, the Army Corps guidance describes a situation similar to the public involvement that occurred in Bristol Bay as not subject to FACA ("Seeking *information* from individuals about whether consensus exists among the individual participants and why is not the same as seeking *group consensus*.").

⁵³ 40 C.F.R. § 25.7.

⁵⁴ 40 C.F.R. § 25.7(b).

recommendations to such officials on important issues.”⁵⁵ EPA’s regulations set forth detailed requirements regarding FAC membership,⁵⁶ designated agency staff contacts,⁵⁷ seeking, transmitting, and responding to “group recommendations” made by the advisory committee,⁵⁸ agency support staff and operating budget,⁵⁹ and committee responsibilities and duties, including selecting a chairperson, adopting rules of order, scheduling meetings, keeping minutes, providing public notice and opportunities for public comment, and making formal group recommendations to the agency.⁶⁰

EPA currently manages 21 FACs.⁶¹ The formal agency-imposed mandates and structure of these FACs stand in sharp contrast to EPA’s general open government activities in Bristol Bay. To start with, EPA’s FACs all possess official names describing the purpose and function EPA has asked them to serve:⁶²

1. Advisory Council on Clean Air Compliance Analysis
2. Children’s Health Protection Advisory Committee
3. Clean Air Act Advisory Committee
4. Clean Air Scientific Advisory Committee
5. Environmental Financial Advisory Board
6. Environmental Laboratory Advisory Board
7. EPA Board of Scientific Counselors
8. EPA Science Advisory Board
9. Farm, Ranch, and Rural Communities Advisory Committee
10. Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel
11. Good Neighbor Environmental Board
12. Governmental Advisory Committee to the United States Representative to the North American Commission for Environmental Cooperation
13. Great Lakes Advisory Board
14. Human Studies Review Board
15. Local Government Advisory Committee
16. National Advisory Committee to the United States Representative to the North American Commission for Environmental Cooperation
17. National Advisory Council for Environmental Policy and Technology
18. National Drinking Water Advisory Council
19. National Environmental Education Advisory Council
20. National Environmental Justice Advisory Council
21. Pesticide Program Dialogue Committee

⁵⁵ *Id.*

⁵⁶ 40 C.F.R. § 25.7(c).

⁵⁷ *Id.* at § 25.7(e).

⁵⁸ *Id.* at § 25.7(e)(2).

⁵⁹ *Id.* at § 25.7(e)(3).

⁶⁰ *Id.* at § 25.7(f).

⁶¹ <http://www.epa.gov/ocem/faca/facacomcontacts.htm>

⁶² *See id.*

As EPA has pointed out, the fact PLP was forced to make up names to describe the purported Bristol Bay FACs in its Complaint is telling.⁶³

The fact that these existing 21 advisory groups are identified on EPA's website as the entire universe of its FACs is another important consideration. Courts have recognized that an agency's view of whether a FAC exists is a key factor. The U.S. Supreme Court in *Public Citizen* "suggested that the fact that the Executive Branch did not consider the group in question ... an advisory committee militated against a finding that it was one."⁶⁴ The D.C. Circuit underscored that consideration when it determined that the government has a good deal of control over whether a group constitutes a FACA advisory committee: "[I]t is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch."⁶⁵ None of the alleged Bristol Bay FACs are included among EPA's listed FACs, and the agency's failure to acknowledge them weighs against a finding that they exist.

Moreover, as the discussion above illustrates, FACs generally exist on a long-term, standing basis to give the agency advice concerning a broad subject area, such as the implementation of a statutory program (e.g., Clean Air Act Advisory Committee)⁶⁶ or the implementation of an overarching policy goal (e.g., National Environmental Justice Advisory Council).⁶⁷ In contrast, the purported Bristol Bay FACs are alleged to exist on a temporary basis solely to advise EPA with respect to one site-specific scientific assessment and 404(c) determination in Bristol Bay, Alaska. If EPA's public participation and open dialogue efforts in connection with large-scale resource development projects were deemed sufficient to trigger

⁶³ Mem. in Supp. of Mot. to Dismiss at 20, *supra* (pointing out that FAC "names" are created by plaintiff to organize its 540 paragraph complaint).

