EXAMINING EPA'S PREDETERMINED EFFORTS TO BLOCK THE PEBBLE MINE, PART II

HEARING

BEFORE THE

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

April 28, 2016

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EXAMINING EPA'S PREDETERMINED EFFORTS TO BLOCK THE PEBBLE MINE, PART II

THURSDAY, APRIL 28, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY,
Washington, D.C.

The Committee met, pursuant to call, at 10:05 a.m., in Room 2318, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Committee] presiding.

LAMAR S. SMITH, Texas
CHAIRMAN

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RANKING MEMBER

Congress of the United States
House of Representatives

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Full Committee

Examining EPA's Predetermined Efforts to Block the Pebble Mine Part II

Thursday, March 28, 2016
10:00 a.m. – 12:00 p.m.
2318 Rayburn House Office Building

<u>Witness</u>

The Honorable Dennis McLerran, Administrator, U.S. Environmental Protection Agency, Region 10

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

HEARING CHARTER

Examining EPA's Predetermined Efforts to Block the Pebble Mine Part II

Thursday, April 28, 2016
10:00 a.m. – 12:00 a.m.
2318 Rayburn House Office Building

PURPOSE

The Committee on Science, Space, and Technology will hold a hearing titled *Examining EPA's Predetermined Efforts to Block the Pebble Mine Part II* on Thursday, April 28, 2016, in Room 2318 of the Rayburn House Office Building. This hearing is a follow-on to the Committee's hearing last November in order to receive testimony from the Environmental Protection Agency (EPA).[1] The hearing will examine the EPA's intention to use Section 404(c) of the Clean Water Act to block the Pebble Mine from development before the project applies for any permits. The Committee is concerned that EPA did not rely on sound science in deciding to undertake a pre-emptive action to limit the Pebble Mine.

WITNESS LIST

- **The Honorable Dennis McLerran**, Administrator, U.S. Environmental Protection Agency, Region 10

BACKGROUND

The Pebble Mine is a proposed copper, molybdenum, and gold mine located near Lake Iliamna within the Bristol Bay watershed in Alaska. According to the developers of the mine, the total value of the natural resources on the site is over $300 billion and would create thousands of high-paying jobs for Alaskans.[2] The Pebble Limited Partnership (PLP), the group that owns the mining claim, has spent millions of dollars undertaking environmental and geological studies in the course of preparing for the numerous permit applications required to develop the mine.[3] PLP has yet to reach the stage in its planning where it is ready to submit a mine plan and permitting applications for use in National Environmental Policy Act (NEPA) and

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[1] More information on the previous Committee hearings on Pebble Mine can be found at: https://science.house.gov/legislation/hearings/full-committee-hearing-examining-epa-s-predetermined-efforts-block-pebble-min-0 (November 5, 2015) and

[2] The Pebble Partnership, *available at* http://www.pebblepartnership.com/why.html#section-jobs (last visited Oct. 30, 2015); Krista Langlois, *Pebble Mine: Alaska Sides with Mining Corporation, Tribes Back EPA*, High Country News, July 8, 2014, *available at* https://www.hcn.org/blogs/goat/the-fight-for-bristol-bay-alaska-sides-with-mining-corporation-tribes-back-epa.

[3] The Pebble Partnership, *available at* http://www.pebblepartnership.com/environment.html (last visited Oct. 30, 2015).

Clean Water Act reviews.[4] Despite this fact, EPA has decided to use Section 404(c) of the Clean Water Act to limit the development of the Pebble Mine resource.

In July 2014, EPA issued a proposed determination, pursuant to Section 404(c) of the Clean Water Act, to limit the scope of the development of the Pebble Mine before PLP had applied for any permits under the law.[5] EPA states that it took this action "because of the high ecological and economic value of the Bristol Bay watershed and the assessed unacceptable environmental effects that would result from the [Pebble Mine development]."[6] PLP believes that EPA's action amounts to a de-facto "veto" of the project and would prevent any development of the mining claim. EPA claims that its proposed determination is the culmination of years of scientific review, the findings of which were released in a January 2014 report entitled: "Final Report, An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska."[7]

Any development project that requires the discharge of material into waterways requires a permit issued by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act. Section 404 of the Clean Water Act requires permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites."[8] The regular permitting process requires that a project undergo evaluation through the NEPA process. However, Pebble Mine has been treated differently by EPA. The agency has asserted that it has the authority under section 404(c) of the Clean Water Act to conduct an evaluation of the mine outside of the normal NEPA process and before a project has applied for any permits or submitted an official mine plan.[9] EPA has never used section 404(c) in this preemptive fashion for a project similar to the Pebble Mine in the history of the Clean Water Act. This action represents a significant expansion of the authority of EPA under the Clean Water Act.

On October 6, 2015, a report was released by the Cohen Group that raised questions about the fairness and biased nature of EPA's use of section 404(c) of the Clean Water Act with regard to the Pebble Mine.[10] The Cohen report, basing its claims on documents obtained from the EPA and interviews conducted in the course of investigation, found that EPA employees based in EPA's Region 10 office may have had inappropriate contact with outside stakeholders opposed to Pebble Mine.[11] Moreover, these same EPA employees seem to have arrived at a

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[4] Hon. William S. Cohen, Report of an Independent Review of the United States Environmental Protection Agency's Actions in Connection with its Evaluation of Potential Mining in Alaska's Bristol Bay Watershed, Oct. 6, 2015, *available at* http://files.cohengroup.net/Final/Final-Report-with-Appendices-compressed.pdf.

[5] U.S. EPA, 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, July 2014, *available at* http://www2.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf.

[6] *Id.*

[7] *Id*

[8] U.S. EPA, Clean Water Act, Section 404, *available at* http://water.epa.gov/lawsregs/guidance/wetlands/sec404.cfm.

[9] U.S. EPA, 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, July 2014, *available at* http://www2.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf.

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[11] *Id.*

predetermined conclusion to use section 404(c) to stop the Pebble Mine before any scientific evidence was gathered regarding the environmental impacts of the Pebble Mine.[12] The report also found that these same employees were instrumental in preparing the scientific assessment that EPA used as a basis for its section 404(c) determination.[13]

On Thursday, April 14, 2016, the Committee conducted a deposition of former EPA Region 10 employee Phil North. The deposition provided insight on the process that the agency used to implement the Section 404(c) process.

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[12] *Id.*
[13] *Id.*

Chairman SMITH. The Committee on Science, Space, and Technology will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Welcome to today's hearing entitled "Examining EPA's Predetermined Efforts to Block the Pebble Mine, Part II."

I'll recognize myself for an opening statement and then the Ranking Member.

Today, we will examine the Environmental Protection Agency's efforts to block the Pebble Mine project from development before it even applied for a permit. This morning, the Committee will hear testimony from EPA Region 10 Administrator Dennis McLerran.

And according to the EPA, Regional Administrator McLerran is the "decision-maker" for EPA matters that involve the Pebble Mine. It was his decision to improperly use the Clean Water Act to stop the Pebble Mine before the project submitted a formal plan, before it submitted a permit application, and before due process was able to proceed.

I am certain that we will hear from our colleagues on the other side of the aisle about the EPA Inspector General's report that appeared to absolve the Agency of any predetermination or bias in this matter. However, the IG's report is flawed. It took a top-down analytical approach and focused only on Administrator McLerran and acting Assistant Administrator Nancy Stoner. It did not focus at all on the EPA employees involved in the Pebble Mine matter, nor did it discover the actions taken by those who funneled information up to Administrator McLerran.

In the course of the Committee's investigation, we discovered that EPA employees colluded with third-party Pebble Mine opponents. They sought to deliberately establish a record that pointed to one outcome: the Pebble Mine will be excluded from the regular permitting process and should be stopped.

Recently, the Committee conducted a deposition of former EPA employee Phil North, the EPA employee who, on the advisement of environmental groups, chose not to voluntarily speak to Congress. Mr. North's testimony is important to understand the mindset of the EPA employees under the authority of Administrator McLerran.

Mr. North readily admitted to the Committee that he opposed the Pebble Mine and advocated among his colleagues that the Agency use the Clean Water Act to stop it. Mr. North and his EPA colleagues arrived at this conclusion before the Agency had produced any scientific information. While the EPA has been quick to minimize Mr. North's role in the Agency's decision-making process, his influence to promote the idea to stop the Pebble Mine is clear.

Mr. North admitted under oath that he provided edits to an official petition letter from a third party sent to Administrator McLerran. The letter requested that the EPA stop the Pebble Mine before it applied for any permits. Mr. North asserted that it was, in fact, his duty as a federal government employee to provide assistance to a group that petitioned the government and the EPA.

The EPA Inspector General and the EPA Office of Ethics apparently do not agree. Both determined that Mr. North's actions constitute a possible misuse of his federal government position.

Mr. North's testimony also provided a clear depiction of the lack of adherence to official EPA policies that went on under Administrator McLerran's watch. Mr. North admitted that he and other EPA employees within Region 10 used personal email accounts to conduct official EPA business. Mr. North discussed matters that related to Pebble Mine on his personal email with third-party groups opposed to the project.

Nearly all of these official records are now unavailable to the Committee for review because Mr. North and the Agency failed to preserve them. We may never know the true extent to which Mr. North and EPA employees worked with outside groups to establish a process to stop the Pebble Mine before it applied for a permit. But we know enough to conclude that EPA employees violated ethical standards by giving outside groups unprecedented access to internal EPA deliberations, allowing for close collaboration on agency actions and strategy.

Documents obtained from the EPA show that Administrator McLerran's trusted advisor on Pebble Mine matters, Richard Parkin, presented only one option to Administrator McLerran: that the EPA use the Clean Water Act to stop the mine before it even applied for a permit.

The EPA should be reminded that it was Congress that established the Clean Water Act. It is not the decision of activist EPA employees to decide to circumvent the processes established in the Clean Water Act.

The EPA and anti-Pebble Mine groups continue to assert that the pre-application process EPA used to stop the Pebble Mine is one that will ultimately save the mining company time and money. But it is not the Agency's place to decide how a company should spend its resources. If the Pebble Mine chooses to use its resources to move forward with the permitting process, then it should be allowed to do so.

Moreover, it appears that the EPA will use this case as precedent to block additional projects throughout the United States. If we allow the EPA to pursue this path of action, the Agency will have set the precedent to tell states, local governments, and even private citizens how they can develop their land before a permit application has ever been filed. This is harmful to economic development and dangerous to the democratic process.

This committee should support due process, protect the permitting process, and insist that EPA actions be based on objective science. The EPA violated all of these tenets in its evaluation of the Pebble Mine. The Committee should not allow EPA to stop projects before they even apply for a permit. This would be contrary to the rule of law and the principles of scientific analysis.

The inappropriate actions by the EPA employees, the misapplication of the law, and lack of decision-making based on science throughout this process requires that the Agency cease any further action against the Pebble Mine. The EPA should allow the established permitting process to run its course and determine the future of this project. Science and due process should lead the way, not predetermined outcomes by activist EPA employees.

[The prepared statement of Chairman Smith follows:]

COMMITTEE ON
SCIENCE, SPACE, & TECHNOLOGY
Lamar Smith, Chairman

For Immediate Release
April 28, 2016

Media Contact: Zachary Kurz
(202) 225-6371

Statement of Chairman Lamar Smith (R-Texas)
Examining EPA's Predetermined Efforts to Block the Pebble Mine Part II

Chairman Smith: Today we will examine the Environmental Protection Agency's (EPA) efforts to block the Pebble Mine Project from development before it even applied for a permit. This morning, the Committee will hear testimony from EPA Region 10 Administrator Dennis McLerran.

According to the EPA, Regional Administrator McLerran is the "decision maker" for EPA matters that involve the Pebble Mine.

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The EPA should allow the established permitting process to run its course and determine the future of this project. Science and due process should lead the way, not pre-determined outcomes by activist EPA employees.

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Chairman SMITH. That concludes my opening statement, and the Ranking Member Ms. Johnson, the gentlewoman from Texas, is recognized for hers.

Ms. JOHNSON. Thank you very much, Chairman Smith, and let me welcome Mr. McLerran. I appreciate your commitment to public service, and I look forward to your testimony.

We've been here twice before with hearings on EPA and the proposed Pebble Mine in Bristol Bay, Alaska. In August 2013, the Committee held a hearing on the EPA's Bristol Bay Watershed Assessment. Last November, it held a second hearing titled "Examining EPA's Predetermined Efforts to Block the Pebble Mine." That hearing included the CEO of the Pebble Partnerships and two of the company's paid consultants.

I am glad we're finally hearing from an EPA witness, Mr. Dennis McLerran. As the EPA Administrator of Region 10 that includes Oregon, Washington, Idaho, and Alaska, he plays a pivotal role in helping EPA carry out its critical mission of protecting human health and environment.

Based on the title of today's hearing, I expect that we will hear a lot of claims of unprecedented use by EPA of its section 404 authority, bias by the EPA in its watershed assessment, and the EPA collusion with outside parties in initiating the 404(c) action. My colleagues are likely to produce selective quotes and emails to support that narrative. That is certainly their right.

But I think the fundamental facts are already clear. First, the Clean Water Act gives EPA the authority to initiate 404(c) action before a permit is applied for. And indeed, EPA did just that in 1988 under President Reagan. EPA's action in the Pebble Mine case was certainly not unprecedented or unlawful.

Secondly, the independent Inspector General for EPA examined the question of potential bias or collusion in support of a predetermined outcome in its Pebble Mine actions. And the IG reported in January of this year that it found no evidence of bias or predetermined outcome. That is about as clear a statement of fact as IG can make.

Third, while some members may attempt to cast doubt over the entire EPA watershed assessment due to the behavior of one EPA employee Mr. Phil North, the reality is that the assessment was a result of multiple meetings with Pebble Partnership, environmental, and other stakeholder groups over multiple years and extensive reviews of the relevant scientific literature.

The resulting assessment, which was peer-reviewed twice, had 20 cosponsors, of which Mr. North was only one. As the EPA IG stated in its January 2016 report, "We found no evidence of bias in how EPA conducted the assessment, and we also found no evidence that the EPA predetermined the outcome of the assessment to initiate a CWA section 401(c) process in the Bristol Bay watershed.

Now, I don't expect the facts that I have just laid out to dissuade those who have decided that uncovering an EPA conspiracy is to be the predetermined outcome of this hearing, but I think it is important that they be placed in the public record.

Mr. Chairman, commercial fishermen in Bristol Bay, environmental groups, Native Alaskan tribes, and even jewelry companies such as Tiffany & Company were deeply concerned that a mine in

Bristol Bay would destroy the splendor and unspoiled beauty of this unique watershed and cripple the economic livelihood of thousands of its residents who rely on its world-renowned salmon fisheries. All those groups called on the EPA to take action to protect this critical environmental resource.

I hope that my majority colleagues will realize that the use of 404(c) process even in Bristol Bay, Alaska, is not a political issue. It is about protecting a unique environmental resource. In that regard, I find it ironic that EPA has been condemned in recent weeks for doing too little to protect the water in Flint, Michigan, and at the same time as they are being condemned by some of the same committee for doing too much to protect the water in Bristol Bay, Alaska.

Lastly, I'm attaching a minority report to my statement that takes a deeper look at how the 401(c) has been applied in the past and the tactics the Pebble Partnership has employed in an attempt to control the public message regarding their controversial mine in Bristol Bay.

I believe, as others have said, that the proposed Bristol mine—Pebble Mine in Bristol Bay is simply the wrong mine in the wrong place. But I also believe that section 401(c) of the Clean Water Act has been used by EPA in the right way in the right place. This law was written with places like Bristol Bay in mind.

The law has not been widely used over the past four decades, nor should be—should it be. It was designed to be used in special cases where potential development poses an extreme adverse threat to U.S. waters. This is exactly what the proposed Pebble Mine in Bristol Bay would do.

I thank you, Mr. Chairman, and I yield back.

[The prepared statement of Ms. Johnson follows:]

OPENING STATEMENT
Ranking Member Eddie Bernice Johnson (D-TX)

House Committee on Science, Space, and Technology
"Examining EPA's Predetermined Efforts to Block the Pebble Mine, Part II"
April 28, 2016

Thank you Chairman Smith, and welcome, Mr. McLerran. I appreciate your commitment to public service, and I look forward to your testimony.

We have been here twice before with hearings on EPA and the proposed Pebble Mine in Bristol Bay, Alaska. In August 2013, the Committee held a hearing on the EPA's Bristol Bay Watershed Assessment. Last November, it held a second hearing titled, "Examining EPA's Predetermined Efforts to Block the Pebble Mine." That hearing included the CEO of the Pebble Partnership and two of the company's paid consultants.
I am glad we are finally hearing from an EPA witness, Mr. Dennis McLerran. As the EPA Administrator of Region 10, that includes Oregon, Washington, Idaho and Alaska, he plays a pivotal role in helping EPA carry out its critical mission of protecting human health and the environment.

Based on the title of today's hearing, I expect that we will hear a lot of claims of unprecedented use by EPA of its Sec. 404 authority, bias by the EPA in its watershed assessment, and EPA collusion with outside parties in initiating a 404 (c) action. My colleagues are likely to produce selective quotes and emails to support that narrative. That is certainly their right, but I think the fundamental facts are already clear.

First, the Clean Water Act gives EPA the authority to initiate a 404(c) action *before* a permit is applied for, and indeed, EPA did just that in 1988 under President Reagan. EPA's action in the Pebble mine case was certainly not "unprecedented" or unlawful.

Second, the independent Inspector General for the EPA examined the question of potential bias or collusion in support of a predetermined outcome in its Pebble mine actions, and the IG reported in January of this year that it found *"no evidence of bias or predetermined outcome."* That is about as clear a statement of fact as an IG can make.

Third, while some Members may attempt to cast doubt over the entire EPA watershed assessment due to the behavior of one EPA employee, Mr. Phil North, the reality is that the assessment was the result of multiple meetings with the Pebble Partnership, environmental and other stakeholder groups over many years, and extensive reviews of the relevant scientific literature.

The resulting assessment, which was peer-reviewed *twice*, had twenty co-authors, of which Mr. North was only one. As the EPA IG stated in its January 2016 report, *"we found no evidence of bias in how EPA conducted the assessment"* and *"we also found no evidence that the EPA* *predetermined the outcome of the assessment to initiate a CWA Section 404(c) process in the Bristol Bay watershed."*

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It is about protecting a unique environmental resource. In that regard, I find it ironic that EPA has been condemned in recent weeks for doing too *little* to protect the water in Flint, Michigan at the same time as they are being condemned by some on this Committee for doing too *much* to protect the water in Bristol Bay, Alaska.

Lastly, I am attaching a Minority Staff Report to my statement that takes a deeper look at how the 404(c) has been applied in the past and the tactics the Pebble Partnership has employed in an attempt to control the public message regarding their controversial mine in Bristol Bay.

I believe, as others have said, that the proposed Pebble Mine in Bristol Bay is simply the wrong mine in the wrong place. But I also believe that Section 404(c) of the Clean Water Act has been used by EPA in the right way in the right place. This law was written with places like Bristol Bay in mind. The law has not been widely used over the past four decades, nor should it be. It was designed to be used in special cases where potential development poses an extreme adverse threat to U.S. waters. This is exactly what the proposed Pebble Mine in Bristol Bay would do.

I yield back.

Chairman SMITH. Thank you, Ms. Johnson.

The gentlewoman from Oregon, Ms. Bonamici.

Ms. BONAMICI. Mr. Chairman, may I be recognized for a minute to speak out of turn?

Chairman SMITH. The gentlewoman is recognized.

Ms. BONAMICI. Thank you, Mr. Chairman, and Committee Members.

I want to recognize Marcy Gallo, the Staff Director for the Environment Subcommittee, who is leaving the Committee to continue serving Congress at the Congressional Research Service. This is her last hearing with us.

I value her commitment, her tireless work, and I know the other Committee Members share my respect for her. I especially appreciate her collaborative approach to working with stakeholders on the Tsunami Warning Education Research Act and the weather bill.

All of us here know how much our staff takes on and how hard they work, often for very little credit. So Marcy, we thank you. We will miss you, and we wish you the best of luck in your next adventure.

Chairman SMITH. Do you want to stand up so you can get recognition?

Ms. BONAMICI. Thank you, Mr. Chairman. I yield.

Chairman SMITH. I thank the gentlewoman for bringing that up.

I also have to not pass up the opportunity of mentioning that there's another staff member of the committee sitting in the front row presumably with his family, John Piazza. Are those your three daughters, John? One daughter, two daughters, three daughters, all of them. Okay. Anyway, it's unusual to see you looking up at us from that particular position, but we're glad you're here with your family.

Ms. JOHNSON. There are other staff members with families out here.

Chairman SMITH. Oh, other staff members with family there as well, good. Okay. Thanks.

Let me proceed and introduce our witness today. He is the Hon. Dennis McLerran, EPA's Regional Administrator for Region 10. Administrator McLerran previously served as Executive Director of the Puget Sound Clean Air Agency and has been involved in a variety of state, local, and federal issues in both the public and private sectors.

Administrator McLerran has over 30 years of experience as an advocate, attorney, and Administrator. Much of his work has focused on environmental land-use and climate issues. Administrator McLerran received his bachelor's degree from the University of Washington and his law degree from the Seattle University School of Law.

We welcome you and look forward to your testimony.

STATEMENT OF DENNIS MCLERRAN, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 10

Mr. MCLERRAN. Good morning, Chairman Smith, Ranking Member Johnson, and Members of the Committee. Okay. Excuse me.

Good morning, Chairman Smith and Ranking Member Johnson and Members of the Committee. I am Dennis McLerran, the Regional Administrator for EPA Region 10, which covers the States of Oregon, Washington, Idaho, Alaska, and 271 tribal governments within those four States.

In May of 2010, several federally recognized tribes from the Bristol Bay watershed in Alaska petitioned EPA to use its Clean Water Act section 404(c) authority to restrict the discharge of fill material from the proposed Pebble Mine. EPA also received similar requests from a diverse group of stakeholders, while others requested that EPA refrain from taking action.

The groups the supported EPA's use of 404(c) were deeply concerned that the largest open pit mine ever proposed in North America could potentially be opened within one of the Western Hemisphere's most productive and vulnerable watersheds.

The economic and cultural value of the Bristol Bay watershed is immense. In 2009, it supported about 14,000 full- and part-time jobs and generated an estimated $480 million in direct economic expenditures and sales. And in addition, for over 4,000 years, it has served as a significant subsistence fishery to Alaska Native people, who may be among the last remaining salmon-based subsistence cultures in the world. For these reasons, EPA took very seriously these local concerns raised about a mining project that had the potential for significant environmental harm to this valuable and vulnerable ecosystem.

EPA staff and management deliberated for months about how to respond to these requests, and we ultimately decided not to initiate EPA's section 404(c) authority at the time of the petitions because we wanted to develop a solid understanding of the watershed and the potential risks of proposed mining activities before deciding whether or not to exercise our authorities regarding the watershed.

Instead, in February of 2011, consistent with the Clean Water Act, section 104, I announced EPA's intent to conduct an ecological risk assessment whose purpose was to characterize the biological and mineral resources of the Bristol Bay watershed, to increase understanding of the potential risks of large-scale mining on the region's fish resources, and to inform future decisions by government agencies and others related to protecting and maintaining the chemical, physical, and biological integrity of the watershed.

To help us collect, evaluate, and summarize information about the Bristol Bay watershed and to assess potential risks to salmon and other resources from large-scale mining, EPA brought in scientists from multiple federal agencies. Consistent with EPA's authorities under the Clean Water Act and relevant guidelines and procedures, EPA committed to a public process to provide an opportunity to engage with all interested stakeholders.

And, for example, EPA consulted with 20 tribes from the watershed, most of whom supported EPA's proposed assessment. And EPA also formed an Intergovernmental Technical Team to get individual input from federal agencies, the State of Alaska, and tribal governments in the Bristol Bay watershed.

EPA also released two drafts of the assessment for public comment. In total, eight public meetings were attended by approximately 2,000 people, and more than 1.1 million comments were submitted. The Pebble Limited Partnership itself submitted over 1,300 pages of written comments on the first draft and over 450 pages on the second draft and participated in the public meetings.

EPA staff, including EPA's Administrator and me as the Regional Administrator met with Pebble executives, state officials, and other interested organizations to solicit their input.

In addition to creating and maintaining an open and transparent process, EPA also sought to guarantee that the assessment incorporated high-quality data and that all findings were scientifically sound. In developing the assessment EPA followed all data quality and peer-review requirements for a highly influential scientific assessment, as outlined by the Office of Management and Budget in the White House.

A recent independent review by EPA's Inspector General confirmed that the Agency followed all applicable processes and procedures, and we also conducted extensive peer review, as was mentioned in the opening statements, with 12 independent peer-review experts in mine engineering, salmon fisheries biology, aquatic ecology, aquatic toxicology, hydrology, wildlife ecology, and Alaska Native cultures. And at a public meeting in August of 2012, Pebble and other stakeholders provided feedback directly to peer-reviewers.

The Bristol Bay Assessment found that the Bristol Bay watershed, while enormously productive ecologically, is also deeply vulnerable to challenges posed by the construction and operation of large-scale mining. The assessment concludes that a large-scale mining would propose—would pose risks to salmon and tribal communities and that those communities have depended on those resources for thousands of years.

Depending on the size of the mine, EPA estimates that from 24 to 94 miles of salmon-supporting streams and 1,300 to 5,350 acres of wetlands, ponds, and lakes would be destroyed. And extensive quantities of mine waste, leachates, and wastewater would have to be collected, stored, and treated and managed during mining operations and long after mining concludes.

In addition to these impacts, our assessment identified risks from potential accidents and failures. Section 404(c) of the Clean Water Act specifically authorizes EPA to prohibit the specification of—or deny or restrict the use of any defined areas as a disposal site for dredged or fill material whenever the Administrator determines that such disposal would cause unacceptable adverse effects.

EPA's 44-year history shows we've only used that authority judiciously and sparingly, and EPA has taken final action under 404(c) authority only 13 times while the Corps of Engineers has issued millions of 404 permits during that same time period.

I would also say that our proposed action in Bristol Bay is not a veto. It's not a final action. And the proposed determination does not prevent Pebble Limited Partnership from filing any permit applications, including a Clean Water Act section 404(c) permit—404 permit application. Rather, this proposed determination addresses where and what level of impacts from the discharge of dredged or fill material related to mining the Pebble deposit could result in unacceptable adverse effects on important water resources near the deposit.

The EPA has consistently demonstrated this willingness to collaborate with federal and state regulatory agencies and mining companies to ensure that projects can move forward in ways that protect water quality in the health of communities.

In conclusion, EPA is relying on strong science to support our review under the Clean Water Act. I am extremely proud of the work that EPA staff have done in compiling and analyzing the science; in conducting an inclusive, open, and transparent process; and in exhibiting a dignified professionalism through the work on the Bristol Bay watershed.

Thank you, Chairman Smith, Ranking Member Johnson, and members of the committee, for this opportunity to appear before you today, and I look forward to answering your questions.

[The prepared statement of Mr. McLerran follows:]

TESTIMONY OF
DENNIS McLERRAN, REGIONAL ADMINISTRATOR
EPA REGION 10
U.S. ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE
COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY
UNITED STATES HOUSE OF REPRESENTATIVES

April 28, 2016

Good morning Chairman Smith, Ranking Member Johnson, and members of the Committee. My name is Dennis McLerran. I am EPA's Regional Administrator for Region 10, which includes the states of Washington, Oregon, Idaho, and Alaska, and the region's 271 tribal governments.

In May of 2010, several federally recognized tribes from the Bristol Bay watershed in Alaska petitioned EPA to use its Clean Water Act Section 404(c) authority to restrict the discharge of dredged or fill material from the proposed Pebble Mine in the watershed.[1] EPA also received similar requests from a diverse group of stakeholders, while others requested that EPA refrain from taking action. The groups that supported EPA's use of 404(c) were deeply concerned that the largest open pit mine in North America could potentially be opened within one of the Western hemisphere's most productive and vulnerable watersheds. The economic and cultural value of the Bristol Bay watershed is immense: it supports about 14,000 part-time and full-time jobs, and generates an estimated $480 million in direct economic expenditures and sales. In addition, for over 4,000 years, it has served as a significant subsistence fishery to Alaska Native people, who may be among the last remaining salmon-based, subsistence cultures in the world. For these reasons, EPA took very seriously these local concerns raised about a mining project

[1] Proposed by the Pebble Limited Partnership, which is owned by the Canadian firm, Northern Dynasty, Limited.

that had the potential for significant environmental harm to this valuable and vulnerable ecosystem.

