Congress of the United States
Washington, DC 20515

March 7, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator Pruitt:

The Committees on Science, Space, and Technology and Natural Resources continue our oversight of the U.S. Environmental Protection Agency's (EPA) 2014 proposed determination to use Section 404(c) of the Clean Water Act to pre-emptively limit the scope of the development of the Pebble Mine in Bristol Bay, Alaska. As the Committees with primary jurisdiction over the science underpinning policy and regulatory decisions at EPA, we are committed to ensuring that the agency's decision-making is based on sound and transparent science. While the Committees are encouraged by your assertion that the agency will carry out its decisions based on due process and the rule of law, recent developments regarding the consideration of the 2014 proposed determination raise serious concerns about the commitment to this goal.

As you are aware, the Committees have determined that the preemptive action taken for the Pebble Mine Project was unprecedented under the Clean Water Act and was justified by a questionable scientific assessment that relied on predetermined conclusions developed by EPA officials.[1] In the course of Committee hearings, document reviews, interviews, and depositions, the Committees learned that EPA employees inappropriately assisted outside groups in petitioning the agency to change the way it operates and to use Section 404(c) to stop this project.[2] Furthermore, the Committees determined that EPA officials charged with preparing the scientific assessment, which influenced the agency's final action, acted with bias and predetermined conclusions aimed to prevent this project and improperly expand EPA's authority under the Clean Water Act.[3]

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[1] *Examining EPA's Predetermined Efforts to Block the Pebble Mine: Hearing Before the H. Comm. on Science, Space, and Technology*, 114th Cong. (2015); *Examining EPA's Predetermined Efforts to Block the Pebble Mine Part II: Hearing Before the H. Comm. on Science, Space, and Technology*, 114th Cong. (2016).
[2] *Id.*
[3] *Id.*

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In light of these concerns, in February 2017, the Science Committee recommended that the incoming Administration rescind the EPA's proposed determination to use Section 404(c) in a preemptive fashion for the proposed Pebble Mine in Bristol Bay, Alaska. While it was encouraging that EPA announced in July 2017 that the agency was considering a withdrawal, it is unfortunate that on January 26, 2018, EPA announced that it was withdrawing its consideration of rescinding the 2014 proposed determination. Despite this decision by the EPA, the Committees believe that the agency can continue to uphold the principles of due process and the rule of law by proceeding with a specific course of action.

The Pebble Limited Partnership submitted a permit application to the U.S. Army Corps of Engineers (Corps) in December 2017 to begin the process for a section 404 permit.[4] This rigorous process includes the development of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act. The Corps will soon engage with an independent third party to conduct the EIS, an action that reflects the most robust analysis of environmental impacts of the proposed project.[5]

In light of these developments, and in a commitment to the principles of due process and the rule of law, the Committees recommend that before taking any further action, EPA recognize that a permit application has been completed by Pebble and that the Corps is carrying out a rigorous EIS process. Moreover, we suggest that EPA clearly states that in the event the EIS scoping process undertaken by the Corps addresses all of the major issues identified in the 2014 proposed determination, that EPA will withdraw the proposed determination. To further alleviate any environmental concerns that you may have regarding this process, the Committee recommends that EPA Region 10 monitor the Corps' scoping process and review any public comments filed therein. After consultation with Region 10, the EPA can make a final informed decision on the status of the proposed determination.

Using the Corps EIS process to inform the decision on the proposed determination will allow a return to the long-established Clean Water Act permitting process, enforcing the principles of due process and the rule of law. Moreover, it establishes a commitment to regulatory certainty and environmental protection while advancing the Administration's commitment to streamlining the permitting process based on sound science. We look forward to working with you further throughout this process.

If you have any questions about this request, please contact the relevant staff of the Committees. Thank you for your attention to this matter.

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[4] *E.g.*, Press Release, Northern Dynasty Minerals Ltd., Northern Dynasty: Pebble to Initiate Federal and State Permitting on December 22, 2017 (Dec. 21, 2017), *available at* https://www.northerndynastyminerals.com/news/news-releases/2017/northern-dynasty-pebble-to-initiate-federal-and-state-permitting-on-december-22-2017/.

[5] Press Release, Northern Dynasty Minerals Ltd., Northern Dynasty: National Environmental Policy Act Permitting Process for Southwest Alaska's Pebble Project Advances with Selection of 3rd Party EIS Contractor (Feb. 5, 2018), *available at* https://www.northerndynastyminerals.com/news/news-releases/2018/northern-dynasty-national-environmental-policy-act-permitting-process-for-southwest-alaskas-pebble-project-advances-with/.

