

# RESOURCE review

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## State calls on EPA to halt Pebble review pending completion of permitting process

By Marleanna Hall

Shortly after February's release of its final Bristol Bay Assessment (BBA), the Environmental Protection Agency (EPA) announced it would initiate a determination process on whether or not Section 404(c) of the Clean Water Act should be used to preemptively veto the Pebble project.

Following this announcement was a 15-day comment period for the State of Alaska, as the land owner, and the Pebble Limited Partnership (Pebble), as the project proponent, and the U.S. Army Corps of Engineers (COE), as lead permitting agency, to demonstrate how the project will protect the sockeye salmon fishery in Bristol Bay.

In early March, Alaska's Attorney General Michael Geraghty wrote the EPA, noting the



In the lower right portion of this photo of the Pebble prospect, a small exploration drilling site is visible. The copper and gold prospect is located 200 miles southwest of Anchorage on state land set aside for its mineral potential.

agency's actions were premature, and urging it to allow the state a reasonable time to respond. The EPA has allowed an extension to the end of April for the state, Pebble, and COE to provide a response.

Geraghty has asked the EPA to halt its review actions "until permit applications for an actual mine project are submitted and thorough reviews by state and federal regulatory agencies are completed."

Governor Sean Parnell explained, "When a company applies for a state permit it kicks off a process. We're not even at that stage yet. However, the EPA is stepping in and saying we want to influence this before a public permitting process can begin."

During the Section 404(c) process, the EPA said it can decide that further review is not necessary, determine and set restrictions for the project, or halt the review and preemptively veto the entire project. Also during the review process, the COE cannot

issue a Section 404(c) permit for fill in wetlands or streams associated with mining the Pebble deposit. No mine permit has been applied for, so the COE would nonetheless not issue such a permit at this time.

However, one of RDC's concerns is the tone of the EPA announcement, which suggests the agency has already predetermined it will not allow Pebble to proceed, regardless of mine design, mitigation measures, and reclamation plans. Project proponents have yet to put forward a formal mine plan or file for a single project permit under the multi-year National Environmental Policy Act (NEPA) permitting process.

EPA Administrator Gina McCarthy referred to "extensive" scientific studies leading the EPA to its conclusion of the "Pebble Mine."

RDC continues to question the science used for the BBA, and purports the EPA  
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## From the Executive Director – Rick Rogers

# A call for bipartisan action to rein in EPA authority

**{ Senator Murkowski signed on to this bipartisan effort and Senator Begich should build upon it as a cosponsor and encourage his colleagues to do the same. Reaching out to senators from the list of 27 states that encouraged the Supreme Court to reconsider the legality of the EPA's retroactive permit veto authority would be a great place to start.”}**

In the U.S. Congress, opportunities for true bipartisan problem solving appear to be far too rare. Recent developments in federal Clean Water Act wetlands permitting have provided a unique opportunity for bipartisan reform, and our Alaska delegation should help lead the charge.

The federal Clean Water Act requires permits for dredge and fill of “jurisdictional wetlands.” Over half of Alaska lands are considered wetlands, with Alaska boasting more wetlands than the entire Lower 48 states combined. In Alaska, virtually any activity from building roads, schools, homes, churches, mines, oil and gas facilities, docks, and harbors require Clean Water Act permits, called “Section 404” permits. The U.S. Army Corps of Engineers issues these permits, but the Environmental Protection Agency (EPA) reserves the authority to determine specific wetland areas that are not suitable for disposal of fill.

Section 404 permits for major projects require a full Environmental Impact Statement (EIS), an exhaustive review of the direct, indirect, and cumulative impacts of the project. While cumbersome and time consuming, this thorough process has served to allow Alaska to move forward and develop the infrastructure and economy we have today. Lesser projects may require an Environmental Assessment.

The EPA, under the Obama administration, has turned decades of 404 permitting on its ear. In a case in West Virginia, it retroactively eliminated close to 90 percent of a coal mine’s fill disposal areas, which had been approved. In spite of efforts by RDC, 27 states (including Alaska), and a host of concerned stakeholders from home builders, manufacturers, and other job-creating industries, the U.S. Supreme court has refused to rehear a court case challenging the EPA’s ability to retroactively veto a valid 404 permit. So unless Congress steps in, permit holders now are at risk of having their lawful permits revoked at the whim of the EPA.

Here in Alaska the EPA is embarking on an unprecedented effort to condemn state mineral resources in the Bristol Bay region worth billions of dollars before a mine plan or permit application has even been filed. Irrespective of your views on Pebble, the EPA should not have the authority to preemptively condemn projects before they apply for permits, make their development and mitigation plans known, and conduct an EIS.

The EPA’s recent preemptive and retroactive approach to 404 puts a cloud of uncertainty on any project impacting wetlands. It will serve to discourage investment in Alaska, and could put a chilling effect on projects big and small, given the ubiquitous wetlands in Alaska and the need for 404 permits for most activities.

Fortunately, there is a bipartisan effort in Congress to restore the 404 program back to what the record shows was the original intent of Congress. In a simple three-page bill sponsored by Senators Manchin (D-WV) and Vitter (R-LA), the authority of EPA to restrict specified fill disposal areas is limited to the project stage where the 404 permit is evaluated, after a 404 permit has been applied for, and before a final permit is issued. The existing rules for enforcement and revocation for non-compliance would remain unchanged; the permits conditions would remain enforceable.