EPA staff and management deliberated for months about how to respond to these requests, and we ultimately decided not to initiate EPA's Section 404(c) authority at that time because we wanted to develop a solid understanding of the watershed, and the potential risks of proposed mining activities, before deciding whether or not to exercise our authorities regarding the watershed. Instead, on February 7, 2011, consistent with Clean Water Act section 104, I announced EPA's intent to conduct an ecological risk assessment, the purpose of which was to:

- characterize the biological and mineral resources of the Bristol Bay watershed;
- increase understanding of the potential risks of large-scale mining on the region's fish resources; and
- inform future decisions by government agencies and others related to protecting and maintaining the chemical, physical, and biological integrity of the watershed.

To help us collect, evaluate, and summarize information about the Bristol Bay watershed -- and to assess potential risks to salmon and other resources from large-scale mining -- EPA brought in scientists from our Office of Research and Development, the Office of Water, and other federal agencies, including the U.S Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and the U.S. Geological Survey.

Consistent with EPA's authorities under the Clean Water Act and relevant guidelines and procedures, EPA committed to a public process to provide an opportunity to engage with all interested stakeholders. For example, EPA consulted, on a government-to-government basis, with 20 tribes from the watershed, most of whom supported EPA's proposed assessment. EPA also formed the Intergovernmental Technical Team to get individual input from other federal agencies, the State of Alaska, and tribal governments in the Bristol Bay watershed. EPA also released two drafts of the assessment for public comment. In total, eight public comment meetings were attended by approximately 2,000 people, and more than 1.1 million comments were submitted. The Pebble Limited Partnership submitted over 1,300 pages of written comments on the first draft of the assessment and over 450 pages on the second draft, and participated in public meetings. EPA staff, including EPA's Administrator and Regional Administrator, met with Pebble Executives, State officials, and other interested organizations to solicit their input, discuss options, and exchange information regarding review of the proposed Pebble Mine.

In addition to creating and maintaining an open and transparent process, EPA also sought to guarantee that the assessment incorporated high quality data and that all findings were scientifically sound. In developing the Assessment, EPA followed all data quality and peer review requirements for a Highly Influential Scientific Assessment[2] as outlined by the White House Office of Management and Budget. A recent independent review by EPA's Office of Inspector General confirmed that the Agency followed all applicable procedures and policies related to scientific conduct and scientific external peer review. With respect to peer review, an extensive, external peer review was conducted by 12 independent experts in mine engineering, salmon fisheries biology, aquatic ecology, aquatic toxicology, hydrology, wildlife ecology, and

[2] A Highly Influential Scientific Assessment ("HISA") is defined by OMB as a product that an agency determines could have a "potential impact of more than $500 million in any year"; "is novel, controversial, or precedent-setting"; or "has significant interagency interest."

Alaska Native cultures. At a public meeting in August of 2012, Pebble and other stakeholders, provided feedback directly to the peer reviewers prior to their formal review.

EPA scientists used the results of that peer review, and the public comments, to improve the draft assessment. EPA then released a second public draft to the same 12 peer reviewers so they could evaluate whether EPA had adequately addressed the concerns and questions raised. EPA evaluated the additional comments from peer reviewers and members of the public, and released the final assessment in January of 2014, three years after beginning the assessment.

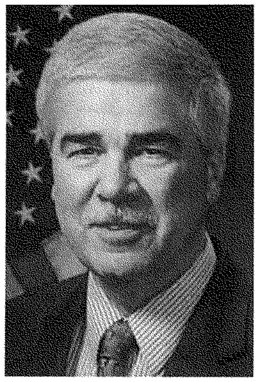
The Bristol Bay Assessment found that the Bristol Bay watershed, while enormously productive ecologically, is also deeply vulnerable to the challenges posed by the construction and operation of a large open pit mining operation. The Assessment concludes that large-scale mining poses risks to salmon and the tribal communities that have depended on them for thousands of years. Depending on the size of the mine, EPA estimates that from 24 to 94 miles of salmon-supporting streams and 1,300 to 5,350 acres of wetlands, ponds, and lakes would be destroyed. Extensive quantities of mine waste, leachates, and wastewater would have to be collected, stored, treated and managed during mining operations, and long after mining concludes. In addition to these impacts as part of routine operations, our assessment identified risks from potential accidents and failures. Short and long-term water collection and treatment failures are possible. Consistent with the recent record of petroleum pipelines and of similar mines operating in North and South America, pipeline failures along the transportation corridor could release toxic copper concentrate or diesel fuel into salmon-supporting streams or wetlands. Additionally, the failure of a tailings storage facility dam (such as the failure of the Mt. Polly Dam in British Columbia in 2014) would result in catastrophic effects on fishery resources.

Section 404(c) of the Clean Water Act specifically authorizes EPA to prohibit the specification of, or deny or restrict the use of, any defined area as a disposal site for dredged or fill material "whenever" the Administrator determines that such disposal would cause "unacceptable adverse effects" on certain aquatic resources. EPA's 44-year history of judicious use of its Section 404(c) authority has and continues to ensure predictability and certainty for the business community while at the same time providing a critical safeguard for the nation's most valuable and vulnerable water resources. As I understand it, EPA has taken final action under its 404(c) authority only 13 times out of the millions of Corps authorizations for regulated activities in jurisdictional waters under Section 404 since the enactment of the CWA in 1972.

On February 28, 2014, I sent letters to the U.S. Army Corps of Engineers, the State of Alaska, and the Pebble Limited Partnership, initiating the Section 404(c) process to review the potential adverse environmental effects of the discharge of dredged or fill material associated with mining the Pebble deposit. After this review and consistent with EPA's implementing regulations, I subsequently issued a Proposed Determination on July 21, 2014 that proposed to restrict the discharge of fill material into certain waters of the U.S. associated with the Pebble Deposit. This proposal is not a "veto"; it is not a final action, and the Proposed Determination does not prevent Pebble Limited Partnership from filing any permit applications, including a Clean Water Act section 404 permit application. Rather, this proposed determination addresses where, and what levels of impacts from the discharge of dredged or fill material related to mining the Pebble deposit could result in unacceptable adverse effects on important water resources near the deposit. The EPA has consistently demonstrated its willingness to collaborate with federal and state regulatory agencies and mining companies to ensure that projects can move forward in ways that protect water quality and the health of communities.

In conclusion, EPA is relying on strong science to support our review under the Clean Water Act. I am extremely proud of the work the staff at EPA have done in compiling and analyzing the science, in conducting an inclusive, open and transparent process, and in exhibiting a dignified professionalism throughout our work in the Bristol Bay watershed.

Thank you, Chairman Smith, Ranking Member Johnson, and members of the Committee, for the opportunity to appear before you today. I look forward to answering your questions.



Dennis J. McLerran, Regional Administrator
U.S. Environmental Protection Agency, Region 10

Dennis McLerran was appointed by President Barack Obama to serve as the Regional Administrator (RA) for Region 10, leading a staff of over 500 employees, with a responsibility for an annual budget of over $300 million. He was sworn in on February 22, 2010. As the RA, Dennis oversees the implementation and enforcement of the federal environmental rules and regulations in the States of Washington, Oregon, Idaho and Alaska, including 271 tribal governments in the Pacific Northwest and Alaska.

Before moving to EPA, Dennis served as Executive Director of the Puget Sound Clean Air Agency, and has been involved in a wide variety of state, local and federal issues and jobs in both the public and private sectors. Dennis has over 30 years of experience as an advocate, attorney and administrator, working on environmental, land use and climate issues.

Dennis is a native of Washington State, a graduate of the University of Washington and the Seattle University School of Law. He has been a Puget Sound Area resident for all of his adult life.

Chairman SMITH. Okay. Thank you, Mr. McLerran.

And I'll recognize myself for questions.

Let me say at the outset that I do not feel that I or this Committee should prejudge Pebble Mine until the process has been completed. I do feel that the process has been subverted and that Pebble Mine has not gotten their day in court. I do think that Pebble Mine is entitled to fair process and an objective evaluation, which they had not yet received.

And my first question is this: Do you think it's appropriate for EPA employees to work with outside groups and try to influence the EPA to arrive at a particular decision? In other words, in this case, we have at least one employee—and there may be others—who tried to make sure that your decision was on one side rather than give you objective information. If you had an employee who attempted to do that, what would you do?

Mr. MCLERRAN. So at EPA we do have an open door and an inclusive process where we listen to advocates on all sides of issues.

Chairman SMITH. Right.

Mr. MCLERRAN. And we do have staff that form opinions about——

Chairman SMITH. Right. Are you familiar with what Mr. North has told us under oath about his efforts to edit letters, edit documents, and try to influence the permitting process? Do you agree that that was legitimate?

Mr. MCLERRAN. So I have not seen Mr. North's testimony in front of the committee. That has not been distributed to us.

Chairman SMITH. Right, but you know we have asserted that Mr. North tried to influence the process and maybe other employees as well. Are you aware of any employee besides Mr. North who has tried to influence the process?

Mr. MCLERRAN. So, again, I would say the Inspector General has done a review of the work——

Chairman SMITH. I'm not asking about that. I'm asking if you know of any employees who have tried to influence the process.

Mr. MCLERRAN. No, I don't.

Chairman SMITH. You do not? And are you aware of any activity by Mr. North that you would consider to be improper?

Mr. MCLERRAN. So we agreed with the—concurred with the findings of the Inspector General that there could have been conduct that was a misuse of position, and we've followed through and done appropriate training——

Chairman SMITH. Okay.

Mr. MCLERRAN. —for our employees.

Chairman SMITH. Are you going to make any effort to try to determine if one or more employees did misuse their position?

Mr. MCLERRAN. So——

Chairman SMITH. No, but you had the Inspector General's report saying that might have occurred. Are you going to follow through and make any effort to see if that occurred and take any action?

Mr. MCLERRAN. So the Inspector General's review was comprehensive. It was broad and looked at the activities of——

Chairman SMITH. Right. I'm not asking about the Inspector General's report. I'm asking about your future actions. Are you going to take any initiative to try to determine if any employee misused their position?

Mr. MCLERRAN. So I've been very involved in this process from——

Chairman SMITH. Really, that's a yes or no answer. Are you going to investigate to see if any employee has misused their position?

Mr. MCLERRAN. So I have reviewed the actions of our employees, and I'm satisfied that the employees have conducted themselves appropriately.

Chairman SMITH. So you disagree with the Inspector General that someone may have misused their position or you agree with them?

Mr. MCLERRAN. So, again, we concurred with the findings of the Inspector General.

Chairman SMITH. Okay. And you have made—then have you conducted an investigation to find out if anybody misused their position and you have concluded that no one did?

Mr. MCLERRAN. So, again, I've been involved in this process from the very beginning and have been engaged with the employees that work to——

Chairman SMITH. Right. Are you going to—have you conducted any investigation?

Mr. MCLERRAN. So we have not conducted an investigation——

Chairman SMITH. Okay. Do you intend to conduct any investigation?

Mr. MCLERRAN. No, sir. Why not when you have an IG report saying people may have misused their position?

Mr. MCLERRAN. So, again, the Inspector General's report was comprehensive.

Chairman SMITH. Right.

Mr. MCLERRAN. I've been involved in——

Chairman SMITH. Aren't you curious whether the Inspector General might have discovered that there was a misuse of position, and why wouldn't you follow up and try to find out if that occurred?

Mr. MCLERRAN. So, again, the review of the Inspector General was comprehensive——

Chairman SMITH. I understand that. You've said that three times. I'm asking you if you are going to follow up, and you said you are not going to conduct any investigation to see if any employee misused their position?

Mr. MCLERRAN. We don't believe that's necessary or appropriate.

Chairman SMITH. That's astounding to me that an Administrator would not want to find out if their employees misused their position as suggested by the IG as a possibility. I'm just amazed that there isn't more accountability.

Let me go to my next question, and that is that, according to the Code of Federal Regulations, when the EPA issues a proposed Notice of Determination, the Army Corps of Engineers cannot issue a permit. First of all, how many other times under 404(c) have you issued a proposed Notice of Determination?

Mr. MCLERRAN. So to my knowledge—and this is on EPA's website—there are 13 times where we've finalized 404(c) action. Two of those involved situations prior to——

Chairman SMITH. The proposed Notice of Determination. Okay. And you do agree with the Code of Federal Regulations that this means that the Army Corps of Engineers cannot now grant a permit. You can still apply, you can still conduct an analysis, but they cannot grant a permit, is that correct?

Mr. MCLERRAN. Once a Notice of Proposed Determination is made, the——

Chairman SMITH. Right.

Mr. MCLERRAN. —Corps of Engineers, under our rules, cannot issue a permit——

Chairman SMITH. Right.

Mr. MCLERRAN. —but they can——

Chairman SMITH. And that is exactly why——

Mr. MCLERRAN. —receive, for example——

Chairman SMITH. —I think you have wrongly——

Mr. MCLERRAN. —and initiate the——

Chairman SMITH. —subverted the process.

Mr. MCLERRAN. —legal process.

Chairman SMITH. Yes. I think you have subverted the process by issuing that proposed Notice of Determination that they can't apply for a permit now. They—you should have followed due process. I regret that you did not.

My time is expired, and the gentlewoman from Texas is recognized for her questions.

Ms. JOHNSON. Thank you, Mr. Chairman.

In your testimony, Mr. McLerran, you stated that several federally recognized tribes requested EPA's use of 404(c) authority to restrict the discharge of the proposed Pebble Mine. What specifically did the group cite as reasons for requesting EPA's assistance? And in general, what are the potential impacts of a mine of this type being proposed by Pebble?

Mr. MCLERRAN. So the groups that requested that EPA take a look at our Clean Water Act authorities with respect to Bristol Bay are broad and wide-ranging. There are a number of federally recognized tribes, but we also received requests from literally hundreds of organizations, including hunting and fishing organizations, environmental organizations, tribal organizations, native corporations and others.

And people were concerned about the particular location and scope and scale of this proposed mine. This would be the largest—arguably the largest open pit mine ever constructed in North America. Its location is at a very, very sensitive spot at the very headwaters of the Nushagak and Kvichak Rivers, which are in the Bristol Bay watershed, and Bristol Bay watershed produces 50 percent of the remaining world's wild sockeye salmon. It's an incredible economic resource. It's—creates many thousands of jobs in Alaska and supports a subsistence culture.

So the communities there were quite concerned about the location of this mine, the characteristics of this mine, and what its impacts might be on the salmon in that watershed that are a huge economic driver, as well as on their cultures, which have been in place for many thousands of years and continue today as an active subsistence culture.

Ms. JOHNSON. Critics have EPA's decision to protect the Bristol Bay watershed continually claim that EPA was biased toward initiating a section 404(c) action and that EPA conducted the watershed assessment with the similar goal in mind. One would hope that this kind of conspiracy language would have been put to rest after the EPA Office of Inspector General released its report in January reviewing the actions of EPA and its decision to conduct an assessment.

The IG found no evidence of bias in how EPA conducted the assessment of Bristol Bay watershed or that the EPA predetermined the assessment outcome. What steps did EPA take to ensure that the assessment would be objective? And who was involved in the—developing the Bristol Bay Watershed Assessment?

Mr. MCLERRAN. So the process—as the person who initiated the Bristol Bay Watershed Assessment, I can tell you that I initiated it because I had a genuine interest in learning more about what the impacts of large-scale mining might be on the fishery resource in the Bristol Bay watershed. And that process was a very open, transparent, and inclusive process that included more than eight public meetings. It included two rounds of peer-review. The peer-reviewers were independent. They were independently selected. We gave the public, including the Pebble Partnership, the opportunity to comment on who should be selected as the peer-reviewers. There were many opportunities for testimony and engagement.

We met directly with the Pebble Partnership and both opponents and proponents of mining in the watershed, and the watershed assessment was conducted over a three-year period in which we engaged with multiple scientists, a large group of federal agencies, as well as our own scientists, and engaged in a very open and transparent process of developing what I believe is an incredible piece of work in looking at what the impacts in this watershed might be on the fishery.

Ms. JOHNSON. And you believe that this watershed assessment was necessary before EPA could initiate the 404(c) process?

Mr. MCLERRAN. That's correct. I felt that when we received the request for action using 404(c), we did not yet have enough information to fully inform a decision. So we felt that it was important to do some science. We used EPA's highly influential scientific assessment process, which is a very rigorous and open and transparent process. There were many individuals that did give us input on that, many experts, and the testimony that we received on the watershed assessment from a wide range of individuals was very extensive. We got over 1.1 million comments on the watershed assessment.

Ms. JOHNSON. Thank you very much.

Chairman SMITH. Thank you, Ms. Johnson.

The gentleman from Texas, Mr. Neugebauer, is recognized for his questions.

Mr. NEUGEBAUER. Thank you, Mr. Chairman.

Mr. McLerran, in May 2010 you received a petition letter written by Alaska attorney Jeff Parker requesting EPA use the 404(c) process in a preemptive manner to stop the Pebble Mine before the project had any chance for permitting. Is that correct?

Mr. MCLERRAN. That is correct.

Mr. NEUGEBAUER. And I'm going to put a slide up here on a——

[Slide.]

Mr. NEUGEBAUER. And this is the testimony of Phil North. And the question is are you aware that Mr. North provided Jeff Parker with edits to the petition letter before it was sent to EPA?

Mr. MCLERRAN. I have recently learned that.

Mr. NEUGEBAUER. But you did not know it then, right?

Mr. MCLERRAN. I do not.

Mr. NEUGEBAUER. Okay. And did you know Mr. North said that he believed his edits strengthened the strength of the petition letter? So his involvement, he felt like, did influence the final outcome. Do you agree with that?

Mr. MCLERRAN. So I would say that we received requests from literally thousands of individuals to take a look at the Bristol Bay watershed and the potential impact of large-scale mining there——

Mr. NEUGEBAUER. So do you think as the manager of EPA then, is it appropriate that EPA employees assist a third-party group in editing a petition letter to the Agency?

Mr. MCLERRAN. So I would not have authorized that or approved of that, but again, I think it's really not very relevant because we receive requests from a broad range of individuals. And we didn't act on that petition. We—at that time. We engaged in developing a scientific review that took over three years and was as extensive as I've previously testified.

Mr. NEUGEBAUER. Were you aware at that time that Mr. North was a supporter of EPA using the preemptive process in this particular case?

Mr. MCLERRAN. So, again, as I said earlier, we had employees who were supportive of taking 404(c) action; we had employees who felt we should wait. We had a wide range of views within the Agency based on the initial reviews that our staff did. My review of the situation was that we needed more science. We needed to develop——

Mr. NEUGEBAUER. And you are aware of the Inspector General report and said that there was possible misuse of position, is that correct?

Mr. MCLERRAN. I am aware of that.

Mr. NEUGEBAUER. Yes. So I think—here's the question I think I have, Mr. McLerran. If you were going to present something before a judge for a determination and you found out that the attorney on the other side was meeting with the judge and the judge was giving him some pointers on points that you might want to make when that case comes before his court, would you think that would be a fair process?

Mr. MCLERRAN. Well, that's a hypothetical that's quite different than the situation I had.

Mr. NEUGEBAUER. Well, I don't think it is, Mr. McLerran. But I think the point here is that we had people inside EPA that were going to have an influence on the process coaching outside groups on trying to determine the outcome before the process even began. And I think if you—you said to this congress—committee a while ago that you think it was an open and fair process. The example I just gave to you, you wouldn't think was a fair process. But that's exactly what was going on is you had people coaching—within EPA coaching the opposition as to what to say to get a desired outcome. Am I missing something here?

Mr. MCLERRAN. I think you are missing that we had staff who had different positions on this. I as the decision-maker took an approach that was different than what many of those folks advocated on both sides of this. The course that we decided to take was to do good science.

Mr. NEUGEBAUER. So you're okay with, you know, in the example I gave you, you're okay with the judge kind of coaching the prosecution on, you know, here's how we can get the outcome that we desire here, you need to say these things in your closing arguments? You would make this statement? You think that's a fair process then?

Mr. MCLERRAN. So, as I said earlier, I think your hypothetical is not——

Mr. NEUGEBAUER. Oh, it's not hypothetical.

Mr. MCLERRAN. —the same as a——

Mr. NEUGEBAUER. I mean, it's the very same example here of your employees coaching the people that were in opposition to this to help reach a desired outcome of that employee. And I just don't think the American people think that's the kind of government that they want.

So I guess the question I would have to you, given the fact that there was a possible misuse of position found by the Inspector General, would you reconsider and let the 404(c) process move forward?

Mr. MCLERRAN. Sir, we are—we have been in the 404(c) process, and again, I think it's been a very open, transparent, and very inclusive process.

Mr. NEUGEBAUER. I'm sorry. I misspoke there. The 404 process. In other words, you know, letting everybody then bringing that process forward and seeing if—through the NEPA process that they can justify that they would take the necessary precautions to meet any opposition to that project.

Mr. MCLERRAN. So, as I previously stated, even today the Pebble Partnership could apply for a 404 permit with the Corps of Engineers and initiate the NEPA process and that entire process. So we—and in fact, I personally believed that they would file for a 404 permit during the pendency of the watershed assessment process. If they chose not to, they continue to choose not to, but we have not precluded that process.

Mr. NEUGEBAUER. Well, but I think you just told the Chairman that, you know, you can't move forward with a 404 based on your determination, so I'm confused. How—what is the—how does that work? I mean, what you're saying to me is you can apply for it but you're going to get turned down? I mean, how is that a good deal?

Mr. MCLERRAN. So, again, what our proposed determination put forward—and we have not completed that process; it's an incomplete process—was that we would impose restrictions on the scope and scale of mining in the watershed. So a 404 permit application could be applied for. It would go through that process, and then, should we determine at the end of the day that restrictions are appropriate in the watershed, then that would be resolved either through the 404(c) process or through the 404——

Mr. NEUGEBAUER. I want to go back to something—you keep saying that some of your employees were in favor of this process. We had one employee that—evidently, that the Inspector General found out that misused, but then now you've told the Chairman that you've really not investigated and don't intend to investigate whether other employees were actually acting in a position that would maybe misusing their position? Your position is because you used plural when you referred to some of the employees who were supportive of blocking this project but only one was identified here in the Inspector General report. So—but we're not going to check and see if anybody else is doing that? And you think it's inappropriate but you're not going to check on it?

Mr. MCLERRAN. Sir, again, as I stated, the Inspector General did a very comprehensive review. We feel it was a complete review. And I also have——

Mr. NEUGEBAUER. Well, the Inspector General——

Mr. MCLERRAN. —been involved——

Mr. NEUGEBAUER. —isn't going to make——

Chairman SMITH. The gentleman's——

Mr. NEUGEBAUER. —the decision on this——

Chairman SMITH. The gentleman's——

Mr. NEUGEBAUER. —project.

Chairman SMITH. I'm sorry to say the gentleman's time has expired, but I do want to clarify. A while ago in response to a question I asked, you agreed that the Army Corps of Engineers could not issue a permit once you had made your determination. Are you changing your testimony on that?

Mr. MCLERRAN. So, again, what I said is that the Corps of Engineers, during the pendency of a——

Chairman SMITH. In other words, Pebble can apply but they can't be approved. It's a ruse.

Mr. MCLERRAN. So that is not exactly the case. What—you know, what we have is a Notice of Proposed Determination that would place restrictions on the scale and size——

Chairman SMITH. A while ago——

Mr. MCLERRAN. The Pebble Partnership——

Chairman SMITH. —you told me that Corps of Engineers could not approve a permit because of the proposed determination.

Mr. MCLERRAN. So during the pendency of a proposed determination, our rules do provide that there would not be an issuance of a permit, but we haven't completed that process——

Chairman SMITH. Yes, I know——

Mr. MCLERRAN. —they're still in that process——

Chairman SMITH. —and we'll come back because——

Mr. MCLERRAN. —and——

Chairman SMITH. —there are others who have the time, but I'm going to revisit that because it seems to me you've contradicted yourself.

Mr. MCLERRAN. And I would like to——

Chairman SMITH. And the gentlewoman from Oregon, Ms. Bonamici, is recognized.

Mr. MCLERRAN. I would like to indicate that the Inspector General did identify potential misuse of the position by one employee, and they reviewed thousands of emails by multiple——

Chairman SMITH. But you're still not going to conduct any further investigation?

Mr. MCLERRAN. So we—and that employee is no longer with EPA, but we feel that we know the scope and scale of activities of our employees.

Chairman SMITH. The gentlewoman from Oregon is recognized.

Ms. BONAMICI. Thank you very much, Mr. Chairman. Welcome to the committee, Mr. McLerran. Nice to see you.

There's been a lot of conversation this morning already about Mr. North, a former employee of the EPA, and I just want to record to clarify a few things. First of all, I'm reading from an EPA Region 10 job description. Mr. North was an ecologist. And part of the EPA job description for Mr. North was environmental liaison, performs liaison work with individuals in a variety of organizations on legislative proposals, regulations, policies, program issues, resources, et cetera, performs liaison work by facilitating resolution of funding, program, and regulatory issues.

So that was included in Mr. North's official job description with the EPA, and I would like to introduce that into the record. Additionally—I'd like to introduce that into the record, the job description. Additionally——

Chairman SMITH. Without objection.

[The information appears in Appendix II]

Ms. BONAMICI. Thank you, Mr. Chairman.

Additionally, the—there's been a lot of conversation about Mr. North's contributions to a letter that was from the tribes, and I would really like the record to reflect reality on this. I'm certainly not here to defend Mr. North's actions, but it's important that we have clarity about exactly what edits Mr. North suggested to the tribal petition.

This is a 12-page letter, and I would like to introduce into the record as well a copy of the letter showing the edits suggested by Mr. North, and on a 12-page letter, Mr. North suggested adding 16 words, suggested deleting 3. These changes included correcting a spelling and removing an extra space. So I really want these suggested edits to be introduced because I just don't see how the strong public accusations we're hearing today are confirmed.

Chairman SMITH. Without objection, that will be made a part of the record as well.

[The information appears in Appendix II]

Ms. BONAMICI. Thank you, Mr. Chairman.

Mr.—Administrator McLerran, thank you again for joining us. Some Members have been critical of the EPA and claim that they've been—not been open and inclusive in the outreach to outside groups during the development of the Bristol Bay Watershed Assessment. Specifically, you've heard allegations that suggest the opinions and concerns from Pebble were not given the same consideration as those from organizations during meetings to discuss the assessment.

So will you please talk in response about how often you met, for example, with Pebble? You certainly didn't only meet with environmental groups. Tell us about what was discussed at those meetings. And I do want have time for another question.

Mr. MCLERRAN. Certainly. As I said earlier, at EPA we have an open door when we do a process like this to folks on all sides of these issues, and the Pebble Partnership and other proponents of mining in the watershed met with us frequently. I met with then-CEO and Board Chair John Shively multiple times during the pendency of the watershed assessment and met with folks who represented other groups that were asking EPA to wait and also seeking input from all of those folks in terms of the science and the potential impacts on the watershed and native cultures in the Bristol Bay area, so many, many meetings with the Pebble Partnership.

In fact, I went to the mine site three times with the Pebble Partnership executives, once with Senator Murkowski, and we engaged in listening to presentations from the Pebble Partnership about their plans, about what they felt they could do to mitigate impacts of mining in the watershed, so an extensive engagement on all sides on this issue.

Ms. BONAMICI. And I have a letter, you sent to John Shively, the former CEO of Pebble, where it appears that you go item by item addressing his concerns. Was that a typical practice that you would—in addition to meet with them, respond to their concerns in writing?

Mr. MCLERRAN. Yes. Mr. Shively would request meetings. I will call him. He would send letters. I would write him back. We had, I think, a good working relationship back and forth.

Ms. BONAMICI. Thank you very much, Administrator McLerran.

You know, Oregonians and others from the Pacific Northwest care a lot about this issue. We've been following it closely. In fact, nine of my colleagues from the Pacific Northwest and I sent a letter to EPA Administrator McCarthy urging her to use the authority given to the EPA under the Clean Water Act to protect the Bristol Bay salmon fisheries from the potentially devastating impacts of the proposed Pebble Mine. This affects the entire region, not just Pebble Bay.