⁶⁴ *Aluminum Co. of Am. v. Nat'l Marine Fisheries Serv.*, 92 F.3d 902, 905 (9th Cir. 1996) (citing *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 457-83 (1989)).

⁶⁵ *Aluminum Co. of Am.*, 92 F.3d at 905 (quoting *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993)).

⁶⁶ The Clean Air Act Advisory Committee is a "senior-level policy committee established in 1990 to advise the U.S. EPA on issues related to implementing the Clean Air Act Amendments of 1990." U.S. Env'tl. Prot. Agency, *Clean Air Act Advisory Committee*, available at <http://www.epa.gov/oar/caaac/>

⁶⁷ The National Environmental Justice Advisory Council is "a federal advisory committee to EPA ... established September 30, 1993" which "provides advice and recommendations about broad, cross-cutting issues related to environmental justice, from all stakeholders involved in the environmental justice dialogue." U.S. Env'tl. Prot. Agency, *National Environmental Justice Advisory Council*, available at <http://www.epa.gov/compliance/environmentaljustice/nejac/index.html>.

FACA, the number of FACs EPA manages would become enormous and unwieldy, contrary to the statutory purpose to reduce the number of FACs.

Furthermore, every one of EPA's 21 FACs are guided by a formally adopted committee charter outlining the committees' structure and function, such as their objectives, scope of activities, membership, reporting requirements, frequency of meetings, and other duties.⁶⁸ Pursuant to these charters, EPA FACs usually have a fixed number of committee members. For example, the Clean Air Scientific Advisory Committee contains seven members and a chairperson appointed by the EPA Administrator.⁶⁹ Similarly, the National Environmental Education Advisory Council has eleven members appointed by the EPA Administrator.⁷⁰ FACs also generally hold regular, structured meetings. The Farm, Ranch, and Rural Communities Federal Advisory Committee, for example, meets approximately two times a year,⁷¹ and the Environmental Laboratory Advisory Board meets approximately once a month by teleconference in addition to two times a year in person.⁷² None of these features are present with respect to the alleged Bristol Bay FACs.

Also important for the present litigation, existing FACs are controlled by the agency,⁷³ and each is tasked with generating reports and advice by consensus as a body, rather than as individuals. With respect to agency control, for instance, each of the 21 FACs is managed by a Designated Federal Officer ("DFO") employed by EPA,⁷⁴ and meetings "may not be conducted" in the absence of the DFO or her designee.⁷⁵

⁶⁸ See, e.g., http://www.epa.gov/ocem/faca/pdf/2011/2011_casac_renewal_charter.pdf; http://www.epa.gov/ofacmo/faca/pdf/2012/2012_nacept_charter_renewal.pdf; <http://www.epa.gov/elab/pdfs/renewal-charter-071511%202011.pdf>.

⁶⁹ See <http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/currentcharter?OpenDocument>.

⁷⁰ See <http://www2.epa.gov/education/national-environmental-education-advisory-council#charter>.

⁷¹ See <http://www.epa.gov/ofacmo/frrcc/about.htm>

⁷² See <http://www.epa.gov/elab/pdfs/renewal-charter-071511%202011.pdf>.

⁷³ "[A]n entity formed privately, rather than at the Federal Government's prompting ... an entity in receipt of no federal funds and not amenable to the strict management by agency officials ... cannot easily be said to have been 'utilized by a department or agency in the same manner as a Government-formed advisory committee.'" *Aluminum Co. of Am.*, 92 F.3d at 905 (quoting *Public Citizen*, 491 U.S. at 457–58).

⁷⁴ <http://www.epa.gov/ocem/faca/facacomcontacts.htm>

⁷⁵ FACA Essentials, http://www.epa.gov/ocem/faca/pdf/2014_0319_faca_essentials.pdf; 5 U.S.C. App. 2 § 10(e).