Senator Murkowski signed on to this bipartisan effort and Senator Begich should build upon it as a cosponsor and encourage his colleagues to do the same. Reaching out to senators from the list of 27 states that encouraged the Supreme Court to reconsider the legality of the EPA’s retroactive permit veto authority would be a great place to start. When a companion bill arrives in the House, we trust Congressman Young will join the effort to achieve consensus.

What a great opportunity for our congressional delegation to reach across the aisle to bring back some certainty to the 404 permitting process.

## Matthias to serve as Honorary Consul of Canada

RDC board member Karen Matthias has been officially recognized as Honorary Consul of Canada in Alaska.

Originally from Victoria, British Columbia, Matthias is an Anchorage-based consultant who provides advocacy and advice to clients in resource development and transportation.

A Canadian diplomat for 16 years, Matthias came to Anchorage in 2004 to open Canada’s first consulate in Alaska. During her five years

as the Canadian Consul, she worked with Alaskans to strengthen Canada-U.S. relations, specifically on Arctic issues.

Matthias will serve as Honorary Consul for a three-year term. Her appointment is an “Order in Council,” made by David Johnston, Canada’s Governor General. Matthias, now a U.S. citizen, is one of 15 Honorary Consuls in the U.S.



# Alaskans speak out against a preemptive veto of Pebble

(Continued from page 1)



did not use the best available science in development of the assessment, and that the engineering modeling in the BBA is seriously flawed and not based on realistic, modern standards, among other concerns.

Further, RDC is concerned the unprecedented nature of a preemptive veto could discourage investment and delay or even halt future projects altogether. Rural Alaska, where oftentimes economic opportunities are few or do not exist, should not be subject to this or any type of government overreach, RDC argued.

The premature initiation of the Section 404(c) process has caused sharp reactions by Alaska's congressional delegation.

U.S. Senator Lisa Murkowski discouraged use of the Section 404(c) process prior to mine permit application.

"I remain convinced that a preemptive veto of a mine or any other project, which the agency claims it can do under the Clean Water Act, would set a terrible precedent for development in our state and across the nation," said Murkowski. A preemptive veto of the Pebble project, before a permit has been applied for, is "outside the legal authority that Congress intended to provide EPA," Murkowski added.

U.S. Congressman Don Young expressed disapproval of the EPA's actions, calling the actions unwarranted.

"This expansive, jurisdictional power grab proposed by the EPA severely jeopardizes not only Alaska's sovereignty, but the rights of states and all private property owners nationwide," said Young.

U.S. Senator Mark Begich issued

an immediate release in response to the initiation of the Section 404(c) process, noting, "I am skeptical of federal overreach from an administration that has already demonstrated it does not understand Alaska's unique needs," adding that he will "be making sure the administration does not take any actions that could have unintended consequences down the road for this region or other development projects in Alaska."

However, Begich did not go as far as opposing a Section 404(c) veto, and has said that "any use of the 404(c) process must be as narrow as possible."

In a recent Anchorage Daily News editorial, a former President of Alyeska Pipeline Service Company, David Wight, explained, "No matter where you stand as Alaskans on Pebble – opposed, support or undecided – the EPA's decision to use the Clean Water Act to most likely prohibit the mine is a troubling, unnecessary intervention that skips its own fair, thorough process already in place."

He went on to explain, "Alaska has successfully developed natural resources for many tens of years in partnership with the EPA using the NEPA process... I am not aware of any major Alaska resource development that did not use NEPA until the EPA announced they would sidestep NEPA and use the Clean Water Act 404(c) process for Pebble."

In an opinion piece to the Bristol Bay Times, Lorene Anelon, President of Iliamna Natives Limited and Iliamna Development Corporation, said, "The people who are impacted the most are the local Village Corporations, hardworking Alaska families

and businesses that would benefit from this project. This is a vital project to this community as well as the State of Alaska for future prosperity."

In addition to efforts to halt the unwarranted Section 404(c) process, RDC has requested support from Alaska's congressional delegation for legislation to rein in EPA authority (see page 3), as well as an investigation by the EPA Inspector General (IG) of the EPA's actions surrounding the initiation of the BBA, and the process used to develop it. RDC has called on Murkowski, Begich, and Young to support a full investigation and a formal response by the IG prior to proceeding in the Section 404(c) process.

In a January request, Northern Dynasty Minerals Ltd. (NDM), the owner of the Pebble Limited Partnership, asked the IG to investigate the agency's watershed assessment, as well as other aspects pertaining to the process and the EPA's actions. The State of Alaska has made a similar request of the IG.

In its letter, RDC wrote, "NDM raises some serious issues regarding the credibility of the watershed assessment, and whether it is in fact a science-based document, or merely a means for the agency to rationalize its preconceived conclusions. Because the assessment may underpin the EPA's conclusions with respect to an anticipated preemptive 404(c) determination, it is imperative that the irregularities raised by NDM be impartially investigated so the public and congress can gauge the document's credibility."



# Are charges from critics of oil tax reform true?

**{ "Now we are seeing new activity, and the revenue department is measuring new production, at least over what was estimated. There are still no guarantees. But things do appear to be happening, and that's good."**

The new Alaska oil production tax is often criticized as a “giveaway” to industry. Critics say there are no guarantees of performance in return for tax breaks.

Are the charges true? Like anything else, it all depends.