Sincerely,

Lamar Smith
Chairman
Committee on Science, Space, and Technology

Rob Bishop
Chairman
Committee on Natural Resources

Paul Gosar
Chairman
Congressional Western Caucus

cc: The Honorable Eddie Bernice Johnson, Ranking Minority Member, House Committee on Science, Space and Technology

The Honorable Raul Grijalva, Ranking Minority Member, House Committee on Natural Resources

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

JASON CHAFFETZ, CHAIRMAN

THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S UNPRECEDENTED 404(C) ACTION IN BRISTOL BAY, ALASKA

STAFF REPORT
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
114TH CONGRESS
NOVEMBER 4, 2015

Contents

Executive Summary 2
Findings 2
Background 3
Unprecedented Nature of a Preemptive 404(c) Veto 4
Phil North's Role in EPA's Preemptive Veto of Pebble Mine 5
Phil North Wanted to Use a Preemptive Veto for Pebble Mine in 2009 7
Phil North Worked With the Tribes Who Petitioned the EPA 9
EPA's Awareness of the Contact with Jeff Parker and Agency Reaction 13
Former EPA Administrator Lisa P. Jackson's Role 16
EPA Did Not Maintain Neutrality With Respect to Pebble Mine 18
Conclusion 19

Executive Summary

The Committee has been investigating the Environmental Protection Agency's actions related to preliminary environmental permitting for the Pebble Project, a well-publicized mining venture in Southwest Alaska. The Committee's investigation was initiated after EPA's unprecedented actions to block mining operations near the Bristol Bay watershed. The Committee's investigation focused on the events leading up to EPA's decision to preemptively veto mining activities in the area under Section 404(c) of the Clean Water Act, despite the fact that no permit application for mining had been submitted.[1]

The Committee's investigation found EPA's use of a preemptive veto was unprecedented and without a legal basis. The Committee also found the process for deciding to use a preemptive veto was unfair and not credible.

Findings

1. EPA employees knew that the agency's use of a Section 404(c) preemptive veto was unprecedented.

2. EPA planned to halt mining activity in Bristol Bay well before receiving petitions from local tribes that urged EPA to take action. EPA's claim that it took action under Section 404(c) in response to the tribal petitions is not true.

3. EPA employees frequently provided sensitive information to mine opponents. One EPA employee helped draft the tribal petition that the agency later claimed to have relied on.

4. An EPA employee proposed ways to shield the agency's work on the Bristol Bay matter from Freedom of Information Act requests.

5. Former EPA Administrator Lisa Jackson dodged advocates for the mining venture and communicated the agency's decisions regarding Bristol Bay at an event sponsored by anti-mine groups.

[1] Press Release, EPA, EPA moves to protect Bristol Bay fishery from Pebble Mine (Feb. 28, 2014), http://yosemite.epa.gov/opa/admpress.nsf/names/r10_2014-2-28_bristol_bay.

Background

The Pebble Mine is a proposed copper, molybdenum, and gold mine located on state land near Iliamna, Alaska in the Bristol Bay Region.[2] According to the mineral rights holders, the proposed mine contains resources that are valued at over $300 billion and will create thousands of high-paying jobs for Alaskans, and support more than 10,000 jobs throughout the United States.[3][4] Pebble is the largest copper-gold deposit in the world and represents a key resource for the development of numerous components for electronic devices and green technologies.[5]

The Pebble Limited Partnership (PLP) spent hundreds of millions of dollars undertaking environmental and geological studies to determine the best plan to build and operate a mine at the site. To date, PLP has not yet submitted a mine plan and permitting applications pursuant to the National Environmental Policy Act (NEPA) and Clean Water Act (CWA) review processes.

The proposed Pebble Mine generated a significant amount of controversy among many groups within Alaska and throughout the country. On May 21, 2010, six Alaskan tribal groups opposed to the mine sent a letter to EPA asking that it initiate a process under Section 404(c) of the CWA to preemptively block PLP from proceeding, before PLP had even applied for permits under the act.[6] In the months that followed, EPA received letters from additional tribal groups, environmental organizations, and other stakeholders who urged the agency to issue a Section 404(c) preemptive veto to stop the project. EPA also received letters in support of the project, from tribal groups, PLP, and the State of Alaska, who requested EPA not use a preemptive veto and allow the mine to go through the regular, well-established NEPA and CWA review process.