FACs typically submit written comments, recommendations, or reports to the EPA Administrator on behalf of the group. For instance, the Great Lakes Advisory Board recently submitted group comments from the Board to the EPA Administrator on the Draft Great Lakes Restoration Initiative Action Plan II,⁷⁶ and the National Drinking Water Advisory Council submitted a group letter to the EPA Administrator with recommendations relating to potential changes to EPA's Revised Lead and Copper Rule.⁷⁷ There are no such recommendations from the alleged de facto FACs to EPA. Each alleged "member" of the purported Bristol Bay FACs has independently submitted their own separate public comments and technical advice and recommendations to EPA throughout both the BBA and 404(c) processes. For example, while Amici Nunamta and BBNC are both supportive of final 404(c) action, comments to the agency differed in substance. Nunamta submitted a one-page letter of overall support, attached Resolution 2013-04 in support of the BBA findings, and urged EPA to immediately take further actions to protect Bristol Bay; whereas BBNC submitted more specific comments in support of EPA and the second BBA draft, including more than 100 pages of technical information on BBA topics such as habitat loss, compensatory mitigation, wastewater treatment, post-closure reclamation, subsistence impacts, and socioeconomic impacts.⁷⁸ The other groups and individuals PLP alleges are part of the "Anti-Mine Coalition FAC" submitted their own comments and technical information.⁷⁹

⁷⁶ <http://greatlakesrestoration.us/advisory/pdfs/20140710-board-summary-1.pdf>;

<http://greatlakesrestoration.us/advisory/pdfs/20140708-transmittalltr-1.pdf>

⁷⁷ <http://water.epa.gov/drink/ndwac/upload/ndwaclettertoepadec2011.pdf>

⁷⁸ Compare Nunamta Comments on BBA Draft 2 (May 28, 2013), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-4396>; with BBNC Comments on BBA Draft 2 (June 28, 2013), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5438>.

⁷⁹ Jeff Parker: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5615>; Trout Unlimited: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5527>; Bob Waldrop (on behalf of BBRSDA): <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-4317>; Rick Halford: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5576>; David Chambers (CSP2): <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5657>; The Nature Conservancy: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-4315>; Tim Troll: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5317>; Bristol Bay Native Association: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-3106>; The Wilderness Society: <http://www.regulations.gov/#!documentDetail;D=EPA->

In short, the collection of individuals and groups that PLP has dubbed FACs possess none of the characteristic features of FACs. PLP thus attempts to manufacture legal claims without any factual support and its claims should be dismissed.

II. PLAINTIFFS' FACA CLAIMS ARE MOOT AND MUST BE DISMISSED.

A. Legal Standards

A plaintiff's claim for relief must be dismissed under Fed. R. Civ. P. 12(b)(1) where there is a "lack of subject matter jurisdiction,"⁸⁰ such as where the court lacks constitutional authority to adjudicate the case.⁸¹ Federal courts "have no jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists" as required under Article III of the U.S. Constitution.⁸² The "district court is not restricted to the face of the pleadings" to resolve factual disputes when considering a 12(b)(1) motion to dismiss.⁸³ "If a factual attack on subject matter jurisdiction is made or factual disputes arise related to jurisdiction, 'no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'"⁸⁴

The factual assertions in this brief are supported by citations to readily available public information. Under Rule 201 of the Federal Rules of Evidence, this court may judicially notice a

[HQ-ORD-2013-0189-5486](http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-5486); Samuel Snyder (on behalf of Alaska Conservation Foundation): <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-6803>; Thomas Tilden: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-4314>; Luki Akelkok: <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2013-0189-0693>.

⁸⁰ FED. R. CIV. P. 12(b)(1).

⁸¹ FED. R. CIV. P. 12(h)(3).

⁸² *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (internal quotations omitted); see *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986 (9th Cir. 1999); *Nome Eskimo Community v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995) ("Mootness, like the related doctrine of standing, restricts judicial power to the decision of cases and controversies, so that our elected government retains the general power to establish social policy.") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992)); *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1094–95 (9th Cir. 2001); *Renne v. Geary*, 501 U.S. 312, 316 (1991) ("Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so."); see also *U.S. v. Ray*, 375 F.3d 980 (9th Cir. 2004).