We now know, for example, that at current oil prices the new tax will bring in about the same amount of revenue next year as the former tax, known as ACES. In fact, the new tax brings in a bit more money. This comparison can shift back and forth, the Department of Revenue says, depending on oil price changes and other factors, but there doesn't seem to be a huge giveaway.

A closer examination of the criticism is merited, however. Critics who are informed, for example, single out a per-barrel tax credit that companies receive for oil produced in the large, existing fields as a giveaway.

In my last column I wrote about the sharp disagreements that developed in the Legislature in 2013 over tax reductions for “new oil,” meaning oil from undeveloped new fields (or new deposits within existing fields,) and “old oil,” which comes from the producing, large “legacy” reservoirs. The debate got complicated because there is actually a lot of new oil that can be squeezed from older producing reservoirs.

When politicians try to sort out politically sensitive issues like this, the solution is generally complicated, and this is no exception.

In Senate Bill 21, the Legislature devised a two-tiered set of tax incentives, one that is more generous for new oil, from new deposits; and another for old oil, from the legacy fields. Both offer per-barrel tax credits but in differing amounts. New oil also got an additional 20 percent tax reduction, called the “Gross Value Exception,” that old oil did not get.

The “old oil” per-barrel tax credit is on a sliding scale linked to prices, and it works out to about \$6 per barrel at current oil prices.

Unlike the tax credits for new oil, where

companies have to produce measurable new barrels to get them, the critics argue that industry doesn't have to really do anything to get the old oil tax credit. That's the giveaway, they say. Actually, the companies do a lot to keep those old fields producing, and they do seem to be doing a lot more now.

But giving critics their point, how can we measure performance for the old oil tax reduction? Realistically, the only way is to do it is just watch what the companies do, and how much oil they produce. If the producers are bending the curve, slowing the decline of the old fields, we will know something is happening.

We do know activity levels in the older fields are up sharply – more rigs are working and more “workovers” of old wells are being done, and the companies say it's due to the tax change. We also have some encouraging word from the Department of Revenue that so far this year – the first six months of the fiscal year – production on the North Slope is running above expectations.

This additional production, which helps offset the decline, consists of barrels that will be likely be classed as old oil not eligible for the generous new-oil tax breaks because of the technical difficulties of metering the oil to qualify as new under the state tax law.

Let's not confuse this, however, with the companies' recent announcements of projects to develop truly new oil from new deposits. It will take a while for this to show up in the pipeline, but so far I count \$6 billion in projects announced since SB 21 passed in 2013. These will produce about 30,000 barrels a day of new oil beginning in 2018 and another 30,000 barrels a day beginning in 2022, the companies say.

This will bend the curve a bit, but is the new activity enough to stop the decline, or reverse it? It might be, if enough drill rigs get busy, but I believe we have to be realistic and count ourselves lucky just to stop the decline.

Which brings me to one more thing.

I hear my Democrat friends (and I'm a Democrat) in the Legislature scolding Gov. Sean Parnell for promising, with the passage of SB 21, to restore production to a million barrels a day. They cite the Department of Revenue's official production forecast that shows a continued long-term decline.

Two things about this: First, the revenue department's production forecast is very conservative. It doesn't include many new discoveries. Anyone familiar with forecasting knows accuracy wanes with time. It's useful only as a baseline, what we have if nothing else happens.

But second, Parnell promised no such thing. I remember the governor making a speech in March 2011 in which he set a goal that in 10 years, with enough effort and money, we might see a million barrels a day again (North Slope production was once two million barrels a day).

Parnell was giving us something to shoot for. It was not a promise.

When President Kennedy announced the moon mission in 1961 he set a goal for a lunar landing in 1969 to inspire us. It wasn't a promise. We actually did it, of course, which shows the power of setting lofty goals.

I followed SB 21 closely as it wound its way through the Legislature and I do not recall any statements by the administration, or the industry, that the bill would increase production. There were statements that it was likely to spur activity, which would likely increase production, I recall, but no promises.

Now we are seeing new activity, and the revenue department is measuring new production, at least over what was estimated. There are still no guarantees. But things do appear to be happening, and that's good.

Tim Bradner is a reporter for the Alaska Journal of Commerce and co-editor of the Alaska Legislative Digest. This column appeared last month in the Anchorage Daily News.



# Understanding Alaska's lawsuit over ANWR

On March 14th Governor Sean Parnell announced that the State of Alaska had filed a lawsuit against the U.S. Department of Interior (DOI) over the state's request to conduct a three-dimensional (3D) seismic survey of the "1002" Coastal Plain area of Arctic National Wildlife Refuge (ANWR). The state in May and again in August requested to conduct a winter 3D study of the 1002 area from the DOI. These requests were rejected by Interior Secretary Sally Jewell and the U.S. Fish and Wildlife Service (FWS) Regional Director Geoffrey Haskett.

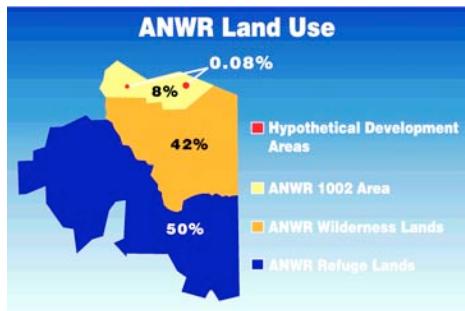
The crux of the lawsuit involves the debate over the existence, or not, of a timeline for study of oil and gas resources in the 1002 area. The state contends the Alaska National Interest Lands Conservation Act (ANILCA), which set up modern ANWR and the decision-making process on management, has no timeline for end of studies, and that any entity should be allowed to apply and be accepted to update seismic data in the region. Any updated data would aid Congress in completing its self imposed mandate to decide for or against oil and gas exploration in the 1002 area.