It is unprecedented for EPA to issue a preemptive Section 404(c) veto for mining operations before a project has submitted permits and applications. Section 404(c) of the CWA requires permits for the discharge of dredged and fill materials into waters of the United States.[7] The traditional permitting process allows the mining entity to apply for the required permit by submitting a detailed application and mining plan, which triggers the requirement for EPA and the Army Corps of Engineers to analyze these materials and decide whether to issue the permit.

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[2] Alaska Dep't of Nat. Resources: Mining, Land & Water, *Pebble Project*, http://dnr.alaska.gov/mlw/mining/largemine/pebble/, (last visited Oct. 30, 2015).

[3] Matthew DiLallo, *Pebble Mine: A $300 Billion Precious Metal Motherlode Nobody Wants to Dig Up*, Daily Finance, (Oct. 2, 2013), http://www.dailyfinance.com/2013/10/02/pebble-mine-gold-copper-motherlode-nobody-wants/.

[4] THE PEBBLE PARTNERSHIP, THE ECONOMIC AND EMPLOYMENT CONTRIBUTIONS OF A CONCEPTUAL PEBBLE MINE TO THE ALASKA AND UNITED STATES ECONOMIES (May 2013), http://corporate.pebblepartnership.com/files/documents/study.pdf.

[5] Minefund.com, *Sizing Up the World's Mega Copper-Gold Projects*, RESOURCEINVESTOR.COM (June 28, 2010), http://www.resourceinvestor.com/2010/06/28/sizing-up-the-worlds-mega-coppergold-projects.

[6] Letter from Jack Hobson, President, Nondalton Tribal Council, to Hon. Lisa P. Jackson, Adm'r, EPA & Dennis J. McLerran, Admin'r, EPA Region 10 (May 2, 2010), http://www.ourbristolbay.com/pdf/tribes-letter-to-epa-on-404-c.pdf.

[7] 3 U.S.C. § 1344

In February 2011, EPA decided to undertake the Bristol Bay Watershed Assessment (BBWA) allegedly in order to inform its decision on whether to proceed with the Section 404(c) veto process. The agency claimed in a press release that "EPA initiated this assessment in response to concerns from federally-recognized tribes and others who petitioned the agency in 2010 to assess any potential risks to the watershed."[8] Documents obtained by the Committee, however, show EPA employees in the Region 10 office contemplated and advocated for a preemptive veto of the project as early as 2009, nearly one year before the tribes submitted their petition. In fact, these employees would eventually be heavily involved in drafting the BBWA.

EPA released the final BBWA in January 2014. Citing findings from the BBWA, the Agency issued a proposed determination pursuant to section 404(c) of the Clean Water Act in July 2014. The proposed determination limited the potential Pebble Mine in Bristol Bay Alaska and included a proposal "to restrict the use of certain waters in the Bristol Bay watershed for disposal of dredged or fill material associated with mining the Pebble deposit."[9]

EPA alleged that Pebble Mine, even at its smallest size, "could result in significant and unacceptable adverse effects on ecologically important streams, wetlands, lakes, and ponds and the fishery areas they support."[10] The proposed determination, filed by EPA Region 10 Administrator Dennis McLerran, would restrict discharges of dredged and fill material in a way that would effectively prohibit mining at the site.[11] EPA is currently barred from taking further preemptive action by a federal judge until PLP's lawsuit against the agency is resolved.[12]

Unprecedented Nature of a Preemptive 404(c) Veto

Finding 1: EPA employees knew that the agency's use of a Section 404(c) preemptive veto was unprecedented.

The Clean Water Act was signed into law in 1972. Since then, the Section 404(c) preemptive veto has never been used. With respect to the process for adjudicating an application to operate a mine, the use of a preemptive veto in this case represents a significant departure from the agency's typical approach.

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[8] Press Release, EPA, EPA plans scientific assessment of Bristol Bay Watershed (Feb. 7, 2011), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/8c1c5dd5d170ad99852578300067d3b3!OpenDocument.

[9] 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), http://www2.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf.