⁸³ *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

⁸⁴ *Furie Operating Alaska, LCC v. U.S. Dep't Homeland Sec.*, No. 3:12–CV–00158 JWS, 2013 WL 1628639, at * 3 (D. Alaska Apr. 15, 2013). Alternatively, where defendants "bring a facial attack on subject matter jurisdiction, the court assumes the factual allegations in the plaintiff's complaint are true and draws all reasonable inferences in the plaintiff's favor," but "the court does not . . . accept the truth of legal conclusions cast in the form of factual allegations." *Id.*

fact that is not subject to reasonable dispute because it is either generally known or can be readily determined from sources whose accuracy cannot reasonably be questioned.⁸⁵ Matters of public record are generally subject to judicial notice.⁸⁶

B. Even Assuming a FACA Violation Occurred, PLP's Claims Are Moot Because Any Conceivable Harm Has Been Cured through Substantial Opportunities for Public Participation.

Mootness has been characterized as the “doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”⁸⁷ For purposes of both standing and mootness then, the requisite personal interest is defined as “injury in fact,” which must be “concrete and particularized and actual or imminent, not conjectural or hypothetical.”⁸⁸

The cognizable injuries associated with FACA violations should be considered in light of its statutory purposes. FACA’s two principal purposes are to “enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them.”⁸⁹ Since PLP is not directly affected by the level of government spending on advisory committees, its main concern is the public accountability of such committees. PLP alleges it has suffered injury due to procedural FACA violations occurring prior to and during the development of the BBA.⁹⁰ Although PLP’s allegations concerning FACA violations are chaotic and do not meet Rule 8 standards,⁹¹ even assuming any violations occurred and that PLP suffered “concrete and particularized” harm to its interests in the public accountability of EPA’s

⁸⁵ FED. R. EVID. 201(b).

⁸⁶ *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) (noting a court may take judicial notice of “matters of public record.”); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (“On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings.”).

⁸⁷ *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quoting *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980)). *Accord Foster v. Carson*, 347 F.3d 742 (9th Cir. 2003); *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999).

⁸⁸ *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (quoting *Lujan*, 504 U.S. at 560).

⁸⁹ *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. at 459.

⁹⁰ *See Compl., supra*; *see also Ctr. for Auto Safety v. Tiemann*, 414 F.Supp 215, 226 (D.D.C. 1976) (“[I]n claiming that agency action should be set aside for procedural irregularity under [FACA], it is plaintiffs’ burden to show that prejudice has resulted.”).

⁹¹ *See Mem. in Supp. of Mot. to Dismiss at 3, supra* (stating PLP “fails to demonstrate how the more than 200 exhibits on which it relies actually meet any element of a FACA claim”); *id.* at 40 n.18 (explaining Rule 8 deficiency).

purported advisory committees, any such harm has been overwhelmingly cured through the extensive opportunities EPA has provided for PLP and others to participate in the development of the BBA and in the 404(c) review process.⁹²

In a variety of contexts, federal courts have concluded that the availability of a subsequent opportunity for comment and for review can cure a FACA violation.⁹³ The Second Circuit has emphasized, for instance, that rulemaking procedures “afford ample opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal.”⁹⁴

Much like the BBA, the NEPA documents at issue in *Seattle Audubon Society v. Lyons* were “the result of a massive effort by the executive branch of the federal government to meet the legal and scientific needs of forest management,” and they reflected “unprecedented thoroughness in doing this complex and difficult job,” including dialogue between and among high-level government officials and “loggers, mill-owners, environmentalists, labor leaders, local government officials, scientists, economists, Native American tribal representatives, and others.”⁹⁵ As such, the court concluded that, notwithstanding technical FACA violations, because “the FEMAT report was circulated during the ninety-day public comment period and was subjected to public comments and criticisms,” the “procedures afford[ed] ample opportunity to correct infirmities.”⁹⁶

Similarly, in *Friends of Iwo Jima v. National Capital Planning Commission*, a decision regarding where to site an Air Force Memorial was “exhaustively debated by the agencies and commissions charged by Congress with this task,” and “any procedural errors [under FACA] are, when viewed against the backdrop of this extended process, plainly harmless.”⁹⁷

As detailed above, in Bristol Bay, EPA has conducted, and is still in the process of conducting, an exhaustive public process with extensive comments and technical information

⁹² See *supra* Section II.