So despite the claims made by some that the EPA may have colluded with groups that opposed the mine, it appears that you were very responsive to the concerns raised by Pebble. And I tend to agree with the EPA IG report that found no evidence of bias in how the EPA conducted the assessment. I hope that the Committee today recognizes this so we can move forward and address other issues of importance to our constituents.

Thank you, Mr. Chairman, and I yield back.

Chairman SMITH. Thank you, Ms. Bonamici.

And the gentleman from Florida, Mr. Posey, is recognized for his questions.

Mr. POSEY. Thank you, Mr. Chairman.

Mr. McLerran, first, let me say that I'm not an advocate for the mine, but I wonder if you feel it's appropriate for career EPA staff to discuss implications of upcoming presidential elections and how it might affect their scientific work.

Mr. MCLERRAN. So I think we all received training and we're quite aware of, you know, what our obligations are with respect to not engaging in political conduct.

Mr. POSEY. So you think it would not be appropriate?

Mr. McLERRAN. I am not aware of the circumstance that you're talking about, and——

Mr. POSEY. Okay.

Mr. McLERRAN. —would need some more——

Mr. POSEY. So are you aware whether or not EPA employees discussed the implications of the 2012 presidential election as it might have affected the work conducted on the Pebble Mine by EPA?

Mr. McLERRAN. I certainly can't recall that.

Mr. POSEY. Okay.

[Slide.]

Mr. POSEY. On screen is testimony from the committee's deposition of the Phil North, which I thought you'd already be familiar with. It indicates that Mr. North contemplated the impact of the 2012 presidential election with outside parties, including Jeff Parker, fellow EPA employee Palmer Hough. Mr. North and Mr. Hough are career employees, not political employees. Could there be any clearer demonstration that the politics was a motivating factor regarding the Pebble Mine for the career employees?

Mr. McLERRAN. So I have not—I'm not aware of any of those communications, and I couldn't make any conclusions about that.

Mr. POSEY. So you'd never seen this deposition——

Mr. McLERRAN. No.

Mr. POSEY. —before?

Mr. McLERRAN. No, I have not.

Mr. POSEY. But you're not willing to take another look at an investigation of what's been before you?

Mr. McLERRAN. So——

Mr. POSEY. I mean, you're learning all kinds of new information today, you're telling me, and you say it's inappropriate. I think you're saying that. But when the Chairman asked if you care to look into the issue any further, you just keep saying no, it's not necessary.

From the committee's investigation, it appears clearly that political factors beyond science and good public policy played a role in EPA's analysis of using a section 404(c) action. And the question is, you know, whether or not you considered it appropriate for EPA employees to consider political factors in preparing supposedly scientific documents.

Mr. McLERRAN. So, again, I'm not aware of any of those conversations, and I'd have to know more.

Mr. POSEY. You've never seen any of the testimony from the depositions that involved Mr. North before?

Mr. McLERRAN. No, I have not.

Mr. POSEY. Yes. Yes. I mean, I just think you would want to investigate and look at the issues further that when the Chairman, you know, suggests that, you say you know all you need to know, and yet we have statements that we brought here that you tend to agree with are at least somewhat inappropriate and maybe we're just trying to insert too much common sense here.

Mr. McLERRAN. So, again, the Inspector General reviewed thousands of emails from EPA employees, found only one EPA employee potentially misused his position, and we followed up on that and have done training to ensure that that never happens again. But

I think we've investigated, the Inspector General has investigated, and that's appropriate.

Mr. POSEY. Well, I would think—I would think you would know that the OIG was not a comprehensive investigation. They reviewed emails from only three individuals. It was not a comprehensive review of all the documents, as I would think you would want just to be a good manager of an agency which you say its mission is openness and transparency. And I just would think you would want to know more about this. But again, I may be trying to inject too much common sense in here, Mr. Chairman. My time is up.

Chairman SMITH. Would the gentleman yield very briefly?

Mr. POSEY. The gentleman yields.

Chairman SMITH. I also want to point out that Mr. North's personal emails that he used to conduct business all disappeared, which is suspicious to a lot of us. But thank you for your questions.

And the gentleman from California, Mr. Takano, is recognized for his questions.

Mr. TAKANO. Thank you, Mr. Chairman.

There seems to be some confusion as to whether EPA has the authority to initiate section 404(c) action to protect the Bristol Bay watershed. Tom Collier, CEO of Pebble Limited Partnership, appears to be very confused about this matter. And I would like to put up a quote from Mr. Tom Collier from his testimony last November. The quote is up on the screen.

[Slide.]

Mr. TAKANO. In his testimony he said, "EPA has sought to implement the first-ever preemptive veto in the 43-year history of the Clean Water Act at Pebble utilizing a little-used provision, section 404(c), in a novel and unprecedented way." That's from Mr. Collier in his testimony.

Slide 2, please.

[Slide.]

Mr. TAKANO. This is the Federal Register notice from the 1979—from 1979 of the final rule establishing the procedures to be used when EPA is considering the use of section 404(c). It clearly states "In effect, section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued. In each case the Administrator may prevent any defined area in waters of the United States from being specified as a disposal site or may simply prevent the discharge of any specific dredge or fill material into the specific area."

Now, I call for slide 3.

[Slide.]

Mr. TAKANO. Now, in 1988, during the Reagan Administration, the EPA exercised its 404(c) authority, and in its final decision stated, "EPA Region 4 believes that the inclusion of the Becker site in this 404(c) action is appropriate even though no application for rock plowing this site has yet been made." Again, it is appropriate even though no application for rock plowing. So this 404(c) authority was invoked prior to the application for a permit.

Now, Mr. McLerran, given what I have just read, would you agree with Mr. Collier's characterization of the 404(c) authority EPA used to protect Bristol Bay watershed? Would you agree with his characterization?

Mr. McLERRAN. No, sir.

Mr. TAKANO. And how do you respond to these kinds of assertions that he's made?

Mr. McLERRAN. Well, we believe that Congress did provide in the Clean Water Act under section 404(c) the authority for EPA to review whether, in certain circumstances, there are unacceptable adverse effects on a variety of factors, including fisheries. And so we believe the authority is clear from Congress. We use it sparingly, as I said previously, for circumstances where we believe that it's justified and merited under the facts. But it is clear authority from Congress.

Mr. TAKANO. Has the EPA, under the Obama Administration, used this authority preemptively in any other matter or is it being considered?

Mr. McLERRAN. No, not prior to a permit application.

Mr. TAKANO. But the one time it was used in a similar fashion was under the Reagan Administration, is that correct?

Mr. McLERRAN. So I think there may be two times, once in Louisiana, once in Florida, that were both during the Reagan Administration.

Mr. TAKANO. So it's been used twice before, this authority, and both were under the Reagan Administration? Is that what you're telling me?

Mr. McLERRAN. That's what I believe is the case.

Mr. TAKANO. Well, it seems to me that the unique nature of Bristol Bay and its support of most salmon populations in the Western Hemisphere make it especially suited to the use of 404(c) authority. Can you please comment on the appropriate use of this authority as it relates to Bristol Bay and other unique ecosystems?

Mr. McLERRAN. So Bristol Bay, again, is a remarkable place. It's a place that produces regularly between 35 and 40 million sockeye salmon every year, produces all five species of wild salmon, and is relatively undisturbed.

Mr. TAKANO. Quickly, if I may interrupt, did you ever discuss the Florida 404(c) case with Mr. Collier? Did you ever have that discussion with him?

Mr. McLERRAN. Not that I can recall.

Mr. TAKANO. Okay. Well, thank you so much.

I yield back, Mr. Chairman.

Chairman SMITH. Would the gentleman yield to me real—very briefly for a couple of questions?

One is I'm not suggesting that the gentleman used quotes out of context, but I noticed that the sentences before and after some of the quotes were obscured, and could you give us the entire passage that you excerpted from a few minutes ago?

Mr. TAKANO. Of course, Mr. Chairman.

Chairman SMITH. Okay. And second of all, I just want to make it clear this is unprecedented under this Administration. In the case of the Florida situation, I think the facts are entirely different, and we'll share those with the gentleman.

Mr. TAKANO. Thank you, Mr. Chairman.

Chairman SMITH. Thank you.

And the gentleman from Texas, Mr. Babin, is recognized for his questions.

Mr. BABIN. Yes, sir. Thank you, Mr. Chairman. I appreciate it. I'd like to show a document to you, Mr. McLerran, which contains notes taken at a meeting with the EPA and Trout Unlimited and other groups who petitioned the Agency to invoke a pre-application 404(c) action.

[Slide.]

Mr. BABIN. As you can see, this email indicates that EPA employee Richard Parkin is reported to have "stressed that while a 404(c) determination will be based on science, politics are as big or bigger factor."

Administrator McLerran, one of your closest advisors on Pebble Mine Richard Parkin admitted that politics will play as large a role as the science in his determination to stop the Pebble Mine. If this is the feeling of the Agency, how can the judgment and impartiality of the EPA be trusted at all in this particular decision?

Mr. MCLERRAN. So I haven't seen this email before but——

Mr. BABIN. You can now.

Mr. MCLERRAN. But I can tell you that, as the decision-maker on this, science was what was important to me. And doing the science, conducting a watershed assessment that gave us the information about what the potential impacts of large-scale mining in the Bristol Bay watershed might be was the most important thing to me.

Mr. BABIN. Well, according to your closest—one of your closest advisors here, he says that science—it's based on science but it's more important to most cases to have politics involved. So that kind of contradicts what you just said.

Was Richard Parkin one of the employees who worked on the Bristol Bay Watershed Assessment, the scientific document that you assert EPA relied on?

Mr. MCLERRAN. Yes.

Mr. BABIN. Okay. These notes appear to come from a meeting with EPA in Pebble Mine opposition. How often did you meet with Trout Unlimited and other groups who urged the EPA to use section 404(c)?

Mr. MCLERRAN. So, as I stated earlier, we had meetings with proponents and opponents of mining in the watershed. I can't recall how many times I had specific meetings but probably half a dozen.

Mr. BABIN. Okay. Well, he conducted the science assessment, so was he impartial? Was he impartial or was he not?

Mr. MCLERRAN. So he was one of a large group of people that——

Mr. BABIN. No, no, no——

Mr. MCLERRAN. —helped prepare——

Mr. BABIN. —was he—do you consider him to be impartial or partial if he was the one conducting the science? Yes or no.

Mr. MCLERRAN. So he was not the only one conducting the science.

Mr. BABIN. You're not answering my question, Mr. McLerran. Given that the sentiment of EPA employees was that the politics of the Pebble Mine situation would trump the science, will you reconsider invoking section 404(c) process so that at public, transparent, and fair permitting process can be carried out?

Mr. MCLERRAN. So, again, I've stated my answer to that previously. We believe that there has been an open, fair, and transparent public process, and there's litigation now pending overall of that. But personally, I believe that the process has been an incredibly open and transparent and fair process.

Mr. BABIN. Well, you have just said that—or you did not answer the question of whether he was impartial or not, so I assume you think he possibly was impartial, plus the fact that you admitted that the Inspector General's report showed possible misuse of EPA employees' positions. But you also stated that you have no intention of investigating further.

And, Mr. McLerran, you've demonstrated a distinct lack of fairness and impartiality and sound administrative abilities. And you are exactly the type of federal employee or bureaucrat that America is really getting tired of. And I would appreciate it if you would answer the questions yes or no without beating around the bush.

So I yield back my time.

Chairman SMITH. Thank you, Mr. Babin.

And the gentleman from Virginia, Mr. Beyer, is recognized.

Mr. BEYER. Thank you, Mr. Chairman.

And I'd like to ask unanimous consent to introduce into the record a letter from Senator Murkowski to John Shively, Mark Cutifani, and Ron Thiessen from July 1, 2013.

Chairman SMITH. Without objection.

[The information follows:]

[The information appears in Appendix II]

Mr. BEYER. And a letter from Mr. John Shively of Pebble Beach Partnership to Mr. McLerran dated October 21, 2011.

Chairman SMITH. Okay. Without objection.

[The information appears in Appendix II]

Mr. BEYER. And I'd like to quote from Senator Murkowski's letter——

Chairman SMITH. Maybe we ought to roll all these together.

Mr. BEYER. Okay. Yes. She—in this letter she—many residents in Alaska are familiar with the ongoing saga that is the Pebble Partnership's failure to submit permit applications to build their mine. But from Lisa's letter—I have so many pieces of paper here—she says, " At least as far back as November 3, 2004, Northern Dynasty Minerals asserted the submission of permit applications was imminent."

The next paragraph, "October 12, 2005, another statement was issued claiming that a full permitting process . . . was slated to begin in 2006."

Next paragraph, "On October 27, 2008, Alaskans were assured that those seeking to develop the Pebble deposit were on schedule to finalize the proposed development plan in 2009."

Next paragraph, "February 1, 2010, Alaskans were told that PLP was preparing to initiate project permitting under the NEPA in 2011."

Finally, in the next paragraph, "June 13, 2013, a PLP representative said that you hope to have a project to take into permitting this year."

She writes basically just very frustrated again and again about the permits that never came forward from PLP and its predecessors.

And then Mr. Shively's letter to Mr. McLerran, he suggests that Pebble would finish a mine design layout in late 2012.

So, Mr. McLerran, did they ever finish that layout?

Mr. MCLERRAN. So the Pebble Partnership has not, to date, submitted a permit application, but they did submit in February of 2011 a set of mine plans to the Securities and Exchange Commission, and that formed the basis for us looking at mine scenarios in the Bristol Bay watershed so——

Mr. BEYER. But they never submitted anything to the EPA?

Mr. MCLERRAN. They did not submit a permit application, still have not, and that has been an enormous frustration to many individuals in the Bristol Bay watershed area.

Mr. BEYER. And is it fair to say that the communities will likely be impacted by the construction and the operation of Pebble Mine faced a deeply uncertain future about what their community was going to become and unless and until either Pebble or the EPA acted, that this was essentially a sort of Damocles, one way or the other hanging over their heads for a generation?

Mr. MCLERRAN. That's certainly what we heard from many in the Bristol Bay area.

Mr. BEYER. Mr. McLerran, I'd like to push back, too, on the relentless assertion by the majority that the EPA's Inspector General who found a possible—emphasize possible—misuse of position by one employee in a single-person office somehow damns the entire organization. Should—is it appropriate for the Native American tribes and the community groups to accuse you of collusion for having worked with Pebble Mine to work out the proper permit process?

Mr. MCLERRAN. Could you restate that again?

Mr. BEYER. Are you guilty of collusion for talking with Pebble Mine about this?

Mr. MCLERRAN. No. I would say no.

Mr. BEYER. Isn't it the requirement in a democracy that our government officials meet freely with both sides, with those for and against, to try to come to a proper determination about how to move forward?

Mr. MCLERRAN. Yes.

Mr. BEYER. Is one person with a possible misuse of position, which looking at—I estimated it was less than 1/2 of one percent of the text in that one letter that he made—added 15 words, corrected a misspelling, and deleted the word "and" and "mining operations" for clarity, there was nothing substantive in that whatsoever. Did you do all the—did you follow all the recommendations of the Inspector General for additional training and looking——

Mr. MCLERRAN. We have and concurred with the Inspector General's report and have conducted the training that was recommended in it——

Mr. BEYER. Thank you. Thank you. There's a slide that Mr. Posey put up. If it's possible to put that back up, it was on the testimony, the deposition from Mr. North if it's possible. If not, I'll just quote from it. Because I had great difficulty understanding how the paragraphs on that page somehow led to the sense that this was politically motivated. In fact, he says, "Were you attempting to finish what I presume was the draft watershed before the presidential election?" And he said, "Yes, it would probably be a good idea but also that I don't think the EPA, no, the EPA was not trying to finish it before that time frame and in fact it was not finished until well into 2000—the following year after the presidential election was determined."

"And do you recall if you found that—if you discussed the impending presidential election?" I can't ride an elevator or walk down a hall around here without discussing the presidential election with Democrats and Republicans and everyone else. Very difficult to take that and to think that that's inserting presidential politics into the determination was happening.

My time is up, Mr. Chairman, but I yield back.

Chairman SMITH. Okay. Thank you, Mr. Beyer.

The gentleman from Louisiana, Mr. Abraham, is recognized.

Mr. ABRAHAM. Thank you, Mr. Chairman. Thank you, Mr. McLerran, for being here.

I've flown the back country of Alaska, and I can tell you the country is beautiful and the people are just great people to be around. And I don't think any of us here in this room want any detriment to the environmental beauty of Alaska. We just want fair play.

I do want to go back to a comment that was just made about the OIG's finding. The EPA OIG's finding was a "possible" only because some emails were missing and the IG could not conduct future interviews of Mr. Phil North because he had actually left the country. So I just wanted to interject that and clarify this Phil North thing that has evidently been bouncing back and forth.

I was listening to your testimony at the beginning, words such as "could impact," "potentially do"—and again, all these are certainly subjective opinions in based on some of your reports that you've gotten from your scientists. And I've gone back and I've read some of their reports, even ten years plus. And three of those scientists that the EPA contracted to—contributed to the BBA assessment Ann Maest, Alan Boraas, Carol Ann Woody, they've long been vocal opponents of the Pebble Mine way before EPA even hired them to give them their opinion.

You're an attorney. You understand the burden of proof. You understand objective data. Do you think it's appropriate for the EPA to use information developed by scientists who've already predetermined their opinion?

Mr. MCLERRAN. So I think that the reports that you're referring to, the one by Ann Maest was not used in our final assessment. And the other two were reports that were submitted during the public process where people were commenting on our draft watershed assessment. And so when those reports were submitted, our Office of Research and Development engaged in some independent peer review, asked a contractor to engage some independent peer reviewers to look at whether those—whether one of those reports was sufficient and scientifically credible and concluded that it was.

I think with respect to the archaeologist who prepared sections, again, that was independently peer-reviewed. One of the peer reviewers that was independently selected was a University of Alaska Fairbanks professor who's been engaged in cultural work in

Alaska as her career of work, and again, independently peer-reviewed the cultural assessment. So——

Mr. ABRAHAM. I think it just—in my opinion and certainly in others that I've talked to, it just adds, you know, to the illegitimacy of the report that the EPA put out as to—because there just appears to be bias from several of the scientists that you guys contracted with.

And I think you've already answered the question, you know, would you reconsider invoking the 401—404(c) process, and I think your answer to that was no.

I am curious. You said that the company itself that wanted to develop the Pebble Mine area, what did they say or how could—what did they say—how they could mitigate the environmental impact? I haven't heard that in any of this committee testimony. What did the companies say they could do to prevent the salmon from dying and that type of deal? Because we don't want the salmon dying. We want the land to stay pristine, and we want the fisheries and the fishermen to be able to do whatever they want to do. But what did the company say about it?

Mr. MCLERRAN. So, as I said, they submitted literally thousands of pages of——

Mr. ABRAHAM. And just give me the synopsis. I mean, just give me the short and dirty of it. What was the final—their final opinion?

Mr. MCLERRAN. So with respect to the fishery, what they were proposing was a concept called compensatory mitigation. And compensatory mitigation is typically used in watersheds that have been previously disturbed where you restore some habitat function, where you put—where you might restore some wetlands or that sort of thing.

Here in this watershed, this is a largely undisturbed watershed. It's pristine, and we didn't feel that—our scientists didn't feel that the compensatory mitigation scheme that was proposed would be effective and it——

Mr. ABRAHAM. And did they say why?

Mr. MCLERRAN. Because, again, in this watershed nature has created a really unparalleled habitat, and for us to be believing that we could improve on nature in this particular watershed was unlikely.

Mr. ABRAHAM. That's an odd answer.

Thank you, Mr. Chairman. I yield back.

Chairman SMITH. Thank you, Mr. Abraham.

The gentleman from Alabama, Mr. Palmer, is recognized for questions.

Mr. PALMER. Thank you, Mr. Chairman.

Are you aware if any EPA employees within Region 10 had come to the conclusion that EPA should use a section 404(c) of the Clean Water Act before EPA had produced any science with regard to the impact of the Pebble project?

Mr. MCLERRAN. So as I stated earlier, there were various opinions amongst the staff members, some who felt that beginning a 404(c) process, which is a pretty extensive process in itself, would be appropriate. There were others that felt that we should we wait until a permit application was submitted to the Corps——

Mr. PALMER. Would you take a——

Mr. MCLERRAN. —and then we ultimately decided to take a middle path, which was conducting a scientific review under our authorities, our section 104 of the Clean Water Act.

Mr. PALMER. Let me draw your attention to what Mr. North said in his deposition, in his testimony, if you look at that slide to your right or left or you may be able to see it there.

[Slide.]

Mr. PALMER. He says, as you stated before, you had formulated your opinion—and this is our questions to Mr. North. "Your opinion on whether EPA should use section 404(c) for the Pebble Mine before a scientific document was prepared by the EPA, right?" And Mr. North testified "Yes."

I've got another slide I want to bring up.

[Slide.]

Mr. PALMER. According to the documents obtained by the committee, EPA employee Phil North began preparing a record to base a preemptive 404(c) action as early as 2009. In an email exchange from December 2009 before EPA received any petitions for action, Mr. North exchanged emails with EPA employee Mary Thiesing. Ms. Thiesing told Mr. North "Approach it as though there will be a 404(c) and we don't need to wait for a new Regional Administrator, new RA, to do that. However, we will be getting one very quickly and there will be no 404(c) without the RA's complete, total, and most importantly, continued buy-in."

Administrator McLerran, this email appears to lay out the playbook for initiating a preemptive 404(c) action against the Pebble Mine. Is it troubling that EPA employees appear to have made up their minds on stopping the Pebble Mine so early in the process? Does that bother you?

Mr. MCLERRAN. So, again, as I stated, there were employees with various opinions——

Mr. PALMER. No, I'm asking you——

Mr. MCLERRAN. —about how to proceed——

Mr. PALMER. —does that bother you. I'm not asking you about the opinion of the EPA employees. I'm asking you, does it bother you that it appears that these people had already made up their minds with no scientific evidence?

Mr. MCLERRAN. So it——

Mr. PALMER. It's a yes or no.

Mr. MCLERRAN. It's the job of EPA employees to look at——

Mr. PALMER. No, sir, it's a yes or no. Does that bother you?

Mr. MCLERRAN. I—you know, I would hesitate to, you know, give you a conclusion based on just this——

Mr. PALMER. No, I'm asking you what it—does it—would it—let me be hypothetical. Would it bother you if EPA employees were acting preemptively without scientific data, without doing the due diligence, to go ahead and deny someone a permit? Would that bother you?

Mr. MCLERRAN. So it would bother me if the——

Mr. PALMER. Thank you.

Mr. MCLERRAN. —if we didn't have the checks and balances that we have.

Mr. PALMER. Let me read something else from that email that bothers me. It goes on to say, "We will be prepared to give the RA a suggested direction when he/she comes on board. This thing will be developing for years, and we aren't likely to get RA support or headquarters support for preemptive 404(c) on a project this big before the information is developed."

Now, that really bothers me because that tells me that they fully understood what they were doing. They were fully aware that if they didn't act preemptively, that the new RA or headquarters wouldn't agree on a preemptive 404(c) without the scientific data, without the due diligence on a project that big. Does that bother you?

Mr. MCLERRAN. So again, exactly what we did is we engaged in an extensive scientific review. We did not invoke 404(c) without engaging in the science.

Mr. PALMER. Well, it says right here that they wanted to move on this project before the information was developed. It seems that the playbook is laid out in this email and it has less to do with establishing the actual science and impacts of a project and conducting objective analysis and more to do about appealing to politics and optics to achieve a certain outcome at the EPA. In your opinion, would that be the correct way for an agency to make a decision?

Mr. MCLERRAN. No, but I don't believe that's what occurred here.

Mr. PALMER. Well, I think that that's what the evidence seems to indicate.

Thank you, Mr. Chairman. I yield back.

Chairman SMITH. Thank you, Mr. Palmer.

The gentleman from California, Mr. Swalwell, is recognized for questions.

Mr. SWALWELL. Thank you, Chair. Thank you, Administrator McLerran.

Just to kind of go back so you can make clear in the record, did the EPA, such as in the Office of the General Counsel, engage in an examination or analysis of its legal ability under section 404(c) before Pebble Mine filed its permit? And if so what did it conclude?

Mr. MCLERRAN. So, yes, the—you know, we did take a hard look at what our authorities were and engaged with legal counsel throughout.

Mr. SWALWELL. Great. And also, Administrator, your agency initially declined to invoke its authority with respect to the proposed mine. Eventually, you did so. Can you explain what changed?

Mr. MCLERRAN. So again, we did a very extensive scientific review, the Bristol Bay Watershed Assessment. We had a very open and transparent process, got literally millions of comments on it, a lot of scientific input, and ultimately, we concluded that a mine of the scale assessed in the watershed assessment would have significant adverse effects upon the fishery.

But what we did do is we did not impose a veto. PLP may still be issued a permit. We imposed restrictions on the scale of mining in the watershed based on a .25 billion-ton mine, which is a mine that is the worldwide average size for porphyry, gold, and copper mines.

Mr. SWALWELL. And, Administrator, do you believe the criticisms of your agency's methodologies from the majority today are valid?

Mr. MCLERRAN. No. I'm quite proud of the process that we conducted. I think it was legally appropriate within the authorities that we have and was an incredibly open and transparent process.

Mr. SWALWELL. Thank you, Chair. I yield back.

Chairman SMITH. Thank you, Mr. Swalwell.

The gentleman from Michigan, Mr. Moolenaar, is recognized for his questions.

Mr. MOOLENAAR. Thank you, Mr. Chairman, and thank you for your testimony today.

If I could, I have a document—a slide that I'd like to show you. It has actually three slides involving a proposal for initiating an advance 404(c) process for the Pebble Mine resented to you by Richard Parkin on August 27, 2010.

[Slide.]

Mr. MOOLENAAR. Are you familiar with this document?

Mr. MCLERRAN. I actually can't read it in the fine print——

Mr. MOOLENAAR. Okay.

Mr. MCLERRAN. —that's on the slide.

Mr. MOOLENAAR. Well, it's basically option 3 from the options paper. Are you familiar with that? It's basically recommending that, you know, going right to the 404(c) process.

Mr. MCLERRAN. So I don't recall having seen this, and again, there were many options papers, multiple drafts of options papers, and ultimately, I was the one who made the decision that we go forward with a watershed assessment.

Mr. MOOLENAAR. Okay. So you're not sure if you've seen this document?

Mr. MCLERRAN. I can't recall having seen this particular document.

Mr. MOOLENAAR. It seems like a pretty important one. In it Mr. Parkin indicates that you should think of the Pebble project as a huge open pit mine and tailings reservoir proposed for Yellowstone National Park. That would rival this situation in many ways but wouldn't have the potential offsite and worldwide impacts of this proposal. That's on this slide here.

Is that how this project was presented to you, that it was worse than putting a mine in Yellowstone National Park?

Mr. MCLERRAN. I don't recall ever having it characterized to me that way.

Mr. MOOLENAAR. That's amazing to me that—so I just want to be clear on the gentleman Richard Parkin, is he one of your senior staff? Is he someone you don't know very well or is he an advisor?

Mr. MCLERRAN. Rick Parkin was the acting Office Director for our Environmental, Tribal, and Public Affairs Environmental Assessment——

Mr. MOOLENAAR. Does he report to you?

Mr. MCLERRAN. At that time he reported, I believe, to Michelle Pirzadeh, the Deputy Regional Administrator.

Mr. MOOLENAAR. Okay. So he wasn't—I mean, in his document, as we go through, he talks about some other things.

And if I could have another slide.

[Slide.]

Mr. MOOLENAAR. He talks about the EPA recognizing that, where possible, it's much preferable to exercise the authority to 404(c) before the Corps or the state has issued a permit and before the permit holder has begun operations. And is that a fair assessment?

Mr. MCLERRAN. So, again, I don't recall it having been characterized to me that way or having that particular conversation with Mr. Parkin.

Mr. MOOLENAAR. Okay. Okay. He also talks about the EPA—the new face of the EPA: open, collaborative, promoting the discussion on environmentalism before a decision is made. Would you agree with that assessment?

Mr. MCLERRAN. So, as I said earlier, EPA does have a culture of being open to listening to advocates on all sides of an issue.

Mr. MOOLENAAR. Okay. He doesn't mention sound science in his characterization of the new EPA, and I find that very interesting that that's not included in the new EPA.

Mr. MOOLENAAR. Another thing—and one of the questions I have—are you familiar with the term honest broker?