DOI and FWS maintain ANILCA indeed had a timeline and that expired with the submission of its final Environmental Impact Statement (EIS) report on the 1002 area to Congress in 1987. That report stated roughly that Congress should go ahead with exploration leasing of the 1002 and that environmental impact would be minimal and could be mitigated. That recommendation still stands today.

Both entities acknowledge Congress' ultimate authority for which the House has voted 12 times to open for leasing and the Senate three times to lease. In 1995, both bodies voted in favor, yet the bill was vetoed by President Bill Clinton. To date the 1002 issue remains the most legislated energy issue in U.S. history, continually generating nearly 20 bills per Congress.

### "Why wouldn't you want to know?"

The state maintains that its actions are based on the requirements in its Constitution and indeed, one can say, in the Congressional demands for statehood; that Alaska use its natural resources to provide for its people.



The state maintains this is a legal right and that this right is being potentially violated by the Secretary's refusal to permit seismic study. A 3D seismic study would merely improve on the 1983-84 2D seismic work conducted for the 1987 ANILCA report, and not violate any laws on impact. The ANILCA EIS indeed is now 27 years old and the data even older, making it difficult for anyone to realistically argue with it in modern times. This, however, is exactly what Congress does every year during 1002 debates.

The state maintains that nowhere in ANILCA is there any written end date for study, and continued updates to data is implied and should be expected. New seismic results could show less or more than the U.S. Geological Survey has gathered out of previous shoots. The detail required of the five years of ANILCA study in the 1980s prove Congress' desire for the best data possible. As Alaska's former Department of Natural Resources Commissioner Dan Sullivan put it, "why wouldn't you want to know?"

DOI, however, thinks otherwise and based its premise on a 2001 opinion by its legal staff, written for then Representative Ed Markey (D-MA). In the opinion, DOI's legal team agrees that nowhere is it expressly written in ANILCA of an end date, but instead looks to the Senate Energy Committee debate on ANILCA and concludes that debate comments point to a conclusion of study after five years – ending in the 1987 EIS. They argue that nowhere does it say exploration studies could continue beyond the submission of the '87 EIS.

### The CCP

To add to the mix of the lawsuit and discussion of updated studies and jurisdiction,

the FWS Comprehensive Conservation Plan (CCP) on ANWR is currently being finalized. The CCP does not hold the force of law, yet will set ANWR management practices and precedent in future development debate.

The last CCP on ANWR in 1988 recommended development of the 1002 area as outlined in the 1987 EIS and said any environmental impact could be mitigated. The current CCP, however, does not even consider oil and gas exploration, but rather only promotes additional Wilderness designations which would prevent any development at all. This is a direct violation of the National Environmental Policy Act (NEPA), which states all land uses must be considered when declaring or studying for declaration of Wilderness. Ironically, the 1002 was defined by Congress as an area set aside specifically for "the study for oil and gas exploration," a point completely ignored by the CCP.

### The Irony and the Agenda

The irony of the entire 3D seismic refusal and CCP study is extreme. With the 3D case, the Secretary is saying Congress does not need updated geologic data, undeniably paramount to any development decision Congress could make. At the same time Secretary Jewell is saying an environmental update that deliberately does not have consideration for development, is important and necessary to decide the fate of the 1002.

When the DOI study benefits Wilderness designation, it is permitted and defended. When a data update benefits a development decision, it is denied. Americans should not be surprised by this double standard as Secretary Jewell boldly stated, "this administration remains opposed to drilling the refuge and I support that position."

When clear political agenda breaks the law, as it does with both ANILCA and NEPA in these cases, it is time for the state to stand up for its rights.

The case will be held in U.S. District Court in Anchorage.

Adrian Herrera is Executive Director of Arctic Power.



# Succeeding in today's litigious regulatory landscape

Alaska's abundant and varied natural resources have no equivalent in any of the other 49 states. This wealth of resources has been, is currently, and will continue to be the fuel that powers Alaska's economy. This same wealth of resources provides a platform for the initiatives of non-governmental organizations (NGOs) that have devoted special attention to Alaska.

These NGOs vary widely in their goals, the strategies they pursue, and their geographic footprints. However, Alaska has arguably received increased attention from large, well-funded NGOs that are headquartered in other states or in other countries.

From a business perspective, Alaska presents the ideal opportunity for these NGOs to create rousing initiatives capable of grabbing the national or international spotlight and the attendant lucrative stream of contributions. These NGOs are sophisticated, nimble, and strategic. They have smart lawyers and creative campaigners.

Looking ahead, the successful resource-based businesses and industries in Alaska will be those that recognize NGO initiatives are inevitably intertwined with the regulatory process and plan in a similarly strategic and proactive manner.

Federal environmental laws enacted in the late 1960s and early 1970s, such as the Endangered Species Act (ESA), the National Environmental Policy Act, the Marine Mammal Protection Act, and the Clean Water Act, frame the playing field on which many NGOs like to compete. In Alaska, NGOs primarily use these laws in two ways.