⁹³ See, e.g., *Wash. Legal Found. v. Dep’t of Justice*, 691 F.Supp. 483, 495–96 (D.D.C.1988), *aff’d sub nom.*, *Pub. Citizen*, 491 U.S. at 459 (concluding that the public accountability aspects of FACA were satisfied by subsequent opportunity to question); *Idaho Farm Bureau Fed’n v. Babbitt*, 900 F.Supp. 1349, 1365–66 (D. Idaho 1995) (denying an injunction de-listing mollusks because there were multiple opportunities to participate in the process).

⁹⁴ *Nat’l Nutritional Foods Ass’n v. Califano*, 603 F.2d 327, 336 (2nd Cir. 1979).

⁹⁵ 871 F.Supp. 1291, 1303 (W.D. Wash. 1994), *aff’d sub nom. Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

⁹⁶ *Id.* at 1310 (quoting *Nat’l Nutritional Foods Ass’n*, 603 F.2d at 336 (alteration in original)).

⁹⁷ *Friends of Iwo Jima v. Nat’l Capital Planning Comm’n*, 176 F.3d 768, 776 (4th Cir. 1999).

submitted by PLP and other mining advocates at every stage. As in *Friends of Iwo Jima*, against this backdrop, any injury PLP could conceivably have suffered in connection with its FACA allegations has been fully cured by EPA's extensive and open public process.

Idaho Farm Bureau is also instructive. The record in that case was "replete with evidence" that a substantive report and proposed agency decision had been "subjected to public comments and criticisms, including those made by Plaintiffs before the report was issued," and Plaintiffs and their consultants had "participated extensively in the public hearings, the panel meeting, and by submitting written comments."⁹⁸ Consequently, the court concluded "that Plaintiffs were 'afford[ed] ample opportunity to correct infirmities'" and thus there was no significant harm.⁹⁹ In the same manner here, any and all FACA-related injuries alleged to have occurred have been subsumed by the tremendous opportunities for public participation that were provided by EPA and extensively utilized by PLP, the State of Alaska, and a full spectrum of other interests.

C. PLP's Claims Are Moot Because There Is No Effective Relief for PLP's Alleged Harm.

As briefed by EPA,¹⁰⁰ an action is also moot and must be dismissed where a court "cannot grant effective relief."¹⁰¹ The activities sought to be enjoined by PLP have already occurred, and the Court "cannot undo what has already been done."¹⁰² This renders the claim moot.¹⁰³ Here, the BBA has already been finalized and PLP has had, and will continue to have, myriad opportunities to present its views, comments, and technical information to EPA prior to the issuance of any final 404(c) determination. These opportunities render any prospective injunctive relief against EPA relating to alleged FACA infirmities in the development of the BBA meaningless.

Moreover, a request for declaratory relief "may not be used to secure judicial

⁹⁸ *Idaho Farm Bureau Fed'n v. Babbitt*, 900 F.Supp. 1349, 1366 (D. Idaho 1995).

⁹⁹ *Id.* (quoting *Seattle Audubon Soc'y*, 871 F.Supp. at 1310, and citing *Nat'l Nutritional Foods*, 603 F.2d at 327).

¹⁰⁰ Mem. in Supp. of Mot. to Dismiss at 42-43, *supra*.

¹⁰¹ *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999) (quoting *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999)).

¹⁰² *Foster v. Carson*, 347 F.3d at 746 (quoting *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002)).

¹⁰³ *Id.*

determination of moot questions.’”¹⁰⁴ “A case or controversy exists justifying declaratory relief only when ‘the challenged ... activity ... has not evaporated or disappeared.’”¹⁰⁵ Since the BBA has been finalized, the entire process of preparing it has ended and the alleged advisory committees that allegedly participated in the development of it no longer exist. Today, EPA is in the midst of a formal process relating to a possible 404(c) determination with multiple opportunities for public participation. PLP’s vague allegations of ongoing FACA violations occurring after the commencement of the 404(c) process in February 2014 lack any basis in fact and appear to be included solely to bring their moot claims into the scope of this Court’s jurisdiction.