Mr. MCLERRAN. I've heard that term before, yes.

Mr. MOOLENAAR. And would you consider—I mean, you seem to be someone who likes to evaluate all sides of an issue for making a decision.

Mr. MCLERRAN. Yes.

Mr. MOOLENAAR. Would you characterize Richard Parkin as an honest broker when it comes to scientific evidence?

Mr. MCLERRAN. So—yes, but he was not the decision-maker in this instance. I was.

Mr. MOOLENAAR. But do you believe that he would give you straightforward information just based—scientific information rather than political information, for example?

Mr. MCLERRAN. Yes. In my job as Administrator is to press the staff on those types of issues, to——

Mr. MOOLENAAR. Okay.

Mr. MCLERRAN. —to really press around the information that I'm receiving.

Mr. MOOLENAAR. Well, I want you to know that, you know, he—just in some documents that we've received, he talks about he wants to sell you on a 404(c) process, he's going to make a pitch right to go to option 3. He also talks about political fallout if we don't go this option and almost like there's a preemptive strike that's necessary before the group that's—would submit a permit so you wouldn't have to explain yourself, you know, why you denied a permit later in the process. Does this preemptive strike, does that make sense to you?

Mr. MCLERRAN. Well, again, the decision that I made was not to move immediately to a 404(c) action. The decision I made was to conduct three years of independently peer-reviewed science in a very extensive, open, public process.

Mr. MOOLENAAR. You know, he uses terms like "We will be more successful controlling the spin on a proactive action." What spin is he talking about?

Mr. MCLERRAN. I really have no idea.

Mr. MOOLENAAR. Okay. And I guess my question to you is why—the bottom line is this: Were you acting in the interest that you wanted to save the Pebble Mine dollars by doing this preemptive action, that you felt like this just should not be a place for a mine, why have them spend their time and energy on a permit? And as a result, they would spend more dollars. So you felt that you were protecting the salmon and saving dollars for a useless permit. Is that really what you were trying to do?

Mr. MCLERRAN. So that was really not a major consideration for me. I think there was discussion of what was Congress's intent in creating the 404(c) authority preemptively and what of that, you know, might have been on Congress's mind. But that was not a primary consideration for——

Mr. MOOLENAAR. But typically, it would be after a permit application, would it not?

Mr. MCLERRAN. So, again, as I've said, we've only used this authority 13 times and it——

Mr. MOOLENAAR. And why was this so important? Why didn't you let the proposal that the mine was advocating for—why didn't you take input and let them make a solid proposal that you could then either reject or support?

Mr. MCLERRAN. So, again, the proponents of Pebble Mine, Northern Dynasty Minerals, had presented pretty detailed plans both in terms of water rights, applications to the State of Alaska, and then to the Securities and Exchange Commission.

Mr. MOOLENAAR. But not to you?

Mr. MCLERRAN. Well, again, we had access to those. They were public documents, public record.

Mr. MOOLENAAR. But they didn't apply for a permit to you?

Mr. MCLERRAN. They did not, but we had others requesting us to use our Clean Water Act authority so——

Chairman SMITH. Okay. The gentleman's time has expired. Thank you, Mr. Moolenaar.

Mr. MOOLENAAR. Thank you, Mr. Chairman.

Chairman SMITH. The gentleman from Texas, Mr. Weber, is recognized.

Mr. WEBER. I thank the Chairman.

Mr. McLerran, welcome to the committee. I hope you find this a judicious use of your time. Good.

In your exchange with Chairman Smith you said you agree the Inspector General could—that there could have been conduct that might have occurred which needs some type of adjustment. Do you recall that exchange?

Mr. MCLERRAN. It's over an hour ago now.

Mr. WEBER. Right. Well, sure, but something along those lines. And on page five of your testimony you write—and I'm quoting—"EPA's 44-year history of judicious use of its section 404(c) authority has and continues to ensure predictability and certainty for the business community." So judiciousness, as it were, from your own words, that's a good thing, right? You—we all seek to be more judicious.

You might be interested, I looked up judicious. An example they used from dictionary.com is "using or showing judgment as to action or practical expediency; prudent." And then it says "judicious use of one's money," and I would submit that we're here to protect taxpayers' dollars.

In your exchange with the gentleman from Virginia, Congressman Beyer, he asked you if you had communicated with the mine owners about their permit but you had not been accused of collusion. Do you remember that exchange?

Mr. MCLERRAN. I do.

Mr. WEBER. Okay. But you didn't offer to strengthen their process or their permit, as Mr. North did to the opponents of the mine. Is that fair? You did not offer to strengthen their permit process?

Mr. MCLERRAN. So in many conversations with the Pebble Partnership, we talked about how the scientific information that we pulled together might benefit them, as well as our decisions.

Mr. WEBER. Okay. Well, if you did, kudos to you. That would be a judicious use of taxpayer money, I would offer. And you also said in the exchange with Mr. Moolenaar that there were multiple drafts of the options papers. Ultimately, you were the one that decided to go forward. Was it based on those options papers, your decision?

Mr. MCLERRAN. So, you know, we—as I understand it now, there were many options papers, you know, exchanged back and forth between staff before I saw options papers.

Mr. WEBER. But you made the decision to go forward based on those options papers. That's what you just said with Mr. Moolenaar. There were many option papers, but ultimately, you were the one that decided to move forward.

Mr. MCLERRAN. So there was more than options papers that went into the decision-making on this.

Mr. WEBER. Okay. But did you see those option papers or did you make a decision without seeing those options papers?

Mr. MCLERRAN. So I saw some final options papers at points of which I was briefed or when the Administrator was briefed, but——

Mr. WEBER. But you'd already made the decision before you saw those options papers?

Mr. MCLERRAN. No.

Mr. WEBER. Oh, so you did see the options papers before you made the decision——

Mr. MCLERRAN. Well——

Mr. WEBER. —to move forward?

Mr. MCLERRAN. —I have not seen all of the options papers that were exchanged amongst staff that I am now aware might have existed.

Mr. WEBER. So is it customary for you to make those kinds of decisions without the benefit of all of those options papers, all that knowledge?

Mr. MCLERRAN. Yes, because what happens, you know, and our process is we have a lot of back and forth between staff——

Mr. WEBER. Okay.

Mr. MCLERRAN. —before they present options to leaders.

Mr. WEBER. Mr. McLerran, in 2015, Kim Strassel at the "Wall Street Journal" asked you about your recollection of one of those documents prepared which laid out those options, and you stated that neither you nor other decision-makers at the EPA had ever seen that document. Did you state that to her?

Mr. MCLERRAN. I did.

Mr. WEBER. Do you stand by that today?

Mr. MCLERRAN. I do.

Mr. WEBER. But you just testified you saw some of those option papers.

Mr. MCLERRAN. So what I saw was final option papers that were documents at the point that I was prepared to make decisions——

Mr. WEBER. So someone—someone cherry-picked and chose what option papers they wanted you to see?

Mr. MCLERRAN. Well, again, our process often involves staff working back and forth together.

Mr. WEBER. Who—the reports—who would have carried those options papers to you and said, Director McLerran, you need to look at these option papers? Who would have done that?

Mr. MCLERRAN. So Rick Parkin typically, you know, would have had those discussions, but again——

Mr. WEBER. Okay.

Mr. MCLERRAN. —the options papers weren't the only consideration——

Mr. WEBER. Would you be surprised to learn, Administrator McLerran—I know you're having to read fine print here—that we have documents that show not only were you briefed on those option papers but you actually requested edits to those documents?

Mr. MCLERRAN. So again, you know, there were points at which I was presented options papers but not all of the options papers that were exchanged back and forth. And while I don't recall editing options papers, that's——

Mr. WEBER. North testified—we've got his testimony—that he doesn't recall writing the options paper, yet you requested edits to it. Does it seem judicious for taxpayer money that nobody in EPA seems to understand who wrote the options paper, doesn't recall the document—you didn't admit until I think just now you made edits on it—with regard to the Pebble Mine, and nobody even knows who authored those documents? Is that—I mean, are we hiding behind an anonymous author of that document?

Mr. MCLERRAN. I would not call that a fair characterization.

Mr. WEBER. You would not—would you call that a judicious use of taxpayer money?

Mr. MCLERRAN. You're asking me to make a conclusion based on your characterization——

Mr. WEBER. Well, the American public—you know, we want fair and open process. We want to know who's responsible and who wrote the documents and how you came to that conclusion without collusion, as Mr. Beyer of Virginia asked you about in communicating with the owners of the mine. So we—the American people expect fair and open process.

Well, let me just close by saying this. You keep saying that the Office of Inspector General looked at these things, but the OIG doesn't hire and fire employees in your department, is that right?

Mr. MCLERRAN. That's correct.

Mr. WEBER. You alone have that ability?

Mr. MCLERRAN. That's correct.

Mr. WEBER. Okay. So I'll go back to what I said earlier about judicious. Now, with your exchange with Chairman Smith, you said there must have been some impropriety. We heard testimony that they looked at three emails. But you still stand by your statements you're not willing to investigate and see if there were any more improprieties in the department that you manage, not the OIG, and that's a judicious use of taxpayer resources?

Mr. MCLERRAN. So just one correction, they looked at over 8,000 emails, and again, you know, we—Mr. North left the Agency before the Inspector General——

Mr. WEBER. So I'm correct that it's three custodians' emails. Well——

Chairman SMITH. The gentleman's time——

Mr. WEBER. Mr. Chairman, I yield back. Thank you, Mr. McLerran.

Chairman SMITH. Thank you, Mr. Weber.

Without objection, I'd like to put in the record the documents that Mr. Moolenaar referred to in his questioning.

[The information follows:]*************** INSERT 8 ***************

Chairman SMITH. The gentleman from Arkansas, Mr. Westerman, is recognized for his questions.

Mr. WESTERMAN. Thank you, Mr. Chairman.

Mr. McLerran, are you aware that employees—I'm over here—employees at the EPA were building a record for a 404(c) process before the Agency ever began working on the watershed assessment?

Mr. MCLERRAN. So, again, as I said, I'm aware now that there were employees that had differing points of view on this, and some had the point of view that a 404(c) action might be appropriate, initiating that action might be appropriate, and others who did not.

Mr. WESTERMAN. And they used taxpayer money to hire a contractor to do this work for the EPA to assess the risk of the Pebble project as part of building this section 404(c) process?

Mr. MCLERRAN. So I—that's a characterization that I would not agree with.

Mr. WESTERMAN. Well, maybe you wouldn't mind looking at the testimony from Phil North. The question says, "So I just want to be very clear, the work that NatureServe, who was the contractor, had already been doing, as you've stated, to build the record for a 404(c) action, that work just became part of the watershed assessment?" And Mr. North answered, "That's correct." "And money was added onto the contract and everything else that was needed to facilitate that?" And he answered, "Right."

So he testified that they'd already been working with NatureServe. When the assessment came along, they just took the work they'd already done and made that part of the assessment. Are you aware or were you aware that NatureServe's work on building a record towards the 404(c) action was then just transferred over to the watershed assessment?

Mr. MCLERRAN. I was not aware of that, and again, the watershed assessment was peer-reviewed, you know, went through a very public and transparent process. So there may have been lots of work that went into that, but, again, we stand behind the watershed assessment, feel that it was a very well-done document, and——

Mr. WESTERMAN. So you have no problem? That doesn't bother you at all?

Mr. MCLERRAN. So, again, I'm not familiar with that. I'd have to look into that.

Mr. WESTERMAN. So if you were to look into it and found out that they had been working on this before the assessment ever began, you wouldn't have any problem with that?

Mr. MCLERRAN. I'd want to determine all of the facts and see what the circumstances were.

Mr. WESTERMAN. But you've already said you don't feel like there's any further investigation needed.

Mr. MCLERRAN. So, again, I'm not familiar with that. I just can't make conclusions about that.

Mr. WESTERMAN. So how can you make a conclusion that no further investigation is needed when you're not even familiar with what's going on?

Mr. MCLERRAN. Well, I've—that's been asked and answered, I'm afraid.

Mr. WESTERMAN. Yes, but it doesn't make much sense the way it's been answered. And it's already been asked. We've reconsidered invoking a 404(c) process as public and transparent, but I think the issue is much bigger than that. If we look at what happened here and just take it down to the bare bones, your agency stacked the deck behind the scenes, and they orchestrated a predetermined action or a predetermined outcome.

Mr. McLerran, just to be honest, your agency appears to be more of a taxpayer-funded advocacy group than an impartial federal agency. I've only been here a year, but, you know, I think back about other testimony we've heard in here about the Gold King Mine disaster where, you know, the—maybe the easiest way to put it was your EPA employees were scientifically incompetent and they were negligent from an engineering standpoint. They were much more concerned about covering their rears than protecting the environment.

When we look at that—and whether there's a mine in Alaska, I really don't care about that, but what I do care about is if you'll screw people over in Alaska or Colorado, you'll screw them over in my state as well. So why should anyone else in America think you or your agency would ever be transparent and fair? And why should we as Congress continue to allow offices like yours to exist and spend taxpayer money on them?

Mr. MCLERRAN. So, again, the process we undertook here, which is the one I'm familiar with, was scrupulously fair.

Mr. WESTERMAN. I yield back, Mr. Chairman.

Chairman SMITH. Thank you, Mr. Westerman.

The gentleman from Illinois, Mr. LaHood, is recognized.

Mr. LAHOOD. Thank you, Mr. Chairman.

And, Administrator McLerran, thank you for being here today. And I would just say at the outset that I have not formed an opinion on the merits of this mine and whether it should go forward.

But sitting here listening today, I am concerned about the process and how that was not followed in this case. And what I think concerns folks and people, particularly back home, and what leads to a lot of cynicism in government is when there seems to be a predetermined path or there seems to be kind of a rigged process. And the nice thing about having depositions is it helps us get to the truth, helps give us accurate facts.

[Slide.]

Mr. LAHOOD. And in looking at the deposition of Mr. North, and it's up on the screen here, you know, it's clear to me that only one option was presented here, and that was the use of 404(c) to stop the Pebble Mine. In that deposition of Mr. North, a question was asked, "And did you ever try to convince anyone else at the EPA that the Agency should use 404(c) authority with regards to the Pebble project?" Answer: "I felt that we should use 404(c), and I made that case." Follow-up question: "Did you ever present the other part of the case, which is not to use 404(c) process?" "I don't think I presented that." That's his answer. Follow-up: "That was not what I presented."

So that's clearly laid out there in the series of question-and-answers under oath by Mr. North. In looking at that exchange, Administrator McLerran, it's clear there's only one option presented there.

And I guess in terms of your position, is it appropriate EPA protocol for EPA employees to present only one option in the Agency?

Mr. MCLERRAN. So Mr. North was part of a larger group of employees who looked at multiple options. Mr. North apparently had concluded that initiating 404(c) was the appropriate step, but I had other senior advisors, much more senior than Mr. North, advocating other options, that we not go forward with a 404(c) action, that we look at additional science.

And it was really an extraordinary step to do a watershed assessment and to do the science. A lot of science existed prior to doing the watershed assessments so people were aware of some of that science and they had made conclusions on that.

But to say that, you know, that was the only recommendation, the only option that was in front of me is just incorrect.

Mr. LAHOOD. Well, again, getting back to my original point of what frustrates us is the kind of predetermined kind of rigged process. I wish I was more confident in what you just mentioned, but the evidence doesn't really bear that out.

And I would just follow up, you know, in terms of the question and answer that I just went through in the deposition, you don't dispute any of that in terms of what Mr. North said, correct?

Mr. MCLERRAN. Well, again, I haven't had a chance to review his deposition, so I don't know the entire context of what he said.

Mr. LAHOOD. Okay. Well, what I just said, do you have any reason to dispute that?

Mr. MCLERRAN. I have no reason to dispute that Mr. North had his opinions but others had different opinions.

Mr. LAHOOD. Well, it appears that in reading through this process, though, he influenced a lot of people, including his manager Michael Szerlog. And I guess in terms of that influence, I mean, he was obviously an important part of this process, was living in Alaska. I mean, it appears to me this demonstrates the biased manner, and I'm trying to figure out how far that went up into EPA. Can you comment on that?

Mr. MCLERRAN. So, again, I think at the decision-making level there was not bias, and I was a key decision-maker on this. I approached this with a very open mind. And again, the option that I chose to pursue was doing additional science, doing the watershed assessment.

Mr. LAHOOD. Well, in light of the transcript that I just read to you and just showed to you, and hopefully you can follow up and look at that, which it sounds like you want to do, I mean, it's clear to me there's bias here.

And I guess my question to you would be in terms of moving forward, would you reconsider invoking the 404(c) process so that a public, transparent, and fair permitting process can be carried out from here forward?

Mr. MCLERRAN. So, as I've said before, we've had a very open, public, and transparent process using our Clean Water Act authorities. The 404(c) process has a tremendous amount of due process associated with it. The watershed assessment was a very open and transparent process that had amazing amounts of due process associated with it. So I think we are conducting processes that are open and fair and have due process associated with it.

Mr. LAHOOD. In terms of my question, would you reconsider that?

Mr. MCLERRAN. No, not at this time.

Mr. LAHOOD. Those are all my questions, Mr. Chairman.

Chairman SMITH. Thank you, Mr. LaHood.

The gentleman from Oklahoma, Mr. Lucas, is recognized.

Mr. LUCAS. Thank you, Mr. Chairman.

Administrator, let's think again about the overall process. And I guess I would first ask you, would you agree that adhering to the process laid out by NEPA, the National Environmental Policy Act, in conducting an environmental impact study is the best way to determine the impacts of the project?

Mr. MCLERRAN. Not necessarily. I think in this instance the review of the watershed and the assessment that was done here in some ways is quite deeper than what you get in a NEPA assessment. Here, we had independent peer-review. You don't have that in a NEPA process. Here, we had a focus on ecological risks, so this was an ecological risk assessment process that we engaged in with the watershed assessment.

Mr. LUCAS. Administrator, are you aware that the National Resources Defense Council, a rather powerful Pebble Mine opponent, called NEPA and the environmental impact study process the Magna Carta of environmental protection?

Mr. MCLERRAN. So I've seen Tom Collier, the Pebble CEO, quote that.

Mr. LUCAS. So do you find it strange that a group like the National Resources Defense Council that holds NEPA and the environmental impact study process in such high regards wants to exclude the Pebble project from that process?

Mr. MCLERRAN. So, again, I think the NEPA process is a fine process. It is an excellent process, but there are other processes as well, and the 404(c) process is an independent process that has its own rules and due process, and it's a very fair——

Mr. LUCAS. It would appear to me——

Mr. MCLERRAN. —and transparent process as well.

Mr. LUCAS. —Administrator, that this Administration's EPA has consistently taken the position that the environmental impact study process must be done and that no shortcuts can be taken before decisions are made regarding environmentally controversial development? So if that's the consistent position of the Administration, why is EPA—why can EPA not trust the process in this particular instance?

Mr. MCLERRAN. So, again, the Pebble Partnership could invoke the permitting process, could invoke the NEPA process by filing a permit with the Corps. They could have done that many times over the years, and they chose not to.

Mr. LUCAS. And you made it quite clear in response to a number of my colleagues that you won't reconsider invoking the 404(c) process, and you're consistent in that response, correct, Administrator?

Mr. MCLERRAN. Yes.

Mr. LUCAS. You know, one of the challenging things for members of this committee and, for that matter, the public back home when dealing with the federal government, agencies within the federal government, is trying to understand and play within the rules as they are presented.

You give the impression at least to this member of the committee and I suspect folks back home that under your leadership and in this particular situation, your part of the Agency is willing to pick and choose between the rules and pick and choose policies as they see fit at that moment. That's very frustrating for those of us in the outside world and for members of this committee.

I would suggest that this seems to point us in a direction that perhaps, Mr. Chairman, ultimately, we need to provide greater guidance and clarification in the law, that we need to provide greater certainty so that those within the Agency understand what they should be doing so that those in the outside world who have to deal with or contend with have the ability to take the right actions in the best interest of the environment and the country. This is amazing, and the fact is everyone needs to know what the rules are and play by the rules.

And with that, Mr. Chairman, in a frustrated way, I yield back.

Chairman SMITH. Thank you, Mr. Lucas.

The gentleman from Georgia, Mr. Loudermilk, is recognized for his questions.

Mr. LOUDERMILK. Well, thank you, Mr. Chairman.

Mr. McLerran, thank you for being here.

As I was listening to your testimony and the questioning here, I heard a frequent assessment by you that you feel that the Agency is operating fairly and transparently. Is that a fair assessment of your feeling?

Mr. MCLERRAN. Yes, that is a fair assessment, and I might add that the process—the 404(c) process is not complete. There still is more due process that would be yet to come and that——

Mr. LOUDERMILK. So—and summarize what you're saying. The EPA is a transparent organization, is operating within the scope of the law that was set up a Congress in the public interest?

Mr. MCLERRAN. I believe that to be so.

Mr. LOUDERMILK. I wish that was the case, but from my experience in the short time I have been in Congress, we have had less than transparency out of the Agency. As Chairman of the Oversight Subcommittee, we have had countless requests and even subpoenas for information from the EPA, and yet we continue to not receive the information that we as a constitutional body who is given the oversight authority over the EPA, including recently receiving several thousand pages of garbled junk when we requested information. So that leaves a lot of questions not only with this body but also with the American people as far as the transparency.

But I'd like to move on. If we could bring up the slide here.

[Slide.]

Mr. LOUDERMILK. We know that Mr. North had frequent email conversations with Jeff Parker, who is representing Alaska tribes, as well as other agencies or organizations that were opposed to the Pebble Mine, and we looked at the—you know, the possibility of collusion, but what I want to look at is the means and the methods of which that communication has taken place.

Private emails, as you have—are probably aware—seem to be a big issue with this Administration. And in this part of the deposition it was asked, "Okay. One of the issues that I think comes up in the PLP litigation is the utilization of personal email addresses to sometimes communicate while you were working from home. Did you do that on occasion when you worked from home?" And Mr. North said yes. The question was then, "And why did you do that?" Mr. North answered, "I'm going to give two reasons. One is because EPA system's didn't work very well, and so in order to communicate with people by email, I had to use my home email. The other reason is because there was no reason not to. I mean, nobody ever said don't use your home email, and sometimes I was sending things off to other EPA employees' home emails if they were working at home just because it was convenient and there was no reason not to do that."

Is this appropriate conduct for EPA employees?

Mr. MCLERRAN. So I believe at that point in time the EPA policy was that if people used personal email, they were to forward those emails to the EPA server. I don't believe it is appropriate to use personal email, and I think we've trained our employees that that's not—certainly in subsequent years, that that's not the way to communicate.

Mr. LOUDERMILK. Are you aware that he had used his personal email? Did you know at that time he was using his personal email?

Mr. MCLERRAN. I did not. I've, you know, subsequently become aware that as the IG became involved.

Mr. LOUDERMILK. Is this a violation of the Federal Records Act to use a personal email address to communicate on official business and not courtesy copy the EPA server?

Mr. MCLERRAN. So I'm not that familiar with the Federal Records Act to actually make that conclusion. I, of course, have taken the training, and the training that we get is to use our EPA email addresses, and if out of necessity—you know, if the system is down or you're forced to use your personal email, forward it to the EPA server.

Mr. LOUDERMILK. So you're not familiar with the Federal Records Act. Is it not there to ensure that public records are there for transparency and fairness, as you stated that your agency operates but you're not aware of what the policies are?

Mr. MCLERRAN. So, again, I'm aware of what the policies are.

Mr. LOUDERMILK. Do you use your personal email address?

Mr. MCLERRAN. No.

Mr. LOUDERMILK. You do not? You have not used your personal email account for business?

Mr. MCLERRAN. So the only times I've used my personal email address would be if I had a large document to review and I might forward that from my EPA address, but that's the only time.

Mr. LOUDERMILK. So the Federal Records Act, part of the reason that we have that is to make sure that there is transparency. And when it is not used, it really causes some problems. In fact, your own Inspector General was not able to obtain those personal emails that were sent by Mr. North.

That brings us to question is sometimes this used just to avoid the Freedom of Information Act?

Mr. MCLERRAN. So, again, our policies are clear. Our policies are that people need to use their EPA email, and if they had occasion to use personal email, to forward those emails and documents to the EPA servers so that records would be——

Mr. LOUDERMILK. Are there other employees in the EPA that are currently using their personal email accounts?

Mr. MCLERRAN. They should not be.

Mr. LOUDERMILK. If they are, are they dealt with administratively, disciplinary?

Mr. MCLERRAN. I have not had the occasion to experience that because our policies and our training are very clear on that.

Mr. LOUDERMILK. Okay. I see my time is expired, Mr. Chairman. I yield back.

Chairman SMITH. Thank you, Mr. Loudermilk.

The gentlewoman from Texas, the Ranking Member is recognized.

Ms. JOHNSON. Thank you very much, Mr. Chairman.

I have a letter here that has been posted publicly from a group of Texas sportsmen who also recognize the value of Bristol Bay, and they write, "Just like we say, don't mess with Texas. Texans don't want anyone messing with the special places where we hunt and fish. The hunting and fishing community may have its differences, but one thing that unites us is our commitment to protecting Bristol Bay, Alaska, from the proposed Pebble Mine." I just thought that would be nice for the record.

Chairman SMITH. Without objection.

[The information appears in Appendix II]

Chairman SMITH. I believe this is the group that's funded by a millionaire who opposes the mine, but that's okay.

Ms. JOHNSON. You like rich people.

Chairman SMITH. Before we adjourn, Zach, will you stand up? I'd like to recognize our Communication Director Zach Kurz, who will be leaving the committee this week after 11 years of great service, which is much appreciated.

Zach is a native of upstate New York, otherwise known as far north Texas. Zach started working on the Science Committee as an intern for Chairman Sherry Boehlert, continued as Press Secretary for Chairman Ralph Hall, and then as Communications Director for all of us.

We wish Zach and his wife Libby and daughter—relatively new daughter Zoe all the best as they embark on a new adventure. Zach, please stay in touch with us. We will miss you, and thanks for all your great work.

Mr. KURZ. Thank you, sir.

Chairman SMITH. And we thank the witness for his testimony and the Members for their questions. The record will remain open for two weeks for additional written comments and written questions from Members. And the hearing is adjourned.

[Whereupon, at 12:00 p.m., the Committee was adjourned.]

Appendix I

Answers to Post-Hearing Questions

ANSWERS TO POST-HEARING QUESTIONS

Responses by The Hon. Dennis McLerran

Committee on Science, Space & Technology
"Examining EPA's Predetermined Efforts to Block the Pebble Mine, Part II"
April 28, 2016

Questions for the Record to:
The Honorable Dennis McLerran, Administrator,
U.S. Environmental Protection Agency, Region 10

Submitted by Ranking Member Eddie Bernice Johnson

1. **Reports in the media, public statements by Pebble, and statements from Members made during the hearing, suggest that your Proposed 404(c) Determination for Bristol Bay bans the Pebble Partnership from building any mine in the region or from filing a 404 permit application.**

   a) **Please clarify the scope of the Proposed Determination and the specific restrictions it places on the proposed Pebble Mine in Bristol Bay.**

   b) **Does EPA's use of its 404(c) authority in this case constitute a ban or "veto" of any mining activity in the defined region?**

   c) **Could there be mining activity in Bristol Bay even with the proposed 404 (c) restrictions on waterways?**

Response: The Bristol Bay watershed is unique, representing one of the Western hemisphere's most productive and vulnerable watersheds. The economic and cultural value of the Bristol Bay watershed is immense: it supports about 14,000 part-time and full-time jobs, and generates an estimated $480 million in direct, annual, economic expenditures and sales. The University of Alaska estimated that the cumulative activities associated with harvesting, processing, and retailing Bristol Bay salmon result in approximately $1.5 billion annually in economic value across the United States.[1] In addition, for over 4,000 years, it has served as a significant subsistence fishery to Alaska Native people, who may be among the last remaining salmon-based, subsistence cultures in the world. On July 21, 2014, after holding numerous public comment meetings that were attended by approximately 2,000 people, and evaluating more than 1.1 million comments that were submitted on the draft Bristol Bay Watershed Assessment, Region 10 issued its proposal to protect one of the world's most valuable salmon fisheries from the effects that could result from the discharge of dredged or fill material associated with the construction and routine operation of a mine at the Pebble deposit. The proposed restrictions are outlined in a document called the Proposed Determination. The Proposed Determination outlines restrictions to avoid unacceptable adverse effects to waters in that area. Effects to waters include the loss of streams, loss of wetlands, lakes, and ponds, or alteration of streamflow in salmon supporting streams.