First, federal environmental statutes provide the basis for NGO challenges to agency regulations, permits, and other authorizations. Savvy NGO lawyers are adept at finding the weak spots in agency decisions and making them the focus of aggressive lawsuits.

Second, NGOs have increasingly used federal environmental laws to proactively change the regulatory baseline to make it more difficult for future projects to succeed. A common example is the petitioning of new species listings under the ESA and subsequent

litigation to push federal agencies through the listing, critical habitat designation, and recovery planning processes. The existence of ESA-listed species and designated critical habitat in the area of a proposed project unquestionably adds a layer of complexity to the permitting process and provides a foundation for future legal challenges by NGOs. Making regulatory processes more complicated is a key long-term strategy used by NGOs to create advantages for future lawsuits.

For projects or industries that receive extra scrutiny from NGOs, the regulatory and litigation complexities are often layered with aggressive public campaigns, creative use of the media, extensive political lobbying, and even violations of the law designed to cause delay or attract attention (or both). All of these potential obstacles require strategic and thoughtful planning. Although each big project requires a custom approach and there is no universal golden ticket to success, the following presents some starting points for building an effective regulatory strategy.

1. Work within the system and push when appropriate. Except in rare circumstances, there is usually little to gain by trying to change the regulatory framework to fit a specific project. The better approach is to understand the existing process well and navigate it efficiently, partner with agencies, and be selectively aggressive when some "push" is needed in the permitting process. Fixes to ineffective or unworkable regulations are best accomplished through thoughtful long-term strategies undertaken by coalitions or industry trade groups, not on a project-by-project basis.

2. Build coalitions with local communities, industry groups, government entities, and/or private companies. This is particularly useful for regulatory decisions with broad-ranging effects or for large, controversial projects. For example, a coalition of state and local governments, Alaska Native groups, and industry was successful in challenging the polar bear critical habitat designation, which was the largest designation in the history of the ESA. Similarly, a diverse base of informed support for a specific project can help to neutralize the "controversy" generated by

NGOs and make for a smoother permitting process.

3. Promote and develop good science. Resource-based projects often occur in remote areas that have a relatively undeveloped scientific baseline. Scientific uncertainty can plague the regulatory process because federal agencies will usually act with extreme caution in the face of uncertainty. Solid scientific information almost always shows that the default worst-case-scenario arguments of NGOs and presumptions of resource agencies are unwarranted.

4. Defend permits and reasonable regulations. The federal Department of Justice (DOJ) has very capable attorneys that generally do a good job of defending the decisions of federal agencies. However, a project proponent can add value by intervening to defend against NGO legal challenges by providing context that the DOJ may not provide and by advancing defenses that the government may not assert.

5. Take the fight to the NGOs. In exceptional circumstances, there may be good reason to proactively seek declaratory or injunctive relief from a court before NGO challenges are filed. This can be effective when there is a historical pattern of NGO challenges to certain activities or indications that an NGO may take other actions to block or impede activities.

Finally, it's easy to get caught up in thinking that Alaska is just becoming an increasingly difficult place to get projects permitted. However, the reality is that the regulatory environment is not going to drastically change any time soon and NGO initiatives are not going away (for Alaska and other parts of the country). For project proponents with a detailed understanding of the regulatory landscape that approach their projects in an adaptive, strategic, and proactive way (not unlike the NGOs that will be opposing them), there is still plenty of room for success.

Ryan Steen is a partner at the law firm Stoel Rives LLP. He was a featured speaker at RDC's Alaska Resources Conference in November.

# Tourism in Alaska to see growth this year

By Marleanna Hall

The Alaska visitor industry will continue to grow in 2014, according to recent forecasts.

A partnership between the State of Alaska and the visitor industry sponsored an Alaska booth at the annual Cruise Shipping Miami (CSM) convention in March. The “North to Alaska” booth once again drew interest from all over the world at this international event.

Over this year’s cruise season, some 28 cruise ships will bring nearly one million visitors to Alaska, reported the Cruise Lines International Association – Alaska (CLIA), formerly Alaska Cruise Association.

This positive outlook is in part thanks to the improvements in state cruise ship taxes in 2010 legislation. These improvements were necessary to be competitive in the global cruising market.

A CSM panel reported Alaska accounts for less than five percent of the global cruise itineraries, further confirming the importance of Alaska’s continued participation.

Alaska Tourism Industry Association’s President & CEO Sarah Leonard has expressed a positive perspective about the



The historic Kennecott copper mine near McCarthy in Wrangell St. Elias National Park is a popular tourism attraction.

2014 visitor outlook, “Tourism in Alaska may see more visitors in the summer months, adding positive economic benefits to our economy year round.”

Additionally, a new report by the McDowell Group on the economic contribution of tourism to Alaska’s economy found that the industry accounts for \$3.9 billion annually, as well as 46,000 jobs during the peak summer season.

The news couldn’t come at a better

time, explained Commissioner Susan Bell. “Decisions are being made right now about tourism marketing funding and investments in related infrastructure,” Bell said.

The report also highlighted revenues of \$179 million to state and municipal governments. The report was prepared for the Alaska Department of Commerce, Community, and Economic Development and can be found at [akrdc.org/tourism](http://akrdc.org/tourism).

## ‘No jeopardy’ to Steller sea lions, according to NMFS

By Kati Capozzi

A new biological opinion (BiOp) released by the National Marine Fisheries Service (NMFS) has cleared the way for regulatory changes in the western Aleutian Islands, where heavy restrictions on commercial fishing were put in place in 2011 to protect Steller sea lions.