III. A PRELIMINARY INJUNCTION WOULD HARM THE INTERESTS OF AMICI AND THE GENERAL PUBLIC.

Amici have been active participants throughout EPA’s BBA and 404(c) processes, a remarkable agency public process that elicited more than 1.7 million public comments from Alaska and across the nation. If the Court grants a preliminary injunction staying EPA’s ongoing 404(c) process, the interests of Amici and the general public will be harmed.¹⁰⁶

¹⁰⁴ *Cook Inlet Treaty Tribes*, 166 F.3d at 990 (quoting *Nome Eskimo Community*, 67 F.3d at 816).

¹⁰⁵ *Seven Words LLC*, 260 F.3d at 1098-99 (quoting *Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012, 1015 (9th Cir. 1989) (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974))).

¹⁰⁶ Just as PLP relies on evidence presented in *Pebble I* to support its harm assertion, Amici here incorporate and refer the Court to the arguments and evidence concerning their harms set forth in the *Pebble I* Motion for Leave to File Brief of Amici Curiae, as well as their Motions to Intervene and accompanying declarations and exhibits filed in, No. 3:14-cv-00097-HRH (D. Alaska), including the following documents: Nunamta Aulukestai’s Mot. for Leave to Intervene, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 10, 2014) (Dkt. 77); Applicant Intervenor-Def. Nunamta Aulukestai’s Mem. in Supp. of Mot. to Intervene, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 10, 2014) (Dkt. 79); Ex. A, Miscellaneous Land Use Permit A896118, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 10, 2014) (Dkt. 79-1); Ex. B, Pebble Mine Prospect—1998–2009 Drilling Data Map (D. Alaska July 10, 2014) (Dkt. 79-2); Ex. C, Letter from Sen. Lisa Murkowski to John Shively et al., *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 10, 2014) (Dkt. 79-3); Decl. of Kimberly Williams, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 10, 2014) (Dkt. 81); Exs. 1–3 to Decl. of Kimberly Williams, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 10, 2014) (Dkts. 81-1 to 81-3); Bristol Bay Native Corp.’s Mot. to Intervene, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 17, 2014) (Dkt. 109); Bristol Bay Native Corp.’s Mem. in Supp. of Mot. to Intervene, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 17, 2014) (Dkt. 110); Decl. of Daniel L. Cheyette in Supp. of Bristol Bay Native Corp.’s Mot. to Intervene, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 17, 2014) (Dkt. 111); Decl. of April Ferguson in Supp. of Bristol Bay Native Corp.’s Mot. to Intervene, *Pebble I*,

Throughout the BBA and 404(c) review processes, Amici have invested substantial time, money, and effort to ensure EPA is making its decision concerning appropriate 404(c) restrictions based on robust scientific data and after thorough consideration of how large-scale mining operations will affect Bristol Bay salmon and water resources and the local communities and industries that depend on them.¹⁰⁷ Indeed, some members of the Amici continue to engage in formal tribal consultation with EPA.¹⁰⁸

If PLP is allowed to proceed with its flawed FACA claims through discovery and trial, the resolution of the present litigation could take years, and a preliminary injunction would postpone the completion of EPA's 404(c) decision-making process until after the completion of the litigation. A preliminary injunction would thus compound the struggles of individuals, communities, and Tribes that are already under great stress from the threat that large-scale mining at the Pebble deposit poses to salmon resources and PLP's serial failed promises to enter a permitting process. For the past ten years, Amici and their members have been suffering social and cultural disruption as well as economic harm due to the looming threat that large-scale mining operations at the Pebble deposit will degrade and destroy Bristol Bay's extraordinary water and salmon resources.¹⁰⁹ Amici are concerned about the continuing delay and uncertainty

No. 3:14-cv-00097-HRH (D. Alaska July 17, 2014) (Dkt. 112); Exs. 1–13 to Decl. of April Ferguson, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 17, 2014) (Dkts. 112-1 to 112-13).