According to EPA records, losses of this nature and magnitude associated with mining the Pebble deposit as proposed would be unprecedented for the Clean Water Act Section 404 regulatory program anywhere in the nation. Degradation of these aquatic resources is likely to be even more pronounced,

[1] http://www.iser.uaa.alaska.edu/Publications/2013_04-TheEconomicImportanceOfTheBristolBaySalmonIndustry.pdf

given the extensive cumulative impacts expected with successive stages of mine expansion.

This Proposed Determination is not a "veto" or ban on mining activity in the covered area. Rather, this Proposed Determination addresses where and at what levels the discharge of dredged or fill material related to mining the Pebble deposit could result in unacceptable adverse effects on the important water resources near the deposit. Moreover, it does not prevent or preclude Pebble Limited Partnership from filing any permit applications, including a Clean Water Act Section 404 permit application.

Importantly, the Proposed Determination is not a final action. However, even if its restrictions are ultimately finalized, it will not amount to an outright ban on all mining activity; proposals to mine the Pebble deposit that have impacts below each of these restrictions could proceed to the Section 404 permitting process with the U.S. Army Corps of Engineers.

The EPA has consistently demonstrated its willingness to collaborate with federal and state regulatory agencies and mining companies to ensure that projects can move forward in ways that protect water quality and the health of communities.

For over a decade, both Northern Dynasty Minerals and the Pebble Limited Partnership have asserted that submission of a permit application was imminent. The Pebble Limited Partnership has not submitted a permit application, which has been an enormous frustration to many in the Bristol Bay watershed area. At any point over these years, up to today, the Pebble Partnership could apply for a 404 permit with the Corps of Engineers and initiate the NEPA process. Yet the Pebble Partnership has chosen not to submit an application.

2. **Retired EPA Ecologist Phil North was a focus of discussion at the April 28th hearing. Allegations of collusion put forward by Pebble Limited Partnership, and some Majority Members of the Committee, appear to be based on a fundamental misunderstanding of both Mr. North's job responsibilities and the extent to which he could have influence over you and other decision makers at EPA. Specifically, Mr. Tom Collier, the CEO of Pebble, has alleged, in the media, that Mr. North colluded with "anti-mine" organizations, and influenced EPA to conduct a 404(c) action to block the mine.**

   a) **What were Mr. North's job responsibilities? Would he have reason to be in contact with any outside organizations, like Pebble or Native Alaskan tribes, as a result of his work? If so, please describe the nature and purpose of these contacts.**

   b) **Please describe the nature of any interactions you may have had with Mr. North. Specifically, when were you made aware of Mr. North's opinion as to the use of 404(c) to protect the Bristol Bay Watershed, and, how was his opinion communicated to you?**

   c) **Were you aware of anyone else within Region 10 who had an opinion on this issue? If so, did they agree or disagree with Mr. North? Was it common for employees at EPA to have differences of opinion on matters before the Agency? How do these differences of opinions manifest in work products that may have been presented to you or to others within Region 10?**

   d) **Did Mr. North have the authority to initiate the Bristol Bay Watershed Assessment (BBWA) on his own?**

e) **Did Mr. North have the authority to initiate a Section 404(c) action?**

f) **Who has the authority to initiate either the BBWA or the 404(c) process?**

g) **Can you please describe in detail how you came to the decision to conduct the BBWA, and subsequently the Section 404(c) action?**

h) **Did initiating the 404(c) process require you to conduct the Bristol Bay Watershed Assessment first?**

i) **You initiated the 404(c) process in February 2014 regarding the proposed Pebble Mine in Bristol Bay by writing the "15-day letter" to the Pebble Limited Partnership. Under the Clean Water Act's regulatory criteria could you have initiated the 404(c) process in regards to the proposed Pebble Mine in Bristol Bay in 2010 as Mr. North believed that EPA's leadership should have done? If so, why did you choose to proceed as you did?**

Response: The U.S. Army Corps of Engineers authorizes thousands of Section 404 permits every year, and the EPA works with the Corps and developers to resolve environmental concerns so projects can move forward. However, the Clean Water Act, specifically Section 404(c), also authorizes the EPA to prohibit or restrict fill activities if EPA determines a project would have unacceptable adverse effects on fishery areas.

In May of 2010, several federally recognized tribes from the Bristol Bay watershed in Alaska petitioned EPA to use its Clean Water Act Section 404(c) authority to restrict the discharge of dredged or fill material from the proposed Pebble Mine in the watershed. EPA also received similar requests from a diverse group of stakeholders, while others requested that EPA refrain from taking action. The groups that supported EPA's use of 404(c) were deeply concerned that the largest open pit mine in North America could potentially be opened within one of the western hemisphere's most productive and yet vulnerable watersheds.

There was a wide range of views within the Agency about how to proceed and a significant amount of deliberation among EPA staff. We ultimately decided to not initiate EPA's Section 404(c) authority at that time because we wanted to develop a solid understanding of the watershed -- and the potential risks associated with proposed mining activities -- before deciding whether or not to exercise our 404(c) authorities. Instead, on February 7, 2011, consistent with Clean Water Act Section 104, I announced EPA's intent to conduct an ecological risk assessment, the purpose of which was to characterize the biological and mineral resources of the Bristol Bay watershed, to increase understanding of the potential risks of large-scale mining on the region's fish resources, and to inform future decisions by government agencies and others related to protecting and maintaining the chemical, physical, and biological integrity of the watershed.

After three years of study, two rounds of public comment, and independent, external peer review, EPA released the Bristol Bay Watershed Assessment in January 2014. The Bristol Bay Watershed Assessment characterizes the significant ecological resources of the region and describes potential impacts on salmon and other fish from large-scale porphyry copper mining at the Pebble deposit. The Assessment established that the extraction, storage, treatment, and transportation activities associated with building, operating, and maintaining one of the largest mines ever built could pose significant risks to the unparalleled ecosystem that produces one of the greatest wild salmon fisheries left in the world.

After careful consideration of available science in the Assessment and other available information, including extensive materials provided by Northern Dynasty Minerals and Pebble Limited Partnership, I decided to proceed under EPA's Clean Water Act Section 404(c) regulations to initiate a process to protect Bristol Bay resources from the adverse environmental effects of large-scale mining the Pebble deposit. To be clear, in accordance with regular agency practice and policies, I made the decision to conduct the Bristol Bay Watershed Assessment and, subsequently, to initiate the 404(c) process.

The Inspector General recently concluded a 17-month comprehensive evaluation of EPA's Bristol Bay Watershed Assessment and found no evidence of bias in how EPA conducted the Bristol Bay Watershed Assessment. Mr. North was an EPA scientist who lived and worked in Alaska. As part of his job duties, Mr. North was expected to conduct outreach to and engage with federal, state, local, and tribal partners on protection and restoration of wetlands and other aquatic resources. In this capacity, Mr. North was a point of contact for Alaska Native villages and tribes. In the course of his job, and due to his expertise in aquatic resources, Mr. North provided information to tribes and stakeholders about the Clean Water Act and EPA's regulatory authorities. Mr. North was one of many EPA employees who contributed to the Bristol Bay Watershed Assessment. He had no decision-making authority regarding whether EPA would conduct the Bristol Bay Watershed Assessment or proceed with the Clean Water Act Section 404(c) process, and he retired before EPA finalized the Bristol Bay Watershed Assessment and before EPA issued the Proposed Determination.

Committee on Science, Space & Technology
"Examining EPA's Predetermined Efforts to Block the Pebble Mine, Part II"
April 28, 2016

Questions for the Record to:
The Honorable Dennis McLerran, Administrator,
U.S. Environmental Protection Agency, Region 10

Submitted by Representative Esty

1. **Mr. McLerran, many reports in the media and statements by Pebble have suggested that your Proposed Determination regarding the 404(c) in Bristol Bay bans the Pebble Partnership from building any mine in the region or from filing a 404 permit application. As we know, this is not what your Proposed Determination intends.**

   Several mine design scenarios in the final Bristol Bay Watershed Assessment found that the presence of a mine in Bristol Bay would destroy 94 miles of salmon streams and alter 33 miles of other streams within the watershed.

   However, your Proposed Determination released in July 2014 did not ban Pebble from building a mine outright, rather it restricted the degree of damage a mine could cause, containing the damage to 5 miles of salmon spawning streams and less than 1,100 acres of wetlands, lakes or ponds where these fish live.

   a. **Can you help clarify this issue for us? What exactly does your Proposed Determination do?**

   b. **Does the EPA's use of its 404(c) authority work as a ban on any mining activity?**

   c. **Now specifically in Pebble's case, does EPA's use of 404(c) authority "veto" any mining activity in Bristol Bay?**

   d. **Does this step, using 404(c), stop Pebble from filing permit applications?**

   e. **Could there be mining activity in Bristol Bay even with 404(c) restrictions on waterways?**

Response: The Bristol Bay watershed is unique, representing one of the Western hemisphere's most productive and vulnerable watersheds. The economic and cultural value of the Bristol Bay watershed is immense: it supports about 14,000 part-time and full-time jobs, and generates an estimated $480 million in direct, annual, economic expenditures and sales. The University of Alaska estimated that the cumulative activities associated with harvesting, processing, and retailing Bristol Bay salmon result in approximately $1.5 billion annually in economic value across the United States.[2] In addition, for over 4,000 years, it has served as a significant subsistence fishery to Alaska Native people, who may be among the last remaining salmon-based, subsistence cultures in the world. On July 21, 2014, after holding numerous public comment meetings that were attended by approximately 2,000 people, and evaluating more than 1.1 million comments that were submitted on the draft Bristol Bay Watershed Assessment, Region 10 issued its proposal to protect one of the world's most valuable salmon fisheries from the effects that could result from the discharge of dredged or fill material associated with the construction and routine operation of a mine at the Pebble deposit. The proposed restrictions are outlined in a document called the Proposed Determination. The Proposed Determination outlines restrictions to avoid unacceptable adverse effects to waters in that area. Effects to waters include the loss of streams, loss of wetlands, lakes, and ponds, or alteration of streamflow in salmon supporting streams.

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Importantly, the Proposed Determination is not a final action. However, even if its restrictions are ultimately finalized, it will not amount to an outright ban on all mining activity; proposals to mine the Pebble deposit that have impacts below each of these restrictions could proceed to the Section 404 permitting process with the U.S. Army Corps of Engineers.

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For over a decade, both Northern Dynasty Minerals and the Pebble Limited Partnership have asserted that submission of a permit application was imminent. The Pebble Limited Partnership has not submitted a permit application, which has been an enormous frustration to many in the Bristol Bay watershed area. At any point over these years, up to today, the Pebble Partnership could apply for a 404 permit with the Corps of Engineers and initiate the NEPA process. Yet the Pebble Partnership has chosen not to submit an application.

[2] http://www.iser.uaa.alaska.edu/Publications/2013_04-TheEconomicImportanceOfTheBristolBaySalmonIndustry.pdf

Appendix II

Additional Material for the Record

DOCUMENT SUBMITTED BY REPRESENTATIVE SUZANNE BONAMICI

EPA Region 10

Position Description Coversheet

ETPA-2005-N-0013

DUTY LOCATION

POSITION NUMBER
00018219

CLASSIFICATION ACTION: State the standard, series and date, used to classify this position.

Name of Employee	**North, Phillip A**
Official Allocation Title	**ECOLOGIST**

Service GS **Series** 0408 **Grade** 13 **CLC**

Organizational Title of Position (if any) **ECOLOGIST**

Organization
91084000
Office of Ecosystems, Tribal & Public Affairs
Aquatic Resources Unit
Seattle, Washington

SUPERVISORY/MANAGERIAL DESIGNATION

S. First or Second level supervisor: An individual who performs supervisory work and managerial responsibilities that require accomplishment of work through combined technical and administrative direction of others; and which constitute a major duty occupying at least 25% of their time. Such supervisory managerial authorities and include assigning and reviewing work on a daily, weekly or monthly basis; assuring that production and accuracy requirements are met; approving leave; recommending performance standards and ratings, and exercising 4 of the 5 authorities and responsibilities described at Level 3-2c in the General Schedule Supervisory Guide.

A. An individual (as defined in Section 7103(a)(10) of Title V of the U.S. Code) who is authorized to hire, direct, assign, promote, reward, transfer, lay off, suspend, discipline, or remove one or more employees, or effectively recommend such action. The exercise of this responsibility is not routine or clerical in nature, but requires the consistent exercise of independent judgment.

M. A manager who directs the work of an organization; is accountable for the success of line or staff programs; monitors, evaluates, and adjusts program activities; and performs the full range of duties outlined in the General Schedule Supervisory Guide. May also include deputies who fully share responsibility for managing the organization or who serve as an alter ego to the manager.

B. A management official (as defined in Section 7103(a)(10) of Title V of the U.S. Code) who formulates, determines or influences an organization's policies. This means creating, establishing, or prescribing general principles, plans, or courses of action for an organization; or bringing about a course of action for the organization. Management officials must actively participate in shaping the organization's policies not just interpret laws and regulations give resource information or recommendations or serve as experts or highly trained professionals who implement or interpret the organization's policies and plans.

T. "Team Leader" This position meets the requirements for coverage under Part II of the General Schedule Leader Grade Evaluation Guide.

E. None of the above applies. This is a non-supervisory/non-managerial position.

SUPERVISORY CERTIFICATION

I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships and that the position is necessary to carry out governmental functions for which I am responsible. The certification is made with the knowlegde that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

Requesting Supervisor		Office Director	
David B. Vann	4-12-05	Michelle Hiller	4/12/05
Name	Date	Name	Date

OFFICIAL CLASSIFICATION CERTIFICATION

1. This position has no promotion potential

2. If position develops as planned and employee progresses satisfactorily, this position has known promotion potential to

Functional Code

Bargaining Unit Code

Fair Labor Standards Act

Check, if applicable:

a. Medical Monitoring Required

b. Extramural Resources Management Duties (_% of time).

POSITION DESCRIPTION
Ecologist, GS-0408-13

18219

Organizational Location: Office of Ecosystems, Tribal and Public Affairs, Aquatic Resources Unit, Alaska Operations Office

Introduction:

Under the legislative authority of Section 404 of the Clean Water Act, work includes responsibility for effective protection and restoration of the nation's waters and associated ecosystems, including shallow groundwater and free-flowing streams. The wetlands program focuses on developing the science and standards necessary to protect wetlands and providing support to federal, tribal, state, local and other partners in protection and preserving wetlands.

Incumbent serves as a senior regional Ecologist for scientific aspects of planning, evaluation and integration of EPA Region10 programs designed to maintain and restore the overall quality and quantity of wetlands and other aquatic resources within Alaska. Incumbent also serves as a scientific focal point for state, federal and local governments and citizen groups and acts as technical advisor on all aspects of aquatic resource regulation and ecological function to the Unit Manager, Aquatic Resources Protection Section, and other offices within the region as appropriate.

Accomplishes duties related to environmental management and/or protection, project plans, and reviews and analyzes technical and/or administrative issues in order to implement environmental programs.

MAJOR DUTIES:

Program/Project Management:
Provides advice and assistance to agency, federal, state, local and/or tribal governments on matters relating to the development, execution, and monitoring of adequate environmental protection policies, plans, and programs. Serves as a technical authority in providing expert advice and assistance to agency, state, local and/or tribal governments on matters relating to the development, execution and monitoring of the most complex and politically sensitive environmental protection policies, plans, and programs. Develops and/or analyzes proposals for new or revised environmental protection regulations and determines their impact on aquatic resources. Responds to inquiries from congressional representatives and the general public concerning the interpretation and application of new plans and policies designed to meet program objectives.

Scientific and Technical Analysis:
Uses analytical methods and techniques to analyze a wide range of scientific, engineering, legal, environmental protection, and/or environmental management issues. Advises regional management and/or state or interstate authorities on the status of scientific/engineering developments and the degree to which their involvement is needed to ensure that vital regional,

tribal or state interests are considered in related agency guidance and policies. Provides expert and highly specialized technical assistance, models, or interpretations of data on matters related to a specific scientific/engineering method/approach/function/process. Develops plans, reviews data, conducts tests, researches environmental data, and/or provides information regarding the analysis and evaluation, with recommendations for the solution of problems/issues. Develops regional policy, as required, to address environmental problems/issues/processes. Develops and implements plans, and agency-specific policies to carry out technical solutions to significant environmental problems. Provides comprehensive and authoritative assistance to senior management in the negotiation of such plans and the resolution of very sensitive policy, legal, and technical issues. Makes formal presentations of a technical and policy nature before EPA headquarters, other federal, tribal, state, and local agency officials, private industry, and public and private groups. Disseminates scientific/ technical information through oral briefings, written documents, workshop/conference/seminar presentations, and/or public hearings to provide information on significant technical and/or policy issues on a specific program, function, or activity. Develops technical/scientific training course(s) and/or course materials, and presents training in specific area of expertise.

Regulation Review/Implementation:
Reviews and implements environmental technical standards, guidelines, policies, and formal regulations. As a technical authority, provides principal support for completion of the regional regulatory implementation process in a program area. Prepares needed documentation. Identifies work priorities and schedules.

Grants/Cooperative Agreements/Interagency Agreements:
Exercises management responsibilities for grant, cooperative agreement, and/or interagency agreement activities related to the initiation, administration, and/or close-out of grants, cooperative agreements, and/or interagency agreements (IAGs), including responsibility for monitoring performance. Provides regional technical expertise in the resolution of audit issues and disputes. Participates in national work-groups involved in the development of agency-wide grants program policy to resolve national program problems. Manages a variety of highly complex and typically long-term grants/cooperative agreements/IAGs, entailing the coordination of efforts and the resolution of conflicting and controversial high profile issues with a number of parties both within and outside the agency. Exercises definitive technical authority regarding audit issues and disputes. Analyzes and revises grant related regulations and policies.

Environmental Data Analysis:
Performs work related to the conduct of studies of diverse environmental issues and the tracking and monitoring of results. Formulates and directs the development and implementation of long-range analytical and managerial studies which guide difficult policy and managerial decisions in the design and implementation of information dissemination. Utilizes analytical techniques which may be controversial or unconventional to conduct studies, evaluate results, and provide impact analyses of available strategies.

Environmental Liaison:
Performs liaison work with individuals in a variety of organizations on legislative proposals,

regulations, policies, program issues, resources, etc. Performs liaison work by facilitating resolution of funding, program and regulatory issues. Serves as a troubleshooter. Duties may include the preparation of planning and environmental documents (environmental impact statements, environmental assessment, executive summaries, public involvement documents, and working papers) and participating in public meetings.

Knowledge and Skills Required by the Positions

- Knowledge of and experience in ecosystem management principles. Environmental policy or environmental science background is highly recommended.
- Experience in multi-project management and work under and meet various deadlines.
- Excellent written and verbal communication skills.
- Skill in negotiating effectively with a wide variety of interested and affected parties.
- Ability to understand and work strategically toward the "big picture."
- Ability to review, analyze, evaluate and summarize environmental, scientific and technical information, issues, policies or procedures. Ability to develop, review and approve sediment sampling plans. Ability to review sediment data to determine suitability for in water or other appropriate disposal. Ability to review and comment on ecological risk assessments involving contaminated sediments.
- Understanding of the roles and responsibilities of various EPA programs and other Federal/State agency programs. Ability to prepare, review and approve 404(b)(1) evaluations and 401 water quality certifications. Ability to review and comment on Section 10 Rivers and Harbors Act and Section 404 Clean Water Act public notices involving dredging and disposal of Dredged Material in Waters of the United States.
- The ability and willingness to create and maintain effective working relationships with tribes, other government agencies, industry and EPA programmatic staff.
- Ability to effectively provide technical, policy and regulatory advice to managers on complex and highly visible or politically sensitive environmental issues.
- Familiarity with various environmental laws, programs and policies.

Knowledge Required by the Position 1550 Points:

Strong professional knowledge and scientific background in the field of wetland and other aquatic resource ecology and wetland investigations. This includes theoretical knowledge of chemical, physical, and biological processes in wetlands (and other aquatic resources) and experience in conducting and managing assessments and investigation of wetland functions.

Demonstrated ability and experience in working effectively with a broad cross-section of scientific and technical personnel from a variety of scientific disciplines, agencies and organizations involved in wetland issues and activities.

A thorough working knowledge of, and experience in working with, federal, state, and local wetland management programs. A detailed knowledge of Clean Water Act provisions and implementing regulations for regulating the placement of dredged and fill material in waters of the U.S.

A mastery of the concepts and principles of ecology to resolve novel or obscure problems; extend and modify techniques; develop new approaches that guide other ecologists who solve a variety of technical problems and/or apply new, innovative, or experimental ecological theories, developments, or practices to problems or studies not susceptible to treatment by acceptable methods.

Expert knowledge of Federal, State, and local laws and regulations, documentation and reporting requirements, and law making or rule making processes sufficient to make decisions or recommendations significantly changing, interpreting, or expanding important agency/national policies and programs.

Demonstrated ability to synthesize and communicate scientific and technical information, both orally and in writing.

Supervisory Controls 450 Points:
The supervisor sets the overall assignment objectives, program emphasis, and resources available. The environmental protection specialist and supervisor, in consultation, develop the deadlines, projects, and work to be done.

The environmental protection specialist, having developed expertise in a particular program or functional area, has continuing responsibility for independently planning and carrying out important environmental protection programs or projects; determining the approach to be taken and the methods to be used; resolving most of the conflicts that arise; coordinating the work with others as necessary; and interpreting policy in terms of established objectives. The specialist keeps the supervisor informed of progress, potentially controversial matters, and problems with far-reaching implications. Completed work is reviewed for conformance to overall requirements, compatibility with other work, and effectiveness in meeting objectives.

Guidelines 450 Points:
Administrative policies and precedents, laws, regional or area directives, agency regulations, and scientific and technical references are usually applicable, but are stated in general terms. For example, operating guidance provides a broad overview of program goals and strategies as well as priorities, but does not detail how the identified priorities and activities will be accomplished. The environmental protection specialist uses initiative and resourcefulness in deviating from, refining, or extending traditional methods and practices, or in developing and recommending new or substantially modified methods, criteria, or policies.

Complexity 325 Points:
Assignments are of such breadth, diversity, and intensity that they involve many varied and complex features, and typically contain a combination of complex features that involve serious or difficult to resolve conflicts between scientific and management requirements. The work requires originating innovative techniques, establishing criteria and standards applicable to wide range of scientific problems and conditions, or developing new scientific concepts or approaches that advance the state-of-the-science.

Scope and Effect 225 Points:
The purpose of the work is to investigate, analyze, review, plan and advise on various unusual, controversial, or technically difficult scientific problems or conditions. Work results are critical to the successful completion of diverse scientific projects or programs. A primary purpose of the work is to assure that the scientific aspects of the aquatic resources protection program are credible, both within the scientific community and with the broader public, are well coordinated with other appropriate EPA programs and are adequate to support the regulatory actions needed to solve wetland problems in Region 10. Because much of the work involved will be precedent-setting and innovative, the results will be useful to others nationwide in dealing with aquatic resource issues.

Personal Contacts 60 Points:
Personal contacts include a wide range of professional and administrative personnel throughout the agency, at other federal agencies, in state and local government, private industry, academia, the public, environmental advocacy groups, and in some cases the media and elected officials.

Purpose of Contacts 120 Points:
Contacts are undertaken to plan, coordinate, or advise on work efforts or resolve operating problems in dealings with others who are working toward mutual goals. Contacts are also undertaken to influence, motivate, or persuade persons or groups who are typically skeptical, resistant, or uncooperative, and who must be approached skillfully to obtain the desired effect (e.g., negotiating compliance requirements or timetables; influencing or persuading agencies/companies to agree to use new or improved technologies about which there may be conflicting opinions; representing the office/agency, as a member of an institutional committee, on controversial licensing/permitting requests; working with Indian tribal leaders to modify plans when conflicting values must be resolved or accommodated; challenging the results of surveys or inspections by regulatory agencies; justifying the feasibility and desirability of plans or proposals that significantly affect office and/or agency practices, such as corrective action plans or funding requirements for environmental compliance and restoration projects).

Physical Demands 5 Points:
The work requires no special physical demands. It may involve some walking, standing, bending, or carrying of light items. Incumbent may be required to participate periodically in physically demanding field investigations and inspections.

Work Environment 5 Points:
The work is performed in an office or similar setting involving everyday risks or discomforts that

require normal safety precautions. At times, incumbent will be required to work in a field environment which might involve work at industrial sites, shorelines and aboard small waterborne vessels.

Total Points: 3190

A JOINT LETTER
From
Six Federally-recognized Tribes in Southwest Alaska:
Nondalton Tribal Council, Koliganik Village Council,
New Stuyahok Traditional Council, Ekwok Village Council
Curyung Tribal Council, Levelock Village Council

_____________, 2010

Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency, Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dennis J. McLerran, Regional Administrator
U.S. Environmental Protection Agency, Region 10
Regional Administrator's Office, RA-140
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Re: Six federally-recognized tribes request EPA to initiate a public process under Section 404(c) of the Clean Water Act, to protect waters, wetlands, fish, wildlife, fisheries, subsistence and public uses in the Kvichak and Nushagak drainages and Bristol Bay of Southwest Alaska from a potential Pebble mine.

Dear Ms. Jackson and Mr. McLerran:

Our six federally recognized tribes, all from the Bristol Bay drainages of southwest Alaska, have government-to-government relationships with the United States. Our tribes are represented by the Nondalton Tribal Council, Koliganek Village Council, New Stuyahok Traditional Council, Ekwok Village Council, Curyung Tribal Council, and Levelock Village Council.

Section 404(c) of the Clean Water Act authorizes EPA to prohibit or restrict the discharge of dredge or fill material, including mine wastes, at defined sites in waters of the United States, including wetlands, whenever EPA determines, after notice and opportunity for hearing, that the use of such sites for disposal would have unacceptable adverse impacts on fisheries, wildlife, water supplies or recreation. EPA may do so *prior* to any ~~mining company's~~ application for permits to discharge such material. 40 CFR 231.1(a).

We request that EPA initiate a 404(c) public process to identify wetlands and waters in the Kvichak and Nushagak river drainages of southwest Alaska where discharges associated with potential large scale metallic sulfide mining at the Pebble deposit could be prohibited or restricted due to such unacceptable adverse effects. The deposit straddles a divide between these two drainages.

We are addressing this to both of you because: (1) 40 CFR 231.3(a) provides that a regional administrator should make the decision of whether to initiate a 404(c) public process; (2) in this instance, initiating a 404(c) process effectuates three of EPA's national priorities,[1] and three of EPA's regional priorities;[2] (3) initiating a 404(c) process promotes EPA's goal that decisions be based on science, law, transparency, and stronger EPA oversight;[3] and (4) doing so is consistent with EPA's national priority of increased attention to Environmental Justice and oversight of mineral processing.[4] Furthermore, EPA's on-going 404(c) process with respect to the Spruce No. 1 mine in West Virginia indicates that EPA prefers to be proactive, *i.e.*, "to address environmental concerns effectively *prior* to permit issuance."[5]

We make this request, *i.e.*, that EPA initiate a 404(c) process, for the following reasons.

1. The cultural and ecological importance of the Kvichak and Nushagak river drainages and the magnitude of a potential Pebble mine indicate that any 404(c) process should be broad at the outset.

Pursuant to 40 CFR 231.3(a), the Regional Administrator's *initial* decision of whether to commence a 404(c) process turns on whether there is "*reason to believe*" that "an 'unacceptable adverse effect' *could* result" from the use of an area; in this instance, for disposal of mine wastes and other discharges. (Italics added). This initial decision is to be based upon "evaluating the information available." We assume that EPA staff has access to EPA's own relevant materials. Therefore, our counsel have prepared an abstracted list of other potentially relevant information, from other government agencies, the mining claimants, academic or professional publications, professional papers, and presidential documents applicable to tribal relations and environmental

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[1] These include: (1) protecting America's waters; (2) expanding the public conversation on environmentalism and working for environmental justice; and (3) forging strong partnerships between EPA, tribes and states. *See* EPA's seven national priorities at http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/#more-636 (last visited Jan. 25, 2010).