The 281-page BiOp found that changes proposed by the North Pacific Fishery Management Council to the current fishing restrictions are not likely to jeopardize the endangered western population of Steller sea lions or negatively affect their critical habitat.

The agency’s previous BiOp, released in 2010, came under intense scrutiny by various fishing groups, the State of Alaska, NMFS’ own Center for Independent Experts, and many industry support groups, including RDC, arguing that NMFS failed to follow correct procedures and lacked scientific support to validate the restrictions when they were handed down.

The new biological opinion was developed based on the best available scientific information and notes that considerable changes have occurred in the Aleutian Islands fisheries, coupled with new data and analyses that help give the agency a better picture of the potential



for commercial fisheries to compete with sea lions for Pacific cod, Atka mackerel, and pollock.

“We don’t have any direct scientific evidence that fisheries are causing nutritional stress in Steller sea lions,” according to NMFS fishery management specialist Brenda Gerke, who helped author the new BiOp. “NMFS is still recommending that the fishery be dispersed over a greater amount of time,” Gerke says. “So not going in and catching fish in a very concentrated fashion.”

It is estimated that the proposed fishery management changes would relieve roughly two-thirds of the economic burden imposed on Aleutian Islands’ fishermen by sea lion protection measures. New regulations could be in place as early as January 2015.

“We are grateful that NOAA Fisheries has taken a new updated view of their 2010 decision,” said Thomas Mack, RDC board member and President of Aleut Corporation.

“This means increased fishing opportunities especially in Adak and other areas of the Aleutians. I also thank the North Pacific Fishery Management Council for their continuous determination to bring fishing back to the Western Aleutians.”

# Proposed rule would extend federal reach

By Carl Portman

The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers jointly released a controversial proposed rule last month which would bring nearly all U.S. rivers and streams, as well as most wetlands near them, under the jurisdiction of the Clean Water Act (CWA).

Western lawmakers, governors, business groups, and industry associations charged that the proposed rule is a prime example of federal overreach. The agencies claim the rule is aimed at clarifying which waters receive protections under the CWA following two Supreme Court decisions.

Federal regulators and environmental groups insist that headwater streams need protection because they serve to protect fish habitat and are interconnected to nearby wetlands. Those streams end up flowing into larger rivers downstream.

Western states, congressional Republicans, and industries have blasted the proposal as the largest federal power grab ever, arguing it will produce more uncertainty, muddle permitting for construction, mining, farming, home building, and other activities, and lead to more litigation.

"At first blush, this appears to be an unprecedented expansion of federal jurisdiction over waters not covered by the Clean Water Act," said RDC Board member Dr. Edmond Packee, Jr., a senior scientist with Travis/Peterson Environmental Consulting, Inc. "A list of what is excluded helps to understand the true scope of the proposed changes," Packee added. "Proposed changes are intended to reassert jurisdiction over areas where the courts have curtailed it since 2001. EPA clearly intends to make the changes without legislation or Congress."

While the agencies claim that the proposed rule is intended to clarify the CWA's reach after years of confusion and uncertainty, the sweeping coverage afforded by the proposed rule, if finalized, would represent a significant expansion of federal jurisdiction. The agencies will accept public comments on the proposed rule for 90 days.

According to an update from the law firm Perkins Coie, the proposed rule would assert CWA jurisdiction over most seasonal and rain-dependent streams and nearby wetlands. The firm said that other types of waters with a more uncertain connection with downstream waters would be evaluated through a case-specific analysis of whether the connection is significant or not. Perkins Coie said the agencies are seeking comment on options to protect

similarly situated waters in certain geographic areas and on adding to the categories of waters that would be protected without the need for a case-specific analysis. The proposed rule would preserve the existing exemptions and exclusions under the CWA for agricultural activities.

The agencies claim that the proposed rule does not cover new types of waters that have not historically been covered under the CWA. "But it is clear that the proposed rule would broadly interpret the 'significant nexus' test used by Justice Kennedy in his concurring opinion in *Rapanos v. United States*," Perkins Coie noted. "Under that test, CWA jurisdiction extends to streams and wetlands only when there is a 'significant nexus' to a navigable water, interstate water or the territorial seas."

The agencies claim that the proposed rule's broad application of the significant nexus test is supported by the latest peer-reviewed science, including EPA's draft report on connectivity of streams and wetlands to downstream waters. The draft, which was published in September, is intended to provide the scientific basis for the proposed rule.

Although the proposed rule will not be finalized until the final version of the report is complete, many have advocated that no proposed rulemaking should go forward until the public comments on the draft report have been analyzed and the EPA Science Advisory Board has completed its review of the draft report.

The proposed rule's greatest impact would likely be in western states.

"Expansion of the significant nexus test will include more mining and forestry activities within the scope of the CWA, subject water management operations to greater regulation, and increase the federal permitting requirements for development projects," Perkins Coie warned.

U.S. Senator Lisa Murkowski slammed the proposed rule. "While I certainly agree that the federal regulatory process needs greater efficiency and certainty, it appears unlikely that this new rule will help meet either of those goals," Murkowski said. "Instead, it appears that the EPA is seeking to dramatically expand its jurisdictional reach under the Clean Water Act. If allowed to stand, this could result in serious collateral damage to our economy, for a wide range of states, and for a wide range of individuals – including our nation's sportsmen."