¹⁰⁷ See, e.g., Decl. of Joseph L. Chythlook at 4 ¶¶ 10–11, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska Aug. 18, 2014) (Dkt. 199) (“Over the past 5 years, we have strongly advocated for EPA to impose restrictions on mining the Pebble deposit in order to protect subsistence and commercial fisheries from the on-going threat posed by the Pebble Mine and to put an end to the perpetual uncertainty and strain suffered by the people of Bristol Bay. . . . I have spent 4 years of my life seeing this process through. On many occasions, I have testified before EPA and attended meetings and hearings on Pebble. . . . These efforts have come at considerable expense to me and my family, both in time and money.”).

¹⁰⁸ See EPA, Senior Managers Schedules, Meetings between Dennis McLerran, EPA Region 10, and Tribal Consultation Representatives (Aug. 11-15, 2014), *available at* http://yosemite.epa.gov/opa/admpress.nsf/Calendars_3?OpenView&RestrictToCategory=Dennis%20J.%20McLerran.%20Regional%20Administrator,%20US%20EPA%20Region%2010&count=10000.

¹⁰⁹

Subsistence in the Bristol Bay region is dependent foremost on the salmon. Subsistence is not only an economic necessity; subsistence has spiritual dimensions integral to the social wellbeing of the families and communities in the Bristol Bay region. Village life coalesces around the anticipation of the fish, fish return, work of harvest, joy of preparation, celebration and feasts, sharing with the elders and teaching the younger generation these essential survival skills.

about development of the Pebble Deposit and the potential impacts to subsistence resources.¹¹⁰ If EPA's 404(c) process is enjoined, these harms to Amici would only continue with no end in sight. The precedent set by a preliminary injunction in this case would also harm Amici by having a "chilling effect" on EPA's willingness to engage informally with Tribes and other interest groups when the 404(c) process resumes after the conclusion of the litigation.¹¹¹

More generally, a preliminary injunction could exacerbate "FOIA-phobia" among a broader array of federal agencies. This effect "arises when agencies choose not to interact with interest groups in ad hoc meetings out of confusion over what FOIA requires and a subsequent fear of being sued for violating the law."¹¹² Discouraging public involvement in administrative decision-making would undermine the open government policies discussed above,¹¹³ and it would undermine the scientific validity of EPA decisions by excluding participants who could otherwise contribute valuable substantial scientific information and help ensure that all relevant data are before the agency when making its decisions. In Bristol Bay, EPA has conducted an open dialogue and vigorous exchange of information with all interested parties in accordance with applicable open government policies, resulting in a robust scientific assessment and an extensive administrative record. These efforts exemplify the kind of open and effective decision-making for which federal agencies should be commended, not penalized.

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to grant EPA's Motion to Dismiss, and in the alternative, to deny PLP's motion for a preliminary injunction based on arguments raised by EPA in its opposition, as well as the harm such an injunction would cause to Amici and other members of the public by delaying EPA's 404(c) process.

Decl. of April Ferguson at 3-4, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 17, 2014) (Dkt. 112).

¹¹⁰ Decl. of Kimberly Williams, *Pebble I*, No. 3:14-cv-00097-HRH (D. Alaska July 10, 2014) (Dkt. 81); *see also* documents cited *supra* at n.106.

¹¹¹ *See generally* Rebecca J. Long & Thomas C. Beierle, The Federal Advisory Committee Act and Public Participation in Environmental Policy. Discussion Paper 99-17, Resources for the Future (Jan. 1999) available at <http://ageconsearch.umn.edu/bitstream/10817/1/dp990017.pdf> (accessed Oct. 30, 2014). *Cf. Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("[T]he right to petition extends to all departments of the Government.").

¹¹² *See* Long, at 11, *supra*.

¹¹³ *See* Section I at 3-4, *supra*.

Respectfully submitted this 12th day of November, 2014.

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CERTIFICATE OF SERVICE

I certify that on November 12, 2014, I caused a copy of MOTION FOR LEAVE TO FILE JOINT BRIEF OF AMICI and JOINT BRIEF OF AMICI IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case, all of whom are registered with the CM/ECF system.

/s/ Valerie L. Brown
Valerie L. Brown