[2] These include: (1) working with Tribal Governments to protect and restore the natural resources on which tribal communities rely for their physical, cultural and economic well-being; (2) protecting and restoring watersheds; and (3) promoting sustainable practices and strategic partnerships, including with tribal governments. *See* EPA's six regional priorities at http://yosemite.epa.gov/R10/EXTAFF.NSF/Reports/2007-2011+Region+10+Strategy (last visited Feb. 12, 2010), and EPA's Region 10 Strategy for Enhancing Tribal Environments at http://yosemite.epa.gov/r10/EXTAFF.NSF/Reports/07-11+Tribal (last visited Feb 12, 2010).

[3] *Id.* Pebble mine also raises issues that may require the assistance of EPA staff in other offices.

[4] EPA's national priorities for enforcement and compliance for FY 2008 – 2010 and FY 2011 – 2013 (proposed) are at http://www.epa.gov/oecaerth/data/planning/priorities/index.html#new.

[5] *See* EPA, Spruce No. 1 Mine 404(c) Questions & Answers for Web Posting, Oct. 16, 2009 (italics added), http://www.epa.gov/owow/wetlands/pdf/spruce_1_Oct_16_2009_q_and_a.pdf (visited Jan. 26, 2010). EPA took this position when it invoked the 404(c) public process after years of working with the applicant and other agencies. Spruce No. 1 is the largest proposed mountaintop removal operation in Appalachia, would clear 2200 acres, and fill seven miles of streams. By contrast, just the open pit portion of a Pebble mine (per applications filed in 2006 and subsequently suspended) would be about two square miles (over 46,000 acres).

justice. We assume that none of these materials would be overlooked and are simply call them to your attention.

The Kvichak River drainage historically produces more sockeye salmon than any other drainage in the world. Sockeye salmon drive Alaska's most commercially valuable salmon fisheries in Bristol Bay. In the Bristol Bay drainages, the Nushagak River drainage, also ~~producees~~produces vast numbers of sockeye, and produces the largest runs of other salmon species, including chinook, coho, chum and pink salmon. Both drainages are critical to the wild commercial salmon fisheries, subsistence fisheries, internationally famous sport fisheries, ~~and~~ abundant wildlife that serve many uses and the ecosystem of the North Pacific Ocean. The drainages provide water supplies to numerous villages and communities, many of which are substantially populated by Alaska Native people.[6]

The Pebble Limited Partnership (PLP) seeks to develop the mining claims and divides them into "Pebble West" and "Pebble East." The former may be susceptible to an open pit mine, and the latter (a more recent discovery) may be susceptible to an underground mine.[7] In 2006, Northern Dynasty Mines, Inc. (NDM)[8] filed and supplemented nine applications with the Alaska Department of Natural Resources (ADNR), and then requested ADNR to suspend them. ADNR did so. Four applications sought to appropriate water. Five sought permits to construct tailings impoundment dams.[9] These nine applications were based *solely* on the Pebble West deposit. The surface area of the water of just two tailings impoundments proposed at that time would have covered over ten square miles (6400 acres). "Beaches" of waste would have surrounded the impoundments created by five dams or embankments up to 740 feet high and several miles long.

The 2006 applications for Pebble West showed that NDM had considered about a dozen potential waste disposal sites, all or many of which appeared to involve wetlands under EPA's jurisdiction. The proposed open pit mine would have involved about 16.5 miles of 54-inch diameter pipelines to move and manage tailings, and over two hundred miles of 15-inch diameter pipelines to transport a slurry concentrate for dewatering and ocean shipment from Cook Inlet,

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[6] Nondalton is closer to a potential Pebble mine than any other community. Dillingham's Curyung Tribal Council represents the largest tribe in the Bristol Bay drainages of about 2400 members. Koliganik, New Stuyahok, Ekwok and Levelock are downstream of Pebble.
[7] EPA routinely recognizes that mine voids, from open pit and underground mines, are significant sources of acid mine drainage. We call to your attention P. Younger, "*Don't forget the voids: aquatic pollution from abandoned mines in Europe*," submitted at the Workshop on Mine and Quarry Waste – the Burden from the Past, held by the Dir. Gen. for the Envir. and Jt. Research Cen. for EU and EC nations, at Orta, Italy, 2002. The paper indicates that voids can vastly exceed waste depositories as sources of water pollution (*see* Table 1 therein, and discussion); *see* http://viso.jrc.ec.europa.eu/pecomines_ext/events/workshop/ProceedingsOrtaWorkshop.pdf.
[8] We understand that NDM is the American subsidiary of Northern Dynasty Minerals Ltd., of which an affiliate is apparently a partner in PLP. See announcement of PLP partnership at http://www.northerndynastyminerals.com/ndm/NewsReleases.asp?ReportID=336841&_Type=News-Releases&_Title=Northern-Dynasty-Anglo-American-Establish-5050-Partnership-To-Advance-Pebbl...
[9] The applications comprise over 2000 pages. The attached appendix lists the website posting them. A law journal article (listed in the appendix) summarizes these applications.

and to return used slurry water to the mine facilities. After suspending the applications, PLP has concentrated on exploring Pebble East, which has resulted in more than doubling the amount of potential mine waste, *i.e.*, to about ten billion tons of waste. Hence, the questions of where, how and whether this vast volume of waste can be safely and permanently handled are major unresolved issues.

Because PLP has yet to finalize plans for a mine, and because associated facilities could also have various direct, indirect and cumulative adverse effects within the scope of 404(c), our tribes recommend that EPA consider a wide geographic area of the Kvichak and Nushagak drainages for 404(c) purposes. Our reasons include: (1) the large scale of a potential Pebble mine; (2) uncertainty over how mine wastes might be handled; (3) the vast quantity of potential mine waste (ten billion tons); (4) the acid generating potential of the host rock, voids, wastes, and dust; (5) the immensity of the task of containing mine contaminants forever, including acid mine drainage; (6) the importance of commercial salmon fisheries at issue; (7) the potential impact on subsistence and recreation, including from increased population and regardless of whether contaminants can be forever contained;[10] and (8) the potential that proposed pipelines could move the wastes to many other locations.

Commented [PAN1]: Is there room here for ecological impacts not directly related to commercial or subsistence fisheries?

2. 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.

PLP recently terminated its Technical Working Groups (TWGs), approximately ten in number. They were composed of federal and state officials who, in an advisory capacity, had sought for several years to review and comment upon PLP's baseline study plans before PLP implemented them, and to review results, in order to advise PLP as it progressed toward an environmental impact statement (EIS). During the life of these working groups, information suggests that PLP was not as forthcoming as agency officials had hoped.

PLP's decision to end the TWGs strongly suggests that federal, state and tribal entities may be more likely to face greater informational deficits as they head into an EIS process, than might have been the situation otherwise. Commencing a 404(c) process may help to remedy some of these information deficits before PLP finalizes its design, submits permit applications, and triggers an EIS process.

Because of the magnitude of the issues, all parties (including PLP, federal, state, local and tribal entities, and the public) will benefit from EPA initiating a 404(c) process *before*, and not *after*, PLP eventually submits its anticipated permit applications for a proposed Pebble mine, and *before* an EIS process commences.[11] Moreover, because the potential to invoke a 404(c) public process exists, postponing an initial decision to do so until applications are filed can serve no affected party.[12]

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[10] *See* Briefing Paper (Pt. III) attached to letter to Rep. Edgmon (enclosed), asserting that state and federal subsistence statutes will not protect subsistence in the context of a potential Pebble mine, even if permits can protect habitat.

[11] PLP recently postponed its applications from 2010 until 2011, and may delay further.

[12] Furthermore, a 404(c) process appears to be less costly than an EIS. Facing issues proactively could reduce all costs of agencies, PLP and the public prior to and during an EIS.

3. Infirmities in the State's 2005 Bristol Bay Area Plan provide ample reason to initiate a 404(c) process at this time.

We realize that our request asks you to decide whether to commence a 404(c) process before an EIS process has begun, or has run its course. We are enclosing copies of two other letters that may assist your decision.[13] For different purposes, they address the methods that ADNR employed in preparing its 2005 Bristol Bay Area Plan (2005 BBAP). It classifies state land into land classification categories, including at the Pebble site and the potential associated facilities, and establishes guidelines and statements of management intent.

The methods used by the 2005 BBAP to classify state land, and establish guidelines and statements of intent, provide ample reason for EPA to initiate a 404(c) process before an EIS process commences. For example, the 2005 BBAP:

1. uses primarily *marine* criteria, such as whether land is a walrus haulout, to determine whether *inland uplands*, such as those at Pebble, qualify for classification as fish and game habitat (*see* 2005 BBAP, p. 2-9; a link to the 2005 BBAP is in the Appendix);
2. *omits moose and caribou* from the process of designating and classifying land as habitat (*see id.*);
3. has *no land use classification category for subsistence hunting and fishing*, while ADNR has a public recreation category that includes land used for *sport hunting and fishing* (*see* ADNR's land use planning regulations at 11 AAC 55.050 – .230 and 2005 BBAP); and
4. defines recreation by *excluding* sport hunting and fishing for purposes of preparing the 2005 BBAP (*see* 2005 BBAP, p. A-11).[14]

As explained in the letter to the U.S. Army Corps of Engineers, Alaska District, and the EPA Alaska Operations Office, as long as the 2005 BBAP is in effect, every alternative in an EIS that would permit a Pebble mine will rest upon the methods that ADNR used in adopting the current land classifications, guidelines, and statements of intent. Because NEPA regulations at

[13] One letter, from our counsel to Col. Reinhard W. Koenig, of the U. S. Army Corps of Engineers, Alaska District, and Mr. John Pavitt of EPA's Alaska Operations Office, seeks discussions of whether the tribes may be treated as cooperating agencies on any EIS prepared for a proposed Pebble mine. The other, from the six tribes, Alaska Independent Fishermen's Marketing Association (AIFMA), and Trout Unlimited (TU) to State Rep. Edgmon, urges the Fisheries Committee of the Alaska House of Representatives to consider legislation to establish a state fish and game refuge or critical habitat area that would include most state land in the Kvichak and Nushagak drainages, including land at the Pebble site.

[14] In *Nondalton Tribal Council, et al., v. ADNR.*, No. 3AN-09-46 CI (3rd Jud. Dist., Ak.), these six tribes, AIFMA and TU allege that ADNR's 2005 BBAP uses many unlawful methods to classify state land, and establish guidelines and management intent, including where Pebble and its facilities might be located. The litigation is undecided. See also enclosed letter to Rep. Edgmon, and briefing paper (Part I) regarding the 2005 BBAP. With respect to ADNR's lack of a subsistence category, ADNR claims that its habitat classifications accommodate subsistence, even though the 2005 BBAP reduces the upland acreage classified or co-classified as habitat by 90 percent, from 12 million acres to 768,000 acres, when compared to the former 1984 BBAP.

40 CFR § 1506.2(d)[15] provide that an EIS must analyze and address any applicable state land use plan, this requirement will put federal agencies in the position of having to explain in public, and on the record, why the federal agencies should evaluate federal permit applications to develop state land where the State's land classifications, guidelines and statements of intent rest upon such questionable methods, be they lawful or not. To ignore them would be facially contrary to 40 CFR § 1506.2(d), and would beg the question of what the classifications, guidelines and statements of intent should be applicable, in the absence of the 2005 BBAP and its methods. Presently, no one can answer that question.

Because no one can do so, and regardless of whether such methods are lawful under *state* law (and we believe the present ones are *not*), we doubt that federal agencies can engage in the legally required, *reasoned* decision-making necessary to approve federal permits so long as the 2005 BBAP is in place.[16] This leaves little room for any decision other than to commence a 404(c) *before*, and not *after*, PLP submits its permit applications, and *before* an EIS process commences. To do otherwise will compel EPA, the Corps and other agencies, in the context of NEPA and an EIS process, either to defend the State's methods used in the 2005 BBAP (which would be untenable), or to ignore them, which would be contrary to 40 CFR § 1506.2(d).

CONCLUSION

For three reasons, this situation seems straightforward. First, the importance of the Kvichak and Nushagak river drainages and the magnitude of the issues raised by a potential Pebble mine warrant an EPA decision now, to commence a 404(c) public process. Second, all of the concerns raised to date, coupled with -the recent decision of the Pebble Limited Partnership to terminate its Technical Working Groups, justify commencing a 404(c) process at this time. Third, the infirmities of ADNR's 2005 Bristol Bay Area Plan provide ample reason to commence a 404(c) process at this time. These infirmities leave little room for any decision other than to do so *before*, and not *after*, PLP submits its permit applications, and *before* an EIS process commences, because during an EIS process no governmental agency could lawfully defend or ignore the 2005 Bristol Bay Area Plan.

Thank you for your attention to this matter. We look forward to hearing from you. We hope to work in a public process under Section 404(c) of the Clean Water Act with the U. S. Environmental Protection Agency.

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[15] 40 CFR § 1506.2(d) provides that to integrate an EIS into state planning processes, an EIS shall discuss any inconsistency of a proposed action with any approved state land use plan; and where inconsistency exists, the EIS should describe the extent to which the federal agency would reconcile its proposed action with the plan. In other words, an EIS on any potential Pebble mine will have to consider and analyze the applicable state land use plan.

[16] The 2005 BBAP appears to be fatal, from a legal standpoint, as the basis for an EIS that would support the issuance of permits for Pebble. *See* Briefing Paper, Pt. II, attached to letter to Rep. Edgmon.

Sincerely yours,

Jack Hobson, President Nondalton Tribal Council P.O. Box 49, Nondalton, AK 99640	Herman Nelson, Sr., President Koliganek Village Council P.O. Box 5057, Koliganik, AK 99576
Moxie Andrew, President New Stuyahok Traditional Council P.O. Box 49, New Stuyahok, Alaska 99636	Luki Akelkok, President Ekwok Village Council P.O. Box 70, Ekwok, Alaska 99580
Thomas Tilden, President Curyung Tribal Council P.O. Box 216, 531 D Street, Dillingham, AK 99576	Raymond Apokedak, President Levelock Village Council P.O. Box 70, Levelock, AK 99625
Geoffrey Y. Parker, Attorney 634 K Street Anchorage, Alaska 99501 Co-Counsel	Thomas E. Meacham, Attorney 9500 Prospect Drive Anchorage, Alaska 99507-5924 Co-Counsel

cc: Col. Reinhard W. Koenig, U. S. Army Corps of Engineers, Alaska District
Kim Elton, Senior Advisor for Alaska Affairs, U. S. Department of the Interior

APPENDIX

An Abstracted List of Potentially Relevant Information
(This list assumes that EPA has access to its own agency documents, and therefore this list does not include such documents.)

Alaska Department of Fish and Game, *The Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes* and its associated *Atlas*, available at http://www.sf.adfg.state.ak.us/SARR/AWC/index.cfm/FA/main.overview (last visited December 30, 2009).

> *The Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes* ("Anadromous Waters Catalogue") and its associated *Atlas* of maps currently contain about 16,000 streams, rivers or lakes in Alaska which have been specified as being important for the spawning, rearing or migration of anadromous fish. Based upon thorough surveys of a few drainages, it is believed that this number represents less than 50% of the streams, rivers and lakes actually

used by anadromous species. It is estimated that at least an additional 20,000 or more anadromous water bodies have not been identified or specified under AS 16.05.871(a), a state permitting statute.

Alaska Department of Natural Resources, Alaska Department of Fish and Game, Alaska Department Environmental Conservation, *Bristol Bay Area Plan for State Lands* (1984), available at http://www.dnr.alaska.gov/mlw/planning/areaplans/bristol/index.htm (last visited December 30, 2009).

Area plans generally have an administrative life of about twenty years, are prepared by the Alaska Department of Natural Resources, and apply to state-owned and state-selected lands. By state statute, area plans must (1) be based on an inventory of uses and resources; (2) designate primary uses of units of state land; these designations convert to classifications of the land; and (3) adopt general and unit specific guidelines and statements of intent to guide management decisions. The Bristol Bay Area Plan of 1984, prepared and adopted by ADNR, ADF&G, and ADEC, contains a set of five habitat maps, and three maps of subsistence use areas for 31 communities and villages in the Bristol Bay drainages. The 1984 Plan remains useful because the later-prepared 2005 Bristol Bay Area Plan lacks comparable maps and comparable cartographic identification of essential and important habitats. The maps from the 1984 Plan are not posted on ADNR's web pages, but may be obtained separately either from ADNR or from counsel to the tribes. BLM's Resource Management Plan has identical or similar maps of subsistence use areas.

Alaska Department of Natural Resources, *Bristol Bay Area Plan for State Lands* (2005), available at http://www.dnr.alaska.gov/mlw/planning/areaplans/bristol/index.htm (last visited December 30, 2009).

See above abstract of the 1984 Bristol Bay Area Plan. The Bristol Bay Area Plan of 2005, prepared and adopted by ADNR, is currently the subject of litigation in *Nondalton Tribal Council, et al., v. State, Department of Natural Resources*, 3DI-09-046 CI, wherein these six Tribes, AIFMA Cooperative (a cooperative association of commercial fishers), and Trout Unlimited seek to have the 2005 Plan declared unlawful.

Directorate General for the Environment and the Joint Research Centre, Workshop on Mine and Quarry Waste – the Burden from the Past (http://viso.jrc.ec.europa.eu/pecomines_ext/events/workshop/ProceedingsOrtaWorkshop.pdf, last visited Jan. 25, 2010)

This is a collection of papers submitted at the conference organized by the for European Union and European Community nations, held at Orta, Italy, in 2002. Many seem useful. In particular, the paper by P. Younger, "*Don't forget the voids: aquatic pollution from abandoned mines in Europe*," indicates that mine voids can vastly exceed mine waste depositories as sources of water pollution (see Table 1 therein, and discussion).

Duffield et al., Economics of Wild Salmon Watersheds: Bristol Bay, Alaska 15 *at* http://www.housemajority.org/coms/hfsh/trout_unlimited_report.pdf (Feb. 2007) (last visited Jan. 6, 2010).

> This report provides estimates of the economic values associated with the sustainable use of wild salmon ecosystem resources, primarily fisheries and wildlife, of the major watersheds of the Bristol Bay, Alaska region. Both regional economic significance and social benefit-cost accounting frameworks are utilized. This study reviews and summarizes existing economic research on the key economic sectors (e.g., commercial fishery, subsistence fishery, recreation, and governmental expenditure and values) in this area. The study also reports recent findings based on original survey data on expenditures, net benefits, attitudes, and motivations of recreational anglers.

William J. Hauser, d/b/a "Fish Talk, Consulting," Potential Impacts of the Proposed Pebble Mine on Fish Habitat and Fishery Resources of Bristol Bay (2007).

> This paper appears to have useful information about salmon production proximate to the proposed road/access route to Pebble, including the hydrological characteristics of areas used by sockeye salmon for beach spawning in northwestern Iliamna Lake, which is immediately down-gradient from the proposed road/access route.

Northern Dynasty Mines, Inc. (NDM), Pebble Project: Applications for surface and ground water rights, and initial applications for certificates of approval to construct dams (2006), available at http://www.dnr.alaska.gov/mlw/mining/largemine/pebble/waterapp.htm (last visited December 30, 2009).

> Shortly after NDM filed these applications, NDM requested DNR to suspend processing them, and DNR agreed to do so. They contain information on the Pebble West portion of the ore body, proposed routes for road access, pipelines and power, and information relevant to the types of facilities envisioned and the magnitude of the project.

Office of the President, Executive Order 12898 (Feb. 11, 1994) re: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, available at http://www.epa.gov/compliance/resources/policies/ej/exec_order_12898.pdf (last visited December 30, 2009).

> Section 4-4 on subsistence consumption of fish and wildlife may bear upon EPA decision-making under Section 404(c).

Office of the President, Executive Order 13175 (Nov. 6, 2000) re: Consultation and Coordination with Indian Tribal Governments, available at http://www.epa.gov/fedreg/eo/eo13175.htm (last visited December 30, 2009). This executive order applies to federal-tribal relationships.

Office of the President, Memorandum for the Heads of Executive Departments and Agencies, re: Tribal Consultation (Nov. 5, 2009), available at http://www.gpoaccess.gov/presdocs/2009/DCPD-200900887.pdf (last visited December 30, 2009). This presidential memorandum supplements Executive Order 13175.

Parker, et al., "*Pebble Mine: Testing the Limits of Alaska's Large Mine Permitting Process*," Alaska Law Review, Vol. 25:1 (June 2008), available at www.law.duke.edu/shell/cite.pl?25+Alaska+L.+Rev.+1+pdf (last visited December 30, 2009).

> This law journal article, by lawyers and biologists, examines the adequacy of the state's large mine permitting process and finds it insufficient to deal with large metallic sulfide mines such as a Pebble mine.[17] The article contains over 170 footnotes, many with links to sources. Many of the non-legal sources may be useful to the Regional Administrator of EPA in making the initial determination of whether there is "reason to believe" that metallic sulfide mining in the area of Pebble "could result" in "unacceptable adverse effect," and therefore whether to commence a 404(c) process. The citations cover: (1) academic and professional literature on impacts that dissolved copper may have on salmonids and other fish, including a discussion of additive and synergistic effects; (2) academic and professional literature on the role that genetic diversity plays in overall productivity of salmon stocks; (3) EPA documents on acid mine drainage; (4) documents from Pebble Limited Partnership or Northern Dynasty on the nature of the ore body, (5) documents from Northern Dynasty submitted as part of its 2006 applications for water rights and approval of dams, (6) a recent study by Dr. John Duffield (University of Montana) of the economic values and job production associated with wild salmon producing watersheds of the Bristol Bay drainages, and (7) other related materials. Some of the links to PLP and NDM materials are no longer active or have been replaced by more up-to-date sources on PLP's webpages (see below).

Pebble Limited Partnership, various websites at http://www.pebblepartnership.com/.

State of Alaska, Alaska Statutes, Title 38, Chap. 38.04 (land use planning and classification) at http://www.legis.state.ak.us/basis/folio.asp, and ADNR regulations (land use planning and classification), 11 AAC 55.010 -- .280 at http://www.legis.state.ak.us/basis/folioproxy.asp?url=http://wwwjnu01.legis.state.ak.us/cgi-bin/folioisa.dll/aac/query=[JUMP:'Title11Chap55']/doc/{@1}?firsthit

Trasky & Associates, Analysis of the Potential Impacts of Copper Sulfide Mining on the Salmon Resources of the Nushagak and Kvichak Watersheds (2007).

> This two-volume report may, or may not, be public at the present time. It was prepared for the Nature Conservancy in Alaska. Mr. Trasky is a retired Regional

[17] The authors have represented or assisted clients or entities opposed to or concerned about a Pebble mine, and continue to do so.

Supervisor of the Alaska Department of Fish and Game, Habitat Division, Region III, which includes the Bristol Bay drainages.

US Department of the Interior, Bureau of Land Management, Subsistence Use Area Maps, Proposed Resource Management Plan (RMP) for BLM lands in the Bristol Bay drainages, and Final Environmental Impact Statement on the proposed RMP (December 2007), available at http://www.blm.gov/ak/st/en/prog/planning/bay_rmp_eis_home_page/bay_feis_documents.html (last visited Jan. 7, 2010).

The final EIS on BLM's proposed Resource Management Plan contains maps of subsistence use areas of many of the villages and communities in the Bristol Bay drainages. The internet links to the maps of subsistence use areas that appear to include significant amounts of the Kvichak and Nushagak drainages are:

Aleknagik:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.39744.File.dat/Map3-51_Aleknagik.pdf (last visited Jan. 7, 2010)

Dillingham:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.16048.File.dat/Map3-52_Dillingham.pdf (last visited Jan. 7, 2010)

Ekwok:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.76842.File.dat/Map3-53_Ekwok.pdf (last visited Jan. 7, 2010)

Igiugig
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.33049.File.dat/Map3-54_Igiugig.pdf (last visited Jan. 7, 2010)

Iliamna:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.78607.File.dat/Map3-55_Iliamna.pdf (last visited Jan. 7, 2010)

Kokhanok:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.64140.File.dat/Map3-57_Kokhanok.pdf (last visited Jan. 7, 2010)

Levelock:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.58501.File.dat/Map3-59_Levelock.pdf (last visited Jan. 7, 2010)

Koliganek:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.56441.File.dat/Map3-58_Koliganek.pdf (last visited Jan. 7, 2010)

Manokotak:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.65865.File.dat/Map3-60_Manokotak.pdf (last visited Jan. 7, 2010)

Nondalton:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.36771.File.dat/Map3-62_Nondalton.pdf (last visited Jan. 7, 2010)

Pedro Bay:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.89854.File.dat/Map3-63_PedroBay.pdf (last visited Jan. 7, 2010)

Platinum:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.4004.File.dat/Map3-64_Platinum.pdf (last visited Jan. 7, 2010)

Portage Creek:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.78039.File.dat/Map3-65_PortageCreek.pdf (last visited Jan. 7, 2010)

Port Alsworth:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.10100.File.dat/Map3-66_PortAlsworth.pdf (last visited Jan. 7, 2010)

New Stuyahok:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.90357.File.dat/Map3-68_NewStuyahok.pdf (last visited Jan. 7, 2010)

Togiak:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.42891.File.dat/Map3-69_Togiak.pdf (last visited Jan. 7, 2010)

Twin Hills:
http://www.blm.gov/pgdata/etc/medialib/blm/ak/afo/bay_rmp_eis_final.Par.66104.File.dat/Map3-70_TwinHills.pdf (last visited Jan. 7, 2010)

END

DOCUMENT SUBMITTED BY REPRESENTATIVE DONALD BEYER

LISA MURKOWSKI
ALASKA

COMMITTEES:
ENERGY AND NATURAL RESOURCES
RANKING MEMBER

APPROPRIATIONS

HEALTH, EDUCATION, LABOR, AND PENSIONS

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July 1, 2013

Mr. John Shively
Chief Executive Officer
Pebble Limited Partnership
3201 C Street, Suite 604
Anchorage, AK 99503

Mr. Mark Cutifani
Chief Executive Officer
AngloAmerican
20 Carlton House Terrace
London
SW1Y 5AN

Mr. Ron Thiessen
Chief Executive Officer
Northern Dynasty Minerals
1040 West Georgia Street
15th Floor
Vancouver, BC, Canada
V6E 4H1

Messrs. Shively, Cutifani and Thiessen:

I write today with regard to the Pebble Limited Partnership (PLP)'s timeline for releasing a project description and submitting permit applications for development of the Pebble deposit in the Bristol Bay region of Alaska. As you know, in anticipation of PLP taking these actions, I have been and remain neutral on potential development in this area.

To that end, I have encouraged all stakeholders to withhold judgment until a project description is released, permit applications filed, and all relevant analyses completed. Because of that position, I have opposed the prospect of a preemptive veto of development in Alaska by the Environmental Protection Agency (EPA) under Section 404(c) of the Clean Water Act. Such an action would be based purely upon speculation and conjecture. It would deprive relevant government agencies and all stakeholders of the specifics needed to make informed decisions. But failure to describe the project and submit permit applications has the same effect.

For nearly a decade, Alaskans have been told that these actions are imminent. This has generated a broad range of responses from people throughout the state. Yet today, after years of waiting, it is anxiety, frustration, and confusion that have become the norm in many communities - rather than optimism about the new economic opportunities that responsible development of the Pebble deposit might be able to deliver.

As you know, I have been highly critical of EPA and protective of the due process that any entity considering investment in Alaska should be provided. But your own actions have created uncertainty among the people I represent, and the time has come to tell Alaskans whether and how you plan to proceed. I have addressed this correspondence to all of you, as a group, because your organizations are collectively responsible for these issues. You are also the only ones in a position to remedy them.

At least as far back as November 3, 2004, Northern Dynasty Minerals asserted that the submission of permit applications was imminent, stating that the company expected "completion in 2005 of ... permit applications."[1] On August 12, 2005, another statement was issued, claiming that "a full permitting process for a port, access road and open pit mine [were] all slated to begin in 2006."[2]

On October 27, 2008, Alaskans were assured that those seeking to develop the Pebble deposit were "on schedule to finalize a proposed development plan in 2009 and, following input from project stakeholders, apply for permits in early 2010."[3] Six months later, on March 18, 2009, this timeline was reaffirmed, with an announcement that PLP was in the midst of "preparation to initiate state and federal permitting under the National Environmental Policy Act (NEPA) in 2010."[4]

On February 1, 2010, Alaskans were told that PLP was "preparing to initiate project permitting under the National Environmental Policy Act (NEPA) in 2011."[5] Yet on May 2, 2011, came the announcement that PLP intended "to enter the permitting phase towards the end of 2012."[6] On October 18, 2011, came another revision, as Alaskans were told by a PLP representative that "We have never even said that we're going to [seek a] permit. We may not."[7]

Most recently, on June 13, 2013, a PLP representative said that you "hope to have a project to take into permitting this year."[8] And in what seems representative of the confusing message being communicated to Alaskans, at the time of this letter, a PLP company website still asserts that you are planning on "initiating permitting by late 2012."[9]

By failing to take the next step – by failing to decide whether to formally describe the project and seek permits for it – PLP has created a vacuum that EPA has now filled with not one, not two, but three hypothetical mine scenarios contained in its so-called Watershed Assessment.