## New guidelines to address disturbance to harbor seals

By Marleanna Hall

The National Marine Fisheries Service (NMFS) announced in late March that it will not propose new regulations for the Alaska harbor seal. Instead, it plans to "adopt new voluntary guidelines" and to provide information about reducing disturbance occurrences.

RDC applauds this announcement, as the Alaska harbor seal is already protected under the Marine Mammal Protection Act (MMPA), and further protections are unnecessary.

The MMPA protects the harbor seal from harassment, including

protection from impact to the seal's migration, breathing, nursing, breeding, feeding, or sheltering.

In a 2013 letter, RDC wrote, "Any additional measures to protect harbor seals from the effects of vessel activity in glacial habitats will likely impact the visitor industry, with little to no added benefit to the harbor seal."

NMFS went on to further say it would work with vessel operators to develop and implement the voluntary guidelines, while continuing to protect harbor seal habitat.



## From the President – Phil Cochrane

# King Cove road decision is upsetting

The recent decision on the King Cove road has got me upset.

In case you missed it, the people of King Cove have been asking for a road from their community to the all-weather Cold Bay Airport for decades. The problem is that the Izembek National Wildlife Refuge lies between. To the people in this community, it is a matter of life and death when trying to get to the Cold Bay airport in bad weather. It's so important to the community that it and the state are willing to exchange 56,000 acres for the 206 acres needed for the road.

But the Obama Administration said no.

In announcing her decision on the matter, Secretary of the Interior Sally Jewel said, "After careful consideration, I support the Service's conclusion that building a road through the Refuge would cause irreversible damage not only to the Refuge itself, but to the wildlife that depend on it. Izembek is an extraordinary place..."

I have met Secretary Jewel and she seems like a nice enough person. And there is no doubt that this is a remarkable piece of land with remarkable wildlife. However, she is simply wrong on this one. Nothing can be extraordinary enough that we put it ahead of the lives of nearly a thousand people.

When I was in grade school, we did an exercise called "Lifeboat" – something the psychologists call a lesson in "values clarification." The premise was simple, you were one of 10 people on a boat that was sinking and the lifeboat only had space for six. It was up to you to determine which four people got thrown overboard. Although we were told there was no right or wrong decisions, the goal was to force you to confront your values and understand your moral compass.

I had déjà vu when I read the news release on the King Cove decision. It is an example of values clarification. The Department of Interior has put 0.07% of the refuge land in the lifeboat and thrown the 950 souls of King Cove overboard. When you read the congratulatory statements from eNGOs, you'll see they support the decision because they 'recognize the incredible value of this remote wilderness.' Of course, there is no mention of people. Why aren't we recognizing the incredible value of human life?

{ "I have met Secretary Jewel and she seems like a nice enough person. And there is no doubt that this is a remarkable piece of land with remarkable wildlife. However, she is simply wrong on this one. Nothing can be extraordinary enough that we put it ahead of the lives of nearly a thousand people."

I suppose none of this should surprise us. This is the result of years of efforts by eNGOs to fight against development – regardless of the impact on people. In fact, Kieran Suckling, a founder of the Center for Biological Diversity described the aggressive tactics to get the government to submit to its will:

"New injunctions, new species listings and new bad press take a terrible toll on agency morale. When we stop the same timber sale three or four times running, the timber planners want to tear their hair out. They feel like their careers are being mocked and destroyed – and they are. So they become much more willing to play by our rules and at least get something done. Psychological warfare is a very under-appreciated aspect of environmental campaigning."

The King Cove road decision is the latest victim of a psychological war being waged around us. Yes, we must be good stewards of our planet, but our values need to be clear and unambiguous. Otherwise, if we are not careful, we will lose the psychological war and our moral compass and forget that human life is precious and needs to be protected.

I am sure someone will read this and accuse me of not caring about the environment. The truth is I do care deeply about habitat and the wildlife that rely on it, but not at the expense of human life.

My values are clear.

## Feds considering listing Southeast Alaska wolf under ESA

By Kati Capozzi

The U.S. Fish and Wildlife Service (FWS) says it will consider the possible protection of Southeast Alaska's Archipelago wolf, found on Prince of Whales Island, under the Endangered Species Act.

The decision to review the status of the wolf comes two years after the Center for Biological Diversity and Greenpeace submitted a petition to protect the species.

Doug Vincent-Lang, director for the Alaska Department of Fish and Game's Division of Wildlife Conservation, said the state has sustainably managed wolves in the region. "We're confident that any potential conservation concerns can be adequately addressed through existing mechanisms, including state regulatory mechanisms that are out there. Given that we don't believe that wolves in Alaska are at risk

now or threatened with the risk of extinction in the foreseeable future and as such we don't believe that there's a justification for a 90-day positive finding for wolves in Southeast Alaska and we're disappointed with the service's decision."

Steve Brockmann, Southeast Alaska coordinator for the FWS Service, said the status review will look at the best available information on wolf populations. "Honestly the Fish and Wildlife Service would prefer to leave management of the wolf with the State of Alaska where it belongs. We do have a responsibility to list it if it needs to be listed. We intend to work with our partners with the state and the Forest Service to make sure we don't have to do that when the time comes."

The finding kicks off a 60-day public comment period, ending May 30th. RDC will post its comments online at [akrdc.org](http://akrdc.org).