[10] *Id.*

[11] *Id.*

[12] Elwood Brehmer, *Federal judge allows Pebble case against EPA to continue*, ALASKA J. OF COM. (June 10, 2015), http://www.alaskajournal.com/business-and-finance/2015-06-10/federal-judge-allows-pebble-case-against-epa-continue

In September 2010, EPA staff under the direction of Bristol Bay team leader Richard Parkin developed a "discussion matrix" document to brief Nancy Stoner, EPA's head of the Office of Water. The discussion matrix was also shared with Region 10 head Dennis McLerran. The document laid out a grid of "Pros" and "Cons" related to issuing the preemptive veto. Under a section on timing, labeled "Proactive before permit applications," there was a notation in the "Cons" section. The note said: "Never been done before in the history of the CWA."[13]

In emails from late August and early September of 2010, Senior Policy Counsel to the Administrator Bob Sussman described using a preemptive 404(c) veto as "novel" and "very novel."[14] In that same email chain, Palmer Hough, an environmental scientist in the Wetlands Division of EPA's Washington, D.C. headquarters, stated that ". . . we have never gone down the route of a 'preemptive' 404c action before . . . ."[15]

Former EPA Deputy Administrator Bob Perciasepe, who served in that position from 2009 to 2014, stated "this is either the first or the second time that [a preemptive 404(c) determination] has been contemplated in a specific situation."[16] He also stated generally that it is "[v]ery unusual to use section 404(c)."[17]

These examples show a clear understanding among EPA employees that the action the Agency was undertaking was unprecedented and exceptional.

Phil North's Role in EPA's Preemptive Veto of Pebble Mine

Finding 2: EPA planned to halt mining activity in Bristol Bay well before receiving petitions from local tribes. EPA's claim that it took action under Section 404(c) in response to the tribal petitions is not true.

Phil North was an EPA ecologist working in Region 10, based in the Kenai Peninsula of Alaska. On July 17, 2013, an article entitled "Full Phil – EPA's North Sets Sail After Eventful Career Helping Launch Bristol Bay-Pebble Mine Assessment," was published by *The Redoubt Reporter*, a community newspaper for the Central Kenai Peninsula in Alaska. The article highlighted Phil North's key role in EPA's decision to block Pebble Mine.[18]

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[13] Email from Rick Parkin, EPA, to Dennis McLerran, Adm'r, EPA Region 10 (Sept. 8, 2010),EPA-BBL-4688.
[14] Email from Palmer Hough, EPA, to David Evans, EPA, et al. (Aug. 31, 2010), EPA-BBL-6189.
[15] *Id.*
[16] Transcribed interview by H. Comm. On Oversight & Gov't Reform with Robert Perciasepe, Deputy Adm'r, EPA, 95 (Apr. 23, 2015)
[17] *Id.*
[18] Jenny Newman, *Full Phil — EPA's North sets sail after eventful career helping launch Bristol Bay-Pebble Mine assessment*, THE REDOUBT REPORTER (July 17, 2013), https://redoubtreporter.wordpress.com/2013/07/17/full-phil-epas-north-sets-sail-after-eventful-career-helping-launch-bristol-bay-pebble-mine-assessment/.

In the article, North explained how he began working full-time on Pebble Mine issues starting in 2009, a year before EPA received a letter from tribal groups asking them to use 404(c) to preemptively veto the mine. Moreover, the article suggests that North believed EPA should use section 404(c) to stop Pebble Mine, a position he took before the agency was asked to do so by the tribes.[19] North stated in the article that the tribes' letter is what compelled EPA to take the action he had already been advocating for. North stated:

> Really, it probably wouldn't have happened without the tribes writing the letter. When the tribes did that it really got the managers' attention. EPA takes tribal sovereignty very, very seriously. I think the tribes are really responsible for EPA making the decision to do the assessment.[20]

After North advertised his role in the Pebble Mine process, the Committee wrote to EPA on July 29, 2013 to request North's relevant documents and communications.[21] The Committee also requested to conduct a transcribed interview of North to better understand his role in EPA's actions related to Pebble Mine.[22]

North evaded the Committee's request for documents by using his personal email account to conduct agency business in direct contention with the Federal Records Act. First, North used a personal email account to conduct official EPA business. EPA informed the National Archives of a potential Federal Records Act violation arising from this conduct on August 6, 2015, after the Office of Inspector General (OIG) notified the agency of the same.[23] The EPA's letter to the National Archives stated:

> Because EPA cannot confirm whether or not these emails are the only instances in which Mr. North potentially conducted government business on his personal email account and failed to forward the emails into his official EPA account, we are writing to report these circumstances which may indicate a potential loss or removal of federal records. . . . As of this time, based on the OIG's description of the documents, EPA has been unable to locate such documents on Agency systems. Further, EPA currently has no information regarding the frequency with which Mr. North used a personal email account to conduct government business and failed to copy or forward emails into an Agency account.[24]