So I have a simple request: please establish a timeline and adhere to it. Clarity and certainty over how you intend to proceed is in the best interest of all who are involved with – and all who could be affected by – development of the Pebble deposit.

Sincerely,

Lisa Murkowski
United States Senator

---

[1] "Northern Dynasty Secures Listing With Symbol 'NAK' on the American Stock Exchange," Northern Dynasty Minerals Ltd. press release, November 3, 2004, on the Northern Dynasty Minerals Ltd. website, http://bit.ly/1cmyd03, accessed June 26, 2013.

[2] "Northern Dynasty Welcomes New Director to Board," Northern Dynasty Minerals Ltd. press release, August 12, 2005, on the Northern Dynasty Minerals Ltd. website, http://bit.ly/138vpW1, accessed June 26, 2013.

[3] "Successful 2008 Study Program Continues At Alaska's Pebble Project," Northern Dynasty Minerals Ltd. press release, October 27, 2008, on the Northern Dynasty Minerals Ltd. website, http://bit.ly/10Vbp7S, accessed June 26, 2013.

[4] "Pebble 2009 Work Plan to Focus on Finalizing Prefeasibility Study," Pebble Limited Partnership press release, March 18, 2009, on the Pebble Limited Partnership website, http://bit.ly/120vTWM, accessed June 26, 2013.

[5] "Updated Mineral Resource Estimate Confirms the Pebble Project as North America's Most Important New Copper-Gold-Molybdenum Development Opportunity," Northern Dynasty Minerals Ltd. press release, February 1, 2010, on the Northern Dynasty Minerals Ltd. website, http://bit.ly/14a3MbK, accessed June 26, 2013.

[6] "$91 million work program underway to prepare Pebble Project for permitting in 2012," Northern Dynasty Minerals Ltd. press release, May 2, 2011, on the Northern Dynasty Minerals Ltd. website, http://bit.ly/15FP3Du, accessed June 26, 2013.

[7] Lempinen, Edward W., "Proposed Pebble Mine Has Alaskan Community Focused on Critical Science and Policy Issues," AAAS news release, October 18, 2011, on the AAAS website, http://bit.ly/nhZqnW, accessed June 26, 2013.

[8] Shively, John. Interview by Monica Trauzzi, OnPoint, E&ETV, "Bristol Bay: Pebble mine's Shively discusses future of project, EPA's watershed assessment," June 13, 2013, online, http://bit.ly/16zAHXq, accessed June 26, 2013.

[9] AngloAmerican, "Case studies: Pebble partnership," http://bit.ly/19tRNeA, accessed June 26, 2013.

EPA-283

John Shively <johnshively@pebblepartnership.com>
10/21/2011 12:45 PM

To Dennis McLerran
cc Bob Sussman, Richard Parkin, Allyn Stern, Cara Steiner-Riley
bcc
Subject Letter

1 attachment

EPA Letter 10 11 Final.pdf

Dennis,

Attached is a letter as a follow up to our recent meeting. Thank you again for taking the time to talk to us.

John

John Shively
Chief Executive Officer
Tel: 907 339 2600
Cell: 907 250 6281

THE pebble PARTNERSHIP

October 21, 2011

Mr. Dennis McLerran
Regional Administrator
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
140-RA
Seattle, WA

Dear Dennis:

I am writing to thank you and your staff for meeting with John Iani and me on October 12th. We discussed several items that I would like to confirm.

Finalizing the Environmental Baseline Document

First, I am sorry that we have been unable to transmit our environmental baseline document ("EBD") to you as soon as we had both hoped. It has taken much longer than we expected to complete our pre-release internal data quality review of this 20,000 page document. We will transmit the EBD to you as soon as we can complete this technical review: our current plans are to have the EBD ready for release on or about December 6.

Making PLP Consultants Available to EPA

In order to keep this process moving forward, , we have offered to make some of Pebble's scientific and technical consultants available to respond to any specific questions EPA has prior to the release of the EBD. Rick Parkin has contacted Ken Taylor, and we look forward to working out the details of that arrangement.

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Baseline Data Transmittal Format

We will be providing the baseline information in pdf format. We recognize EPA's desire to obtain the data in a manipulatable format. However, this data has great value to us (we have spent over $100 million on it), and EPA cannot guarantee that the data will not be made public.. Ordinarily this data and its interpretation would not be made public until we applied to begin the NEPA process. We offered to discuss providing the raw data to an agreed upon independent third-party contractor that could make analysis runs per EPA requests, but it is my understanding that this approach will not meet EPA's review standards for the watershed assessment.

EPA Review of the Baseline Data

EPA indicated that providing the EBD in December might mean that EPA would choose not to use some of the information contained in it. EPA has indicated in the past that that data was very important to your study. We agree that these data are important, thus, we believe that EPA should take the time and effort to review this information. We do not expect to begin applying for permits for our project until 2013, so we do not understand why EPA would feel the need to issue its assessment without considering the EBD data.

Mine Design Layout

As we stated at the meeting, we will be unable to comply with the request that Rick Parkin made for a current mine design layout of the Pebble Project that would be of any use to the Watershed Assessment process. As you are aware, we are currently in the pre-feasibility phase of developing a mine design layout which we hope to complete late in 2012. PLP and its predecessors have considered many options for all components of this project over the past several years, and we are still considering additional options.

The pre-feasibility study will result in a mine design layout that will supersede all previous designs. This study will include a comprehensive analysis of the geologic,

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mining engineering, and economic factors governing the project, as well as an evaluation of appropriate environmental mitigation alternatives. The environmental evaluation will include, among other things, subjects such as waste management, water treatment, reclamation practices and mine closure and reclamation. Until that study is completed, there will be no mine design for EPA to analyze that has taken all of these factors into account, so the request is premature.

It takes years of environmental studies, careful planning and design work to ensure that the plan we ultimately propose – which will be reviewed by numerous federal and state regulatory agencies – meets or exceeds the agency design requirements and environmental protection standards. The reviewing agencies will include the EPA, the U.S. Army Corps of engineers, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, as well as the Alaska Departments of Fish and Game, Natural Resources and Environmental Conservation and others. All of those agencies, as well as Native Alaskans and the public, ultimately will have the opportunity to participate in a thorough review of the Pebble Project as the Environmental Impact Statement is developed under the National Environmental Policy Act.

EPA has undertaken the unprecedented task of assessing the impacts of potential development of a mineral deposit before the project is designed and submitted for permitting. Using an outdated and merely conceptual plan such as the one submitted in 2006 to the Alaska Department of Natural Resources by Northern Dynasty Mines for water rights applications – or even the preliminary Waldrop plan of February 2011 – would be an inadequate basis for such an assessment. Any analysis of this design would lead to erroneous conclusions having little relevance to what may actually be submitted by PLP at some future date.

Relevant Data From Other Mining Operations

There are alternative and sources of information for the agency to tap in lieu of a conceptual Pebble mine design that will likely become irrelevant. hile all mine designs are location specific and must address local physiographic, environmental and social conditions, there are some examples of existing mines in somewhat similar ecological regions of North America that might provide you with a more accurate assessment of the effects of mining a copper/gold/molybdenum deposit on the surrounding environment. Analyzing these would provide EPA with real data rather than speculative results. The Gibraltar mine and Highland Valley Copper are two copper mines in British Columbia that have been constructed and have been in operation for a number years. Both of these operations are mining ore bodies similar to that of the Pebble deposit, and both are in the Fraser River Valley where they must co-exist with one of the largest sockeye salmon populations in the world.

The regulatory environment here in Alaska is at least as stringent as it is in Canada. An analysis of the impacts of either of these two mines on the surrounding environment would provide your agency with a far more solid basis for any conclusions in your assessment of the Nushagak and Kvichak watersheds than you will produce using a hypothetical mine plan, regardless of the source.

We will be providing information on these and other mines so that EPA has an opportunity to assess mitigation measures being used by 21st century mining operations.

Watershed Assessment Schedule

EPA's current schedule for the Watershed Assessment is too ambitious. Given the substantial amount of information that EPA will have to review, and given the area being studied is the size of New Jersey and Maryland combined, providing a quality science-based product of the quality requested by Sen. Cantwell (among many others) is not realistic. Either quality or schedule will have to be sacrificed. Of those two choices, we respectfully request that quality should be controlling here. Moreover, as noted above, extending the schedule will not pose any risk to the watershed because PLP does not plan to apply for any permits before 2013, and when it does, the project will undergo a thorough environmental review.

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Peer Review

We had a very healthy discussion about the approach EPA will use to have an independent contractor select members of the peer review panel. We support this approach and are pleased that all peer reviewers will have to be free from conflicts of

interest with PLP, our opposition and EPA itself. As we know, at least one of the contractors pick by EPA to assist with the Assessment was not free of such conflicts.

Tribal Consultation

Our discussion about Tribal consultation was quite useful. We understand that Region 10 solicited 31 tribal entities in the Bristol Bay region to determine which Tribes were interested in being consulted during the Assessment, and 14 of those entities responded positively. Rick Parkin has since provided us with the names of those Tribes.

We understand that EPA is still in the process of finalizing your consultation plan for the Tribes, and that EPA has been conducting some Tribal consultation since the study began. We will be interested in seeing the plan once it is complete.

Mitigation

Finally, one of the aspects of the Assessment which continues to concern us is the approach EPA will take to mitigation. As stated above, if attempting to predict what mine development plan fits anywhere in the two watersheds is at present an uninformative exercise, it, it is also too early to reliably predict what mitigation measures will be employed. This issue warrants further discussion.

* * *

In closing we sincerely appreciate the open communication we have enjoyed with you, Bob Sussman and the Regional Administrator's office. We also appreciate your

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commitment in visiting the site twice this year. We look forward to continuing our dialogue in the near future.

Sincerely yours,

John Shively
Chief Executive Officer

Robert Sussman
Rick Parkin
Allyn Stern
Cara Steiner-Riley

Document submitted by Representative John R. Moolenaar

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PRIVILEGE CLAIMS NOT WAIVED FOR ANY OTHER PURPOSE

EPA-BBL-6438

David Evans/DC/USEPA/US
08/25/2010 12:50 PM

To Palmer Hough
cc Brian Frazer
bcc
Subject *Confidential: Fw: Fw: *** Confidential *** Not for distribution *** Re: Bristol Bay Options Paper

Palmer,

Here's a juicy one, right up your alley.

Hoping we can meet to discuss your thoughts tomorrow afternoon - I'll be out root-canaling Friday am.

Dave

David Evans, Director
Wetlands Division
Office of Wetlands, Oceans and Watersheds
(202) 566-0535
----- Forwarded by David Evans/DC/USEPA/US on 08/25/2010 12:49 PM -----

From:	Richard Parkin/R10/USEPA/US
To:	David Evans/DC/USEPA/US@EPA, Brian Frazer/DC/USEPA/US@EPA
Cc:	Michael Szerlog/R10/USEPA/US@EPA, Phil North/R10/USEPA/US@EPA
Date:	08/25/2010 11:38 AM
Subject:	*Confidential: Fw: *** Confidential *** Not for distribution *** Re: Bristol Bay Options Paper

Hi Dave and Brian, I have a meeting scheduled for Friday afternoon with the RA, DRA, and other Senior managers on Bristol Bay. Below is a draft of how I want to sell an advanced 404(c) process to them. It is undergoing editing as we speak but is close enough hopefully for you guys to see what I have in mind and whether it will fly for a 404(c) process. What I have developed is how I envision we would engage the public and stakeholders from the time that the 15 day notice is given up to a decision whether to proceed with a public hearing on restrictions or not. Hope that is clear. I would really like to hear your thoughts by Friday morning and if you are thinking "No no you have this all wrong" I would like to hear that right away. Thanks for your help. If you keep going down the email chain you will find an options paper that the RA has already been briefed on.

Rick Parkin
U.S. EPA, Region 10
(206) 553-8574
----- Forwarded by Richard Parkin/R10/USEPA/US on 08/25/2010 08:30 AM -----

From:	Richard Parkin/R10/USEPA/US
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Cc:	Richard Parkin/R10/USEPA/US@EPA, Christine Reichgott/R10/USEPA/US@EPA, Michael Szerlog/R10/USEPA/US@EPA, Sally Thomas/R10/USEPA/US@EPA, Jeff Philip/R10/USEPA/US@EPA, Wenona Wilson/R10/USEPA/US@EPA, Linda Anderson-Carnahan/R10/USEPA/US@EPA, Katherine Brown/R10/USEPA/US@EPA
Date:	08/24/2010 04:15 PM
Subject:	*** Confidential *** Not for distribution *** Re: Bristol Bay Options Paper

The attachment below is a first draft of the pitch I will make to Dennis et al. I included Phil's attachment also for those of you who haven't seen it. I am viewing it as a background piece but in my pitch I am going right to a recommendation for option 3. The vision for the process forward that I put in here is probably not exactly what we will end up with but I wanted to give them a concrete vision of how this could be successfully handled. Everything is fair game for comment. I would like to hear back from you tomorrow so I can finalize it and send it to Dennis, Mike B. Marcia and Michelle on Thursday. Thanks

Bristol Bay Proposal.doc

Rick Parkin
U.S. EPA, Region 10
(206) 553-8574

Phil North   Rick, For purposes of your discussions this wee...   08/23/2010 06:09:53 PM

From:	Phil North/R10/USEPA/US
To:	Richard Parkin/R10/USEPA/US@EPA
Cc:	Michael Szerlog/R10/USEPA/US@EPA, Mary Thiesing/R10/USEPA/US@EPA, Cara Steiner-Riley/R10/USEPA/US@EPA, Patricia McGrath/R10/USEPA/US@EPA
Date:	08/23/2010 06:09 PM
Subject:	Bristol Bay Options Paper

Rick,
For purposes of your discussions this week and in light of recent events, here is the options paper that Mary Anne and I modified and finalized today.

Bristol Bay Options Paper 8-23-10 final.doc

Phillip North
Environmental Protection Agency
Kenai River Center
514 Funny River Road
Soldotna, Alaska 99669
(907) 714-2483
fax 260-5992
north.phil@epa.gov

"To protect your rivers, protect your mountains."

DRAFT – DELIBERATIVE – NOT FOR DISTRIBUTION

Bristol Bay Proposal
Initiate a 404 (c) Process
(Option 3 – August 23, 2010 Options Paper)
August 27, 2010

"We can not solve our problems with the same thinking we used when we created them".
Albert Einstein

Short Process Description:

- RA notifies the District Engineer:
  1. that he intends to issue a public notice, pursuant to Section 404(c) of the CWA, of a proposed determination to prohibit or restrict a defined area in the Bristol Bay Watershed for disposal of dredged or fill material; and
  2. that he intends to engage in an open public process lasting 12 to 18 months to inform his final determination whether to issue the public notice.

- Region notifies the public and government entities, through mailings, public notices and the EPA web page that:
  - Tribes, a native corporation and Trout Unlimited have requested that EPA begin a public process to investigate a 404 (c) prohibition or restriction of mining projects in the Bristol Bay watershed.
  - Sufficient information exists to meet the regulatory threshold that "unacceptable adverse effects" to the Bristol Bay fishery and ecosystem could result from disposal of dredged or fill material for a major mining project.
  - This process does not represent a judgment that discharge of dredged or fill material will result in unacceptable adverse impacts; it means that the Regional Administrator believes that the issue should be explored.
  - Region 10 will engage the public, government and non-government expertise, and state and federal regulatory agencies in an open process leading to a decision in 12 to 18 months whether to issue the public notice proposing to prohibit or restrict disposal of dredged or fill material.

- Short description of the public process:

  - Develop the process around three questions:
  1. Is the Bristol Bay fishery the one of a kind, world class fishery that it is depicted to be?
  2. Given the nature of ore deposits in the water shed, state-of-the-art mining practices and the hydrology and geology of the watershed, is there substantial risk of unacceptable adverse impacts (population level impacts) to the fishery that call for restrictions or even prohibition of the disposal of dredged or fill material?

3. If warranted by the answers to 1 and 2 above, what restrictions would reduce or eliminate the risk of unacceptable adverse impacts?

- Create a steering committee consisting of EPA, NMFS, USGS, FWS, ADNR, AF&G, ADEC and two Tribal Government representatives. The PLP and other Tribal Government representatives will be invited to attend steering committee meetings and provide information but not to participate in decision making. The committee will attempt to reach consensus but if unable to do so, EPA will be the decision maker. The committee will perform the following tasks:
  - Determine what information is needed to answer the fundamental questions.
  - Pool the information at their disposal and determine appropriate sources of missing information.
  - Analyze the information and draft responses to the fundamental questions.
  - Participate in public meetings addressing each of the fundamental questions.
- Three public meetings will be held in Anchorage and 3 public meeting will be held in the Bristol Bay Watershed (a total of 6) to explain the steering committee's preliminary findings under each question and take public input.
- A summary of each public meeting will be developed and made available via the web page.
- The steering committee may create fact sheets and mailings as its work progresses to keep the public informed.
- EPA will consult with Tribes and Tribal Corporations in the watershed that request consultation and will meet with PLP and other mining interests as requested and appropriate.
- EPA will enter into IAGs and contracts as appropriate for assistance in collecting and evaluating information and possibly for assistance with public meetings and information dissemination.

Two Key Questions for EPA at this point:

1. Why would we do this to ourselves: Throw ourselves into a political firestorm, with the resource shortages we already face and the possibility of litigation?

   Short answer:

   Because of the resource. This is truly a world class fishery. There is probably no other resource in the United States that compares to this one in ecological and economic value. Think of a huge open pit mine and tailings reservoir proposed for Yellowstone National Park. That would rival this situation in many ways but wouldn't have the potential off site and world wide impacts of this proposal.

2. What is to be gained by doing this now rather than waiting for the NEPA and 404 processes to run their courses?

   Short answer:

   The project proponents will have spent tens of millions of dollars by the time the NEPA and 404 processes are completed, perhaps without even investigating the options and proposals that agencies would think likely to reduce or eliminate unacceptable adverse impacts.

   An EPA solo adverse decision after 3 years of spin doctoring, one-sided information releases, and lack of commitment to a process by the state is the worst way to go about this.

   EPA starts in a neutral position, without making a judgment, and begins a collaborative process, leading to a judgment.

   In the preamble to the regulations EPA expressed its preference for taking advance 404(c) action. For example, "...EPA recognizes that where possible it is much preferable to exercise this authority before the Corps or State has issued a permit, and before the permit holder has begun operations,"

   An open, advanced process can facilitate planning by the project proponent and allow more efficient and timely development of permittable projects.

   Because this is the new face of EPA: open, collaborative, promoting the discussion on environmentalism before a decision is made.

   This project epitomizes such EPA priorities as the discussion on environmentalism, environmental justice, sustainability, protect America's waters. etc.

Thoughts on the down side:

Regarding the political backlash:

The political backlash will be much worse if we wait through the NEPA and 404 processes. That will be the backlash against a renegade, unreasonable agency that is going counter to all the evidence of a long, expensive, fair process to permit projects. We have always had a terrible time reversing the spin that is put on such an action.

We will be more successful controlling the spin on a proactive action. We are doing due diligence. We are facilitating a process that can control undue expense for the project proponent and allow for efficient and timely permittable projects.

There is no question that if we could see the future and see that a 404(c) action should be initiated that now, in advance, is the time to do it, from the political backlash standpoint.

Regarding resources:

As an agency we strive to put our resources on the highest human health and ecological risks. This project qualifies on both counts. The risks to the people, the communities, the fishery and the ecosystem are immense and potentially forever. Few localized industrial impacts carry the risks of mining in Bristol Bay. Compare it to the OCS oil and gas industry off the North Slope. Such activity poses great risks to the people, resources and ecology of that Region. But when a well is exhausted, the risk ends. You cap it and walk away. The risk in Bristol Bay from large acidified tailings reservoirs will never end.

We always find a way to muster resources for important work:

- Hurricane Katrina
- The Bold
- Yakima Groundwater
- Move and Space Action Teams
- Swift Creek Asbestos issue
- Puget Sound Grant reviews
- etc

Regarding litigation:

Just because we are sued doesn't mean we are wrong.

It is much better to be sued for proactive, bold steps to protect the environment than for doing nothing, which is usually the case.

Risk of litigation is simply an argument to do the job right the first time.

Comments from Headquarters

Politically the climate is right.
If we are going to end up pushing a 404(c), an advance action is the way to go.
Clear signals from the Administrator of a willingness to hear from Region 10.
Region 10 needs to make a clear recommendation soon.
Full support from the Wetlands Division.

Options for EPA Involvement in Mining Activity in the Bristol Bay Watershed

I. Issue:

Bristol Bay in southwest Alaska is arguably the most important watershed in the world for wild salmon. It produces 8% of the world's Pacific Salmon, all of them wild fish. The Nushagak River and Kvichak River watersheds, which are tributaries to Bristol Bay, produce 50% of these fish by themselves. Bristol Bay has the largest sockeye salmon fishery in the world for commercial, subsistence, and recreational fishing. The Yupik Alaska Native culture is a salmon-based subsistence culture that has been supported by these fish throughout the region for thousands of years. The estimated sustainable value of the fishery is approximately $500 million per year in today's dollars[1,2]. These salmon also provide critical support to both the terrestrial ecosystems of the watersheds and the marine ecosystems of the North Pacific Ocean[3].

There is a very large copper, molybdenum and gold sulfide ore deposit located at the headwaters of the Koktuli River and Upper Talarik Creek of the Nushagak and Kvichak watersheds. A mining company (Pebble Limited Partnership, (PLP)) has developed draft mine plans and has provided other information that indicates that if this large ore deposit is developed, it could be one of the largest mines in the world with a measured and indicated gross value of $300 billion and a similar quantity of reserves inferred[4]. If fully developed it would be 6 to 10 times larger than the Bingham Canyon Mine in Utah, self-reported to be the largest man made excavation on earth[5]. Although PLP has not yet submitted permit applications for developing the ore deposit, based on information they have provided, mining activity at this location would comprise: 1) an excavation with a surface foot print up to 6 square miles and extraction up to a mile deep, 2) a mill site, 3) transportation-related infrastructure, and 4) 4 to 10+ billion tons of waste stored in impoundments. Thousands of acres of wetlands and tens of miles of streams could be permanently lost during construction of a mine. Pollution from operations following construction could potentially include pipeline spills of metals concentrate, seepage from tailings impoundments, acid drainage from waste rock dumps and the mine pit, acid-generating dust and road runoff. All of these sources, if not adequately managed, could impact nearby salmon bearing waters during the effective mine life, which could be 50 to 100+ years. There is also the possibility of shipping-related spills of metals concentrate into marine waters. In the long term, the open pit mine and large waste disposal facilities would need to be maintained in perpetuity at the top of these ecologically unique watersheds.

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1 Duffield, J.W. et al. 2007. Economics of Wild Salmon Ecosystems: Bristol Bay, Alaska. USDA Forest Service Proceedings RMRS-P-49.
2 Alaska Department of Fish and Game. 2009. 2009 Bristol Bay Salmon Season Summary. Alaska Department of Fish and Game, Anchorage, Alaska.
3 National Oceanographic and Atmospheric Administration, Alaska Fisheries Science Center, Seattle, Washington, personal communications with Dr. Sarah Gaichas and Dr. Kerim Aydin by Phil North, March 1, 2010.
4 Based on metals prices found on line at http://www.metalprices.com/ on August 7, 2010 and metal quantities listed on the Pebble Limited Partnership web site on May 11, 2010, http://www.pebblepartnership.com/.
5 Kennecott Utah Copper web site last accessed May 12, 2010, http://www.kennecott.com/visitors-center/

Additional proposals for developing mineral deposits similar to Pebble appear likely in the near future. Exploration on the Kahiltna Terrane, of which Bristol Bay is a part, has increased as a result of the Pebble discovery[6]. The claim block owned by PLP includes two "high priority targets" to the southwest of the Pebble deposit but within the magnetic anomaly that led to the discovery of Pebble[7]. Exploration has begun on Groundhog Mountain just north of the Pebble deposit[8] and on claims adjacent to PLP's to the southwest[9]. Mining geologists have now described an ancient mineralized volcanic caldera wholly within the Bristol Bay drainage, of which the Pebble site is the southeast quarter[10]. Exploration is proceeding for copper sulfide deposits around this caldera. Pebble appears to be the first of multiple sulfide deposit mining prospects in the Nushagak and Kvichak watersheds.

Based on information from PLP, other mining sources and EPA's review of existing literature and reports, EPA Region 10, Aquatic Resources Unit believes that:

1) Bristol Bay, its watersheds, and aquatic resources are irreplaceable natural and economically essential resources that can provide benefits to countless generations to come; and
2) Large-scale filling of wetlands and stream channels that support the salmon resources of Bristol Bay and the development of mines, with associated infrastructure, acid generating mine pits, waste rock and tailings ponds, pose significant and unacceptable risks of damage to this unique and essential resource.

As a result, EPA Region 10, Aquatics Resources Unit, staff have identified the Nushagak and Kvichak watersheds of Bristol Bay as candidates for a Section 404(c) prohibition or restriction under the Clean Water Act. In addition, six Alaskan tribes, the Bristol Bay Native Corporation, the Bristol Bay Native Association and two commercial fishing associations have requested that EPA use its authority under Section 404(c) to protect these unique resources.

Under Section 404(c) of the Clean Water Act, EPA is authorized "to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and [the Administrator] is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas....The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.[11]"Historically, EPA has generally waited until a permit application was pending before it made 404(c) determinations. However, that is neither a

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[6] Lasely, Shane. 2010. Mining News: Explorers descend on the Kahiltna Terrane. North of 60 Mining News, Vol. 15, No. 26. Week of June 27, 2010.
[7] Northern Dynasty Minerals, Ltd. Web site accessed on July 9, 2010: http://www northerndynastyminerals.com/ndm/PD_EL.asp
[8] Alaska Public Radio web site accessed on June 9, 2010: http://aprn.org/2010/06/08/mining-company-explores-groundhog-mountain/
[9] See footnote 6
[10] Mining News. 2008. Mining News: Junior seeks JV partner for SW claims. North of 60 Mining, Vol. 13, No. 17. Week of April 27, 2008.
[11] 33 U.S.C. § 1344(c)

requirement nor an intent of the process. EPA can make such a determination before any application is submitted[12]. In fact, the preamble to the 404(c) regulations states a clear preference for making a 404(c) determination in advance of a permit[13].

If EPA determines, given the information it has at hand, that there is "likely to be" an unacceptable adverse impact to the aquatic ecosystem, then EPA's regulations allow EPA to proceed under Section 404(c) without the permit or NEPA process[14]. Therefore, EPA could choose to "*prohibit* the designation of an area as a disposal site" for any purpose, or it could *restrict* the use of an area as a disposal site for a particular purpose such as the large scale mining of sulfide ores, or it could *restrict* the use of an area as a disposal site by placing conditions on disposal, location, volume, etc., that will adequately prevent unacceptable adverse impacts to the resource. On the other hand, if EPA concludes, based on all available information, that there are levels of activity which could be sustained in these watersheds without unacceptable adverse impacts to the aquatic ecosystem, then a permit application or applications could proceed under §404, with attendant review under NEPA.

Prohibition or restriction under 404(c) could be comprise any of a number of strategies for responding to specific risks. The prohibition or restriction could be:

- Geographically based, e.g., all watersheds surrounding ore body
- Activity-based, e.g., discharges resulting from sulfide ore mining, or based on type of mine
- Threshold-based, e.g., limit on volume of discharge, or on sulfide content of waste, etc.
- Could be combination of any of the above
- Any threshold-based action requires identification of a "safe" threshold

Tribal consultation and public involvement will help to define the nature and scope of a prohibition or restriction.

At this time we identify two options for action currently available to EPA. The pros and cons and the projected resource needs of each option are listed below.