# Industry digest

## Slope investment to drive 2014 construction

A new report by the University of Alaska Institute of Social and Economic Research (ISER) projects overall construction activity will rise 18 percent in Alaska this year, driven primarily by a surge in oil industry activity across the North Slope.

"It's pretty amazing," said RDC Board member John MacKinnon, Executive Director of the Associated General Contractors. "I think we can attribute most of that to SB 21, the oil tax reform bill passed by the Legislature last year."

The report noted "the biggest sector, and the one projected to increase the most this year, is oil and gas. We expect that, if actual spending matches the announced plans and past experience in the industry, spending will be up 33 percent from \$3.2 billion last year."

The report added, "the growth is being driven by the continuing high price of oil, the increase in the cost of inputs to all phases of oil and gas operations, the growing need to maintain the aging infrastructure and facilities on the North Slope and in Cook Inlet and, perhaps the most important, by the climate of optimism created by the passage of the new production tax on oil and gas that went into effect at the start of 2014."

## North Slope production rallies

A sharp uptick in activity by North Slope producers has resulted in more oil flowing down the Alaska pipeline than state analysts predicted in their fall forecast last December.

Production through January averaged 526,000 barrels per day compared to the forecast of 508,000 barrels per day for the fiscal year beginning July 1st and ending June 30, 2014. In December, production reached 569,000 barrels per day and 562,500 barrels per day in January. If the average for the remainder of the fiscal year is sustained at 526,000 b/d, the decline rate between FY 2013 and FY 2014 will fall to only one percent – compared to a forecasted decline of 4.4 percent in December. That is well above the North Slope's long-term rate of decline of six percent.

Energy reporter and columnist Tim Bradner noted that some of the increased production is a result of activity planned before the passage of oil tax reform legislation last year, but also from an uptick in activity that stems from the tax change. Bradner reported there is a 30 percent increase in the drilling of new wells in the producing fields.

"There are no guarantees of new production, but there is already new activity and new production being documented by the state. It seems to be working," Bradner said.

"The new production we're seeing on the Slope represents the producers' faith that Alaskans will vote to keep the new tax law intact," Bradner added.

## Court rules in favor of Tongass exemption

The 9th Circuit Court of Appeals reversed the District's Court's 2011 decision that invalidated the Tongass National Forest exemption from the 2001 Roadless Rule.

The panel held that the U.S. Department of Agriculture gave valid reasons for exempting the Tongass, including the changes in economic predictions and the high socioeconomic costs in Alaska. The panel concluded that the government's reasoning in reaching its decision were neither arbitrary nor capricious. The panel remanded the case to the district court to determine whether a supplemental environmental

impact statement is required under the National Environmental Policy Act.

"This is a huge victory for Alaska and their families who depend on economic development in the Tongass," said Governor Sean Parnell. "Although the rule has already done irreparable harm to the timber industry and small communities in Southeast Alaska, this win will allow Alaskans to start building the industry back up."

## RDC supports working forest concept

In comments to the Alaska Division of Forestry, RDC said the new Southeast Alaska State Forest should be managed as a working forest to furnish a continuous supply of timber to the forest products industry.

A working forest is one that recognizes the human component of our forest, incentivizes workforce development and local jobs, while providing opportunities to enhance wildlife habitat, recreation, and subsistence activities.

RDC was a strong supporter of the legislation creating the Southeast State Forest in 2010. Currently, RDC is supporting a bill which would create the Susitna State Forest.

A major goal of RDC is to build a more diverse and vibrant economy in Southeast Alaska through the restoration of a fully integrated forest products industry.

The Tongass National Forest is well known for its timber resource base, but the vast majority is closed to active forest management. Overall, less than six percent of Southeast Alaska is open to logging.

RDC explained in its comments that an adequate long-term supply of economic timber is essential if the forest industry is to play a major role in rebuilding the region's economy.

The majority of the timber is on federal land, but federal timber sales have declined sharply. Subsequently, the demand for state timber from local mills has increased significantly. While the Southeast State Forest does not have the timber base to fully support the industry, it can provide a stable supply of timber to local mills and supplement declining timber harvests from the Tongass. It can also provide relief to the industry while it waits for increasing second-growth harvests from the national forest in coming decades.

## RDC defends Mooses Tooth project in NPR-A

At a public hearing last month in Anchorage, RDC urged the U.S. Bureau of Land Management (BLM) to move forward with the Greater Mooses Tooth (GMT) project in the National Petroleum Reserve-Alaska.

The GMT project was reviewed and approved by the BLM and its cooperating agencies 2004. It was further reviewed in the NPR-A Intergrated Activity Plan (IAP). Moreover, the project has been modified only slightly from its original proposal. The project is essentially the same as that approved for permitting in the 2004 Record of Decision and evaluated under the 2012 IAP, with changes that reduced impacts and the overall footprint.

The ConocoPhillips project will provide significant revenues to Alaska Natives throughout the state through royalties and revenue sharing among Alaska Native regional corporations. New oil production from GMT will help offset declining North Slope production. It will create new jobs, generate needed revenues to the North Slope Borough, state, and federal government, while reducing America's dependence on imported oil.



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ConocoPhillips is working on three new development projects on the North Slope that represent about \$2 billion of investment. These projects will boost production significantly by 2018 to help offset the production decline through TAPS, and will employ hundreds of workers during construction. In addition, we have added two rigs to the Kuparuk fleet. These rigs are already adding production and providing several hundred new jobs for Alaska. That's what we call moving in the right direction.

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