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[19] *Id.*
[20] *Id.*
[21] Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, to Hon. Gina McCarthy, Adm'r, EPA(July 29, 2013).
[22] Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight and Gov't Reform, to Phil North, July 29, 2013.
[23] Letter from Matthew Leopard, Acting Records Officer, EPA, to Paul M. Wester, Jr., Chief Records Officer for the U.S. Gov't, Nat'l Archives and Records Admin. (Aug. 6, 2015) (on file with Committee staff)
[24] Letter from Matthew Leopard, Acting Records Officer, EPA, to Paul M. Wester, Jr., Chief Records Officer for the U.S. Gov't, Nat'l Archives and Records Admin. (Aug. 6, 2015) (on file with Committee staff)

The agency has stated that it provided all available relevant materials regarding North's work to the Committee. EPA's letter to the National Archives makes clear that the agency does not have access to the entirety of North's relevant records and the agency is unable to provide the full record to the Committee.

Furthermore, North was unwilling to participate in a voluntary transcribed interview with Committee staff, and his attorney was unwilling to accept a subpoena for testimony on his behalf. North then left the country and avoided service by the U.S. Marshals Service of a subpoena to be deposed by the Committee. According to press reports, North was most recently in Australia.[25]

Phil North Wanted to Use a Preemptive Veto for Pebble Mine in 2009

The Committee obtained documents sufficient to understand North's misconduct despite North's, and EPA's, unwillingness or inability to cooperate with the Committee's investigation. Documents show North played an integral role in the preemptive veto process, both before EPA received the letter from the tribes requesting 404(c) action and in authoring the BBWA. In 2009, North began to inquire about potential EPA actions to influence the outcome of the Pebble Mine project, due to his belief that the project would harm the environment. In November 2009, North prepared a presentation for EPA Region 10 managers to consider the use of a 404(c) action for Bristol Bay.[26] The presentation outlined his intent to advocate for a preemptive veto before PLP submitted a permit application.[27] Moreover, the presentation included numerous pre-determined conclusions about the potential adverse effects of the project. These conclusions were pure speculation—PLP had not had an opportunity to disclose or define its mine plan.[28] North's presentation recommended that EPA invoke the preemptive 404(c) process.[29] While it appears that Region 10 managers did not immediately take up North's idea to veto the Pebble Mine, he continued to work in earnest toward that end.

In December 2009, North learned that then-EPA Administrator Lisa Jackson requested a staff briefing on Pebble Mine. In an email to EPA employees Michael Szerlog and Mary Thiesing, North discussed how EPA's Aquatic Resources Unit could influence the project. North stated: "We should begin to identify the information needed for a review or 404(c) and begin to collect that information. Of course, as demonstrated in the presentation, I have already started this process as part of my day-to-day duties."[30]

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[25] Manuel Quinones, *Judge approves subpoena for elusive former EPA scientist*, E&E NEWS (Aug. 28, 2015), http://www.eenews.net/greenwire/2015/08/28/stories/1060024087.
[26] Email from Phil North, to Glenn Suter & Kate Schofield, EPA (Aug. 23, 2012), EPA-PNL-848.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Email from Phil North, EPA, to Michael Szerlog & Mary Thiesing, EPA (Dec. 16, 2009), EPA-BBL-4866.

North's colleagues in Region 10 showed interest in North's plan. Thiesing agreed with North that their team should take the lead in shaping the discussion, since they had the authority to stop the mine, and that they should further build a record so that their preemptive 404(c) plans could move forward at any moment.[31] She suggested they "approach it as though there will be a 404(c), and we don't need to wait for a new [Regional Administrator][32] 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."[33]

Thiesing also laid the groundwork for a preemptive veto. She wrote: "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."[34]

Moreover, Thiesing advocated for outreach to tribal groups to push the preemptive veto plan forward. She suggested that North begin to compile "[l]ists 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."[35]

On December 31, 2009, North reached out to Bill Pearcy, a professor of Ocean Ecology and Biogeochemistry at Oregon State University, and Daniel Schindler, a professor of Aquatic & Fishery Sciences at the University of Washington, in an attempt to define the impact of the Pebble Mine on salmon in the Nushagak and Kvichak Rivers.[36] Professor Schindler recommended to North that he reach out to the National Oceanic and Atmospheric Administration (NOAA). Schindler added: "Cheers and good luck – all data to show that the Pebble Mine is an environmental (and social) mistake are needed!"[37]

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[31] Email from Mary Thiesing, EPA, to Phil North & Michael Szerlog, EPA (Dec. 16, 2009), EPA-BBL-4866.
[32] *Id.* (*When this email was written EPA Region 10 did not have an appointed Administrator. Dennis McLerran was sworn in as the EPA Region 10 Administrator on February 22, 2010.*).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Email from Phil North