II. Options:

1. **<u>No action in response to Tribal and others' request for a 404(c)</u>**

   EPA would participate in the permit and NEPA process for each mine as applications are submitted, followed by a 404(q) and 404(c) determination if appropriate. EPA would be addressing potential environmental impacts individually as projects are proposed.

   A. Process:

[12] 40 C.F.R. Part 231.1
[13] Federal Register Vol. 44, No 196, Pages 58076 through 58082, Tuesday, October 9, 1979, Preamble to the final rule: Denial or Restriction of Disposal sites; Section 404(c) Procedures.
[14] 40 C.F.R. Part 231.2(e)

a) Evaluate Clean Water Act (CWA) Section 404 permit applications
- Pebble Limited Partnership has said that they expect to submit CWA Section 404 permit applications in 2012.
- Permit applications from other sites would follow on individual project schedules in the years to come.
- 404 permits are required from the Army Corps of Engineers for each project.
- EPA's role would be to review each project and comment on its compliance with the 404(b)(1) Guidelines
- Potential outcomes include:
  1. Provide recommendations on avoidance, minimization and compensatory mitigation for fill discharges.
  2. Include "elevation language" in our comments on the permit public notice that reserves our "rights" to elevate disagreements to higher authority than the Alaska District (404(q)); possibly elevate the permit decision.
  3. Use our 404(c) authority to withdraw ("veto") the Corps' 404 permit.

b) Participate in NEPA Environmental Impact Statement (EIS) development
- EPA's role is to review and comment on the technical merit of the EIS and compliance with NEPA regulations.
  1. EPA could be a co-lead with the Corps, but this is less likely since EPA haws no specific permit authority.
- EPA would rate the project according to the quality of the EIS and the environmental impact of the project.
- EPA could rate the project environmentally unacceptable and recommend that no action be taken. EPA would have the option of elevating the Corps' NEPA decision to the Council on Environmental Quality.

<u>Pros:</u>
- The permit and NEPA processes could generate a great deal more detailed environmental information and analysis upon which to base a decision.
- Support for a 404(c) position from other agencies and the public may increase as more information is made available about the project and potential impacts. It should be noted, however, that substantial support already exists.

<u>Cons:</u>
- Each permit and NEPA process would likely take several years to complete.
- To negotiate the regulatory process a great deal of human and other resources will be required by all parties involved for each permit.
- PLP would likely spend tens of millions of dollars on necessary environmental studies.

- We can anticipate that significant Region 10 ARU, ORC, OEA and ERSMU FTE would have to be assigned to this unusually large and complex initial project for an extended review period.
- EPA Region 10 Aquatic Resources Unit believes that there is already sufficient information to make a recommendation that the Nushagak and Kvichak River watersheds should be restricted for discharge of dredged or fill material.
- The 404 permit process and NEPA process do not address watershed issues, but are specific to a single project. If the record, when developed, indicates that there are no practicable precautions or practices for ore development which will adequately protect the resources, the only mechanism which will protect them on a watershed basis is 404(c).

Estimated Resources Needs: We estimate that the project team (up to six staff) would be engaged for several years for each proposed mine, to a greater and lesser extent over that time. One each of ERSMU and ARU staff would be involved to a substantial extent over most of that time. Other team members with special technical expertise would be involved as the expertise was needed (weeks at a time).

2. Initiate 404(c) process ("Intent to Issue Notice of Proposed Determination")

EPA would address the protection of aquatic resources in the Nushagak and Kvichak watersheds as opposed to restricting individual mining operations. While it would address the mining of sulfide deposits, it may also address other development. We would address all issues in a single comprehensive and pro-active action.

A. Process:

a) Send "15 day" letter to Corps of Engineers stating that EPA is considering invoking Section 404(c) of the Clean Water Act.

b) Initiate discussions with PLP about the risk of adverse effects on the Nushagak and Kvichak watersheds and fisheries. Solicit information from them that would rebut our conclusions.

c) Initiate government to government consultation with Nushagak and Kvichak tribes about the nature and scope of a 404(c).

d) Dedicate staff and contractor time to compile existing information on the Bristol Bay watershed and information relevant to sulfide-ore mining, and to identify any additional analyses that might be needed.

e) Engage USGS to assist in the analysis of geochemical, hydrogeologic and seismic information existing for the Bristol Bay area.

f) Engage NOAA to assist in the analysis of climate information for Bristol Bay and fisheries and other relevant information for Bristol Bay and associated waters (Bering Sea and North Pacific).

g) Develop a formal impacts evaluation for mining in the Bristol Bay watershed.

h) Have ORC evaluate the potential for a "takings" claim and assist in evaluating restricted areas or activities.

i) Develop options for appropriate restrictions on discharges from mining and other activities that would be permittable within Bristol Bay watershed.

<u>Pros:</u>

- Pro-active protection of Bristol Bay aquatic resources for subsistence, commercial, recreational and broad ecological purposes.
- Achieves goals identified in preamble to 404(c) regs: i.e., it facilitates planning by developers and industry, eliminates waste of resources on projects that will likely be restricted at the end of a more extensive process and facilitates comprehensive protection of aquatic resources.
- Positively responsive to tribal governments to whom we have a trust responsibility.
- Agencies throughout the federal, state and tribal governments would be relieved of the burden of staffing the long term effort of NEPA, Section 7 consultation, and 404 review and various state laws and programs.
- PLP or any other project proponent could avoid spending tens of millions of dollars on a project EPA ARU program staff believe should be withdrawn in the end.
- EPA resources required for relatively shorter period of time.

<u>Cons:</u>

- Will generate an immediate political backlash by the State of Alaska and mining interests.
- EPA will become the target of litigation from the State of Alaska, PLP (or another project proponent), and others once the 404(c) is completed.
- Requires dedication of substantial EPA resources for the next 1 to 2 years.

<u>Estimated Resource Needs:</u> We estimate that 2 FTEs would be required for 1 to 2 years, plus others with specific expertise at specific times (weeks at a time). Will likely require a request of resources from headquarters.

DOCUMENT SUBMITTED BY RANKING MEMBER
EDDIE BERNICE JOHNSON

SPORTSMEN BRISTOL BAY

April 26, 2016

Chairman Smith,

Texas is home to a proud sporting tradition, something we know you believe in just as deeply as we do. 2.7 million Texans hunt and fish. It's part of who we are and what we do – and just like we say "don't mess with Texas," Texans don't want anyone messing with the special places where we hunt and fish, the places where we chase tarpon along the Gulf coast, stalk deer in the Hill Country, and hunker down in our waterfowl blinds for ducks and geese. We're a big state, with lots of variety and opportunity.

But, as much as we Texans might think we have a patent on "big," there's one place that's even bigger and wilder than Texas – and that's Alaska. Alaska draws many thousands of Texans north every year, because it represents some of the finest remote hunting and angling to be found not just in the United States, but in the entire world.

That's why we've been following and engaging in one of the sporting community's most important conservation battles for nearly a decade. The hunting and fishing community may have its differences -- but one thing that unites us is our commitment to protecting Bristol Bay, Alaska from the proposed Pebble Mine. That's why we're writing to you as a fellow Texan because we want you to hear directly from us what a fundamental issue this is to our community.

A great Republican Senator named Ted Stevens called this project "the wrong mine in the wrong place." An unprecedented coalition of native tribes, commercial fishermen, anglers and hunters, conservationists, religious groups, restaurateurs and outdoor enthusiasts have been fighting this foreign-owned mine proposal trying to gain protections for the Bristol Bay region.

Why are we so committed? Because Bristol Bay supports one of the planet's best remaining salmon fisheries, which at an average run of 37.5 million fish, produces 46% of the world's sockeye salmon. On top of the incredible number of sockeye salmon, the watershed supports prized sport fish that result in more than 29,000 fishing trips per year. The area is also home to high densities of brown bear, moose, caribou, waterfowl, and ptarmigan that attract hunters from around the globe.

Economically speaking, sportfishing, hunting, and tourism alone generate more than $160 million in local economic activity, creating nearly 2,500 local, sustainable jobs. The proposed Pebble Mine would create only about 1,000 temporary mining jobs while threatening 14,000 commercial and recreational fishery jobs in a $1.5 billion annual salmon fishery that can last indefinitely.

Millions of anglers and hunters from Texas and across this country are asking you to recognize that Pebble Mine is too risky and the scientific record of the Bristol Bay Watershed Assessment proves the area must be protected for this and future generations to enjoy.

Thank you for considering our views as you lead the committee and as you weigh in on this important issue.

Dallas Safari Club
Dallas, TX (over 6,000 members)

The Guadalupe River Trout Unlimited Chapter
Texas (5,700 members strong)

Class IV, LLC
Austin, TX

EPIC Angling & Adventure
Austin, TX / Alaska

Good Eats Flyfishing
Arroyo City, TX

Howler Bros.
Austin, TX

Laguna Madre Outfitters
Rio Hondo, TX

Tailwaters Fly Fishing Co. & Tailwaters Travel Co.
Dallas, TX

Temple Fork Outfitters
Dallas, TX

Wyatt Abernethy – Past Board Member, Dallas Safari Club
Dallas, TX

Dr. Richard Allen – Past President, Dallas Safari Club
Kerrville, TX

Ben Carter – Executive Director, Dallas Safari Club
Dallas, TX

Bill Cason
Austin, TX

Banning Collins
Austin, TX

Michael Curlee
Austin, TX

Mark Foohey
Austin, TX

Bradley B Garner
Austin, TX

David Leake,
Dallas, TX

Mick McCorcle
Fairview, TX

Mike McLaughlin
Southlake, TX

Capt. Scott Meyer
Lindale, TX

Capt. Ben Paschal
Rio Hondo, TX

Capt. John Pilmer
Arroyo City, TX

David Price, Jr.
Carrollton, TX

Rus Schwausch
Austin, TX

Harvey Don Ware
Sweetwater, TX

Kevin Wheelan
Dallas, TX

Rick Wittenbraker
Austin, TX

TX Sportsmen Science & Tech – Pebble Mine (April 26, 2016)

Appendix III

Slides

Deposition of Phil North

(preliminary transcript)

A.	I think it's my duty as a federal employee, when someone comes to me and they want help petitioning the government, it's my duty to give them feedback and help them on that.

Code of the Federal Regulations 33CFR 323.6(b)

The Corps will not issue a permit where the regional administrator of EPA has notified the district engineer and applicant in writing … that he intends to issue a public notice of a proposed determination to prohibit or withdraw the specification, or to deny, restrict or withdraw the use for specification … 115

Deposition of Phil North

(preliminary transcript)

Q And let's take a look at Exhibit 13 here. **You wrote to Jeff Parker. I quote, "I keep trying to include ecological impacts, but if they make the sentences awkward then delete." What exactly did you mean by that?**

A Well, there was that one that one suggestion of including ecological effects, not just commercial and subsistence fishing. So that's I think that's I mean, this is a long time ago, so I don't remember specifically, but I assume that's what I was talking about.

Q And did you feel that would strengthen the petition letter?

A Yes [emphasis added].

Q And in your opinion, did the petition letter that Jeff Parker sent to EPA on behalf of his clients, did did that change the perspective of people at the EPA?

A The letter?

Q Yes.

A Yes. Yes, I I believe so.

1

SLIDE SUBMITTED BY REPRESENTATIVE RANDY NEUGEBAUER

Deposition of Phil North

(preliminary transcript)

Q	Was the impending 2012 presidential elections something that you ever discussed with regard to the Pebble Mine situation?
A	With?
Q	Did you sorry. Did you discuss it internally at EPA?
A	I believe that we were aware of it and and yes, we probably discussed that that could change the landscape of what we were doing.
Q	Were you attempting to finish what I presume was the draft watershed assessment at that point before the presidential elections?
A	I would have to say that at say, between Palmer Hough and I, we probably discussed that that would be a good idea, but I would also have to say that I don't think EPA no, EPA was not trying to finish it before that time frame. At least not that I'm aware of.
Q	And do you recall if you discussed the impending presidential election with Jeff Parker?
A	I don't doubt that we talked about it. As I said, and I'll probably say more again, he called me quite often and talked to me about lots of things, and this certainly would have been something that he would have been thinking about and brought up.

1

SLIDE SUBMITTED BY REPRESENTATIVE BILL POSEY

TESTIMONY OF THOMAS C. COLLIER
CHIEF EXECUTIVE OFFICER
THE PEBBLE PARTNERSHIP
"HEARING EXAMINING EPA'S PREDETERMINED EFFORTS
TO BLOCK THE PEBBLE MINE"
BEFORE THE COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES
November 5, 2015

Specifically, EPA has sought to implement the first-ever pre-emptive veto in the 43-year history of the *Clean Water Act* at Pebble, utilizing a little used provision, Section 404(c), in a novel and unprecedented way.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 231

[FRL 1292-6]

Denial or Restriction of Disposal Sites; Section 404(c) Procedures

AGENCY: Environmental Protection Agency.

ACTION: Rule.

Section 404(c) gives the Administrator authority to prohibit or withdraw the specification of a site as a disposal site or to deny or restrict use of a disposal site. In effect, section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued. in each case, the Administrator may prevent any defined area in waters of the United States from being specified as a disposal site, or may simply prevent the discharge of any specific dredge or fill material into a specified area. In either case, the Administrator must determine, after notice and opportunity for public hearing, that the discharge of material will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding grounds), wildlife or recreational areas. The Administrator may also use section 404(c) where the site in question is covered by a state 404 permit program.

FINAL DETERMINATION OF THE U.S. ENVIRONMENTAL

PROTECTION AGENCY'S ASSISTANT ADMINISTRATOR

FOR WATER, CONCERNING THREE WETLAND PROPERTIES

(sites owned by Henry Rem Estate, Marion Becker, et. al. and Senior Corporation)

FOR WHICH ROCKPLOWING IS PROPOSED IN EAST EVERGLADES,

DADE COUNTY, FLORIDA

[redacted] agricultural areas was similar to that of the Rem site). Section 231.1 of the Section 404(c) regulations states that EPA's Section 404(c) authority may be used either to veto a permit which the Corps has determined it would issue (as in the case of the Rem site) or to preclude permitting either before the Corps has made its final decision (as in the case of the Senior Corp. site) or in the absence of a permit application (as is the case of the Becker site). EPA Region IV concluded that because the Rem, [redacted]

15 June 1988
Date

Rebecca W. Hanmer
Rebecca W. Hanmer
Acting Assistant Administrator
for Water

From: Katherine Carscallen
To: Tim Bristol
Cc: Brian Kraft; Shoren Brown; Scott Hed; Elizabeth Dubovsky; Kate Miller; Lesely Rogers; Lindsey Bloom; melanie brown; Nelli Williams; Rick Halford; Wayne Nastri; Tim Bristol
Subject: Re: Could you..
Date: Tuesday, February 22, 2011 4:26:58 PM
Attachments: Ekwok Notes.doc
ATT12806444.htm

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tim, i went over most of this on the call this morning, but if you want to take a look and probably help shoren in on whatever I missed?

Internal Trout Unlimited Email
Date: February 22, 2011
Subject: Re: Could you…
Attached: Ekwok Notes.doc

Ekwok Notes

Richard Parkins – Reviewed Outline with Tribes –

Clarified what 'build a common understanding of potential impacts to BB's salmon fishery….' means. – get an idea from all 'stake holders' if this is 1. Really a 'world class fishery' and 2. Put at unacceptable risk by proposed mineral developments – are these risks mitigateable?

Stressed that while a 404c determination would be based on science – politics are as big or bigger factor

Asked if people would support any gold/copper mine in the region, if it could be shown that the mine would be developed without harm to the fishery – Directed @ BBNC. (Teal explained – BBNC is supportive of some mines, but with a risk threshold which Pebble surpasses)

Explained the possibility of a determination that would Restrict vs. Prohibit development.

Outlined what public meetings will look like:

Best time to be in region: Late May. Aug 1-20th First week in September. October/November.
Parkins gave the impression that Late summer would be the most likely time for first round of meetings.

Considering 4 Meeting locations: Anchorage/Dillingham/Illiamna/King Salmon
-locations chosen geographically & meeting facilities.
--Tribes stressed that EPA should choose another village- New Stuyahok or Nondalton were strongly suggested.

Asked what the best method to contact tribes or update them through the website –

Stressed that while a 404c determination would be based on science – politics are as big or bigger factor.

Deposition of Phil North

(preliminary transcript)

Q.	As you stated before, you had formulated your opinion on whether EPA should use Section 404(c) for the Pebble mine before a scientific document was prepared by the EPA; right?
A.	Yes.

INTERNAL DELIBERATIVE AND/OR PRIVILEGED DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES IN RESPONSE TO SUBPOENA
PRIVILEGE CLAIMS NOT WAIVED FOR ANY OTHER PURPOSE

EPA-BBL-4886

Mary Thiesing/R10/USEPA/US
12/16/2009 07:06 PM

To Phil North, Michael Szerlog
cc
bcc
Subject Re: Pebble

Phil,

I agree with you on practically everything, but especially on the need for ARU to lead the discussion. We have the authority to stop this project, and may consider exercising that authority; consequently, we should be the ones to shape the discussion. However, I also think, as you rightly pointed out, that we need to approach this as a team effort, even within ARU. As project lead, you will get asked to brief people on a moment's notice, and just pulling together the briefing packages will be daunting and often happen without a lot of warning. I definitely think we need to start gathering information right now and continue to do so as the project gains momentum. I think what we have to do is approach it as though there will be a 404(c), and we don't need to wait for a new RA to do that; however, we will be getting one very quickly, and there will be no 404(c) without the RA's complete, total, and most importantly, continued buy-in. We can be prepared to give the RA a suggested direction when he/she comes on board. This thing will be developing for years, and we aren't likely to get RA support or HQ support for a pre-emptive 404(c) on a project this big before the information is developed. The other thing is--and I have seen this happen with my own eyes--is that you have to keep doing a gut check, especially with HQ,, because support waxes and wanes depending on the administration, which session of Congress, whether it's an election year, etc. The best thing you can do si build a HUGE record, so that if political pressure causes HQ to withdraw support, you have a big public record which still spells out the facts.

So, while you aren't going to get commitments on a 404(c) right now, you are absolutely right in that we need to build our information "war chest". You did a fantastic job (I thought) in blocking out a very persuasive set of arguments on this. To flesh them out, I would recommend the following:

1. Don't base your arguments on impacts 200 or more years out. A political appointee will make the decision, and they are only interested in what's happening now that they can see, touch, etc. All that a court has to hear is that the project proponent will take every possible precaution to protect the environment and they think that the government is being unreasonable in insisting it's not enough. What would be helpful is to identify mines of the same type, and preferably, by the same project proponent, that have had adverse environmental effects that weren't addressed by the permit or that happened anyway. Lists of impacts, and especially, pictures where despite "industry best efforts", they trashed the surrounding environment and left a cleanup to the government. This is especially significant because we will need to do tribal outreach, and they need to understand what the risk of irreversible jeopardy really is, rather than just getting bought off by the industry.

2. That being said, I think we still want the persuasive hydrology and geology data to show potential effects, if it can be assembled, including earthquake risk in real time.

3. Pictures of the endangered species are useful, but don't go more than one slide on the subject. Get a dollar amount on the value of the fishery as well as the number of people it employs and the portion of the world's catch it reopresents (I think you said 43% for the state? How much of it comes from Bristol Bay?)

By the way--keep this under your hat, because I wasn't authorized to make it public and I am not sure who knows yet--but Region 3 is doing a 404(c) on that mountaintop mining project. I believe the PD will hit the Federal Register in January.

Mary Anne

Phil North Hi Michael, I learned from the Mining Team meet... 12/16/2009 03:33:01 PM
Phil North/R10/USEPA/US

From: Mary Thiesing
To: Phil North
Date: December 16, 2009
Subject: Re: Pebble

Approach it as though there will be a 404(c), and we don't need to wait for a new [Regional Administrator] to do that; however, we will be getting one very quickly, and there will be no 404(c) without the RA's complete, total, and most importantly, continued buy-in.

The best thing you can do si [sic] build a HUGE record, so that if political pressure causes HQ to withdraw support, you have a big public record which still spells out the facts.

Lists of impacts, and especially, pictures where 'despite industry best efforts', they trashed the surrounding environment and left a cleanup to the government. This is especially significant because we will need to do tribal outreach, and they need to understand where the risk of irreversible jeopardy really is, rather than just getting bought off by industry. 2

DRAFT – DELIBERATIVE – NOT FOR DISTRIBUTION

Bristol Bay Proposal
Initiate a 404 (c) Process
(Option 3 – August 23, 2010 Options Paper)
<u>August 27, 2010</u>

"We can not solve our problems with the same thinking we used when we created them".
Albert Einstein

<u>Short Process Description:</u>

- RA notifies the District Engineer:
  1. that he intends to issue a public notice, pursuant to Section 404(c) of the CWA, of a proposed determination to prohibit or restrict a defined area in the Bristol Bay Watershed for disposal of dredged or fill material; and
  2. that he intends to engage in an open public process lasting 12 to 18 months to inform his final determination whether to issue the public notice.

- Region notifies the public and government entities, through mailings, public notices and the EPA web page that:
  - Tribes, a native corporation and Trout Unlimited have requested that EPA begin a public process to investigate a 404 (c) prohibition or restriction of mining projects in the Bristol Bay watershed.
  - Sufficient information exists to meet the regulatory threshold that "unacceptable adverse effects" to the Bristol Bay fishery and ecosystem could result from disposal of dredged or fill material for a major mining project.
  - This process does not represent a judgment that discharge of dredged or fill material will result in unacceptable adverse impacts; it means that the Regional Administrator believes that the issue should be explored.
  - Region 10 will engage the public, government and non-government expertise, and state and federal regulatory agencies in an open process leading to a decision in 12 to 18 months whether to issue the public notice proposing to prohibit or restrict disposal of dredged or fill material.

- Short description of the public process:

  - Develop the process around three questions:
  1. Is the Bristol Bay fishery the one of a kind, world class fishery that it is depicted to be?
  2. Given the nature of ore deposits in the water shed, state-of-the-art mining practices and the hydrology and geology of the watershed, is there substantial risk of unacceptable adverse impacts (population level impacts) to the fishery that call for restrictions or even prohibition of the disposal of dredged or fill material?

SLIDE SUBMITTED BY REPRESENTATIVE JOHN R. MOOLENAAR

3. If warranted by the answers to 1 and 2 above, what restrictions would reduce or eliminate the risk of unacceptable adverse impacts?

- Create a steering committee consisting of EPA, NMFS, USGS, FWS, ADNR, AF&G, ADEC and two Tribal Government representatives. The PLP and other Tribal Government representatives will be invited to attend steering committee meetings and provide information but not to participate in decision making. The committee will attempt to reach consensus but if unable to do so, EPA will be the decision maker. The committee will perform the following tasks:
  - Determine what information is needed to answer the fundamental questions.
  - Pool the information at their disposal and determine appropriate sources of missing information.
  - Analyze the information and draft responses to the fundamental questions.
  - Participate in public meetings addressing each of the fundamental questions.
- Three public meetings will be held in Anchorage and 3 public meeting will be held in the Bristol Bay Watershed (a total of 6) to explain the steering committee's preliminary findings under each question and take public input.
- A summary of each public meeting will be developed and made available via the web page.
- The steering committee may create fact sheets and mailings as its work progresses to keep the public informed.
- EPA will consult with Tribes and Tribal Corporations in the watershed that request consultation and will meet with PLP and other mining interests as requested and appropriate.
- EPA will enter into IAGs and contracts as appropriate for assistance in collecting and evaluating information and possibly for assistance with public meetings and information dissemination.

Two Key Questions for EPA at this point:

1. Why would we do this to ourselves: Throw ourselves into a political firestorm, with the resource shortages we already face and the possibility of litigation?

   Short answer:

   Because of the resource. This is truly a world class fishery. There is probably no other resource in the United States that compares to this one in ecological and economic value. Think of a huge open pit mine and tailings reservoir proposed for Yellowstone National Park. That would rival this situation in many ways but wouldn't have the potential off site and world wide impacts of this proposal.

Think of a huge open pit mine and tailings reservoir proposed for Yellowstone National Park. That would rival this situation in many ways but wouldn't have the potential off site and world wide impacts of this proposal.

INTERNAL DELIBERATIVE AND/OR PRIVILEGED DOCUMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY
DISCLOSURE AUTHORIZED ONLY TO CONGRESS FOR OVERSIGHT PURPOSES IN RESPONSE TO SUBPOENA
PRIVILEGE CLAIMS NOT WAIVED FOR ANY OTHER PURPOSE

2. What is to be gained by doing this now rather than waiting for the NEPA and 404 processes to run their courses?

<u>Short answer</u>:

The project proponents will have spent tens of millions of dollars by the time the NEPA and 404 processes are completed, perhaps without even investigating the options and proposals that agencies would think likely to reduce or eliminate unacceptable adverse impacts.

An EPA solo adverse decision after 3 years of spin doctoring, one-sided information releases, and lack of commitment to a process by the state is the worst way to go about this.

EPA starts in a neutral position, without making a judgment, and begins a collaborative process, leading to a judgment.

In the preamble to the regulations EPA expressed its preference for taking advance 404(c) action. For example, "…EPA recognizes that where possible it is much preferable to exercise this authority before the Corps or State has issued a permit, and before the permit holder has begun operations,"

An open, advanced process can facilitate planning by the project proponent and allow more efficient and timely development of permittable projects.

Because this is the new face of EPA: open, collaborative, promoting the discussion on environmentalism before a decision is made.

This project epitomizes such EPA priorities as the discussion on environmentalism, environmental justice, sustainability, protect America's waters, etc.

<u>Thoughts on the down side</u>:

Regarding the political backlash:

The political backlash will be much worse if we wait through the NEPA and 404 processes. That will be the backlash against a renegade, unreasonable agency that is going counter to all the evidence of a long, expensive, fair process to permit projects. We have always had a terrible time reversing the spin that is put on such an action.

We will be more successful controlling the spin on a proactive action. We are doing due diligence. We are facilitating a process that can control undue expense for the project proponent and allow for efficient and timely permittable projects.

"…EPA recognizes that where possible it is much preferable to exercise this authority before the Corps or State has issued a permit, and before the permit holder has begun operations."

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SLIDE SUBMITTED BY REPRESENTATIVE BRUCE WESTERMAN

Deposition of Phil North

(preliminary transcript)

Q.	And I have just a few seconds here. So I just want to be very clear. The work that NatureServe had already been doing, as you've stated to build the record for a 404(c) action, that work just became part of the watershed assessment?
A.	That's correct.
Q.	And money was added onto the contract and everything else that was needed to facilitate that?
A.	Right.

Deposition of Phil North

(preliminary transcript)

Q. And did you ever try to convince anyone else at the EPA that the agency should use Section 404(c) authority with regards to the Pebble project?

A. Well, what do you mean by "anyone else"? I mean I don't deal with everybody in the agency.

Q. Right. Do you specifically recall trying to persuade someone to that particular sentiment?

A. Well, I think it was my job to brief them and to inform people about the issue, and then it was really strictly up to them to decide whether they agreed or not. I felt that we should use 404(c), and I made that case.

Q. Did you present the other part of the case, which, presumably, is not to use the 404(c) process?

A. Well, actually, now that you mention that, I believe in the option paper it talked about the other about not using 404(c) and what that entailed. But I don't think it was necessarily my job to say well, **I mean I had come to the conclusion that this was an authority that we had and we should do so. So I don't think I presented, you know, say, "Well, here's the option. The other options is to wait for the permitting process to go"** --

[Mr. North's COUNSEL]: Keep your voice up.
THE WITNESS: -- **you know, "to go forward and to work under that." I don't think -- that was not what I was presenting** [emphasis added]. 1

Slide submitted by Representative Darin LaHood

Deposition of Phil North

(preliminary transcript)

Q. Okay. One of the issues that I think has come up in the PLP litigation is the utilization of a personal E mail address to sometimes communicate while you were working from home. Did you do that on occasion when you worked from home?

A. Yes.

Q. And why did you do that?

A. I'm going to give two reasons. One is because the EPA system didn't work very well. And so in order to communicate with people by E mail, I had to use my home E mail. **The other reason is because there was no reason not to. I mean nobody ever said, "Don't use your home E mail," and sometimes I was sending things off to other EPA employees' home E mail if they were working at home, just because it was convenient and there was no reason not to do that** [emphasis added]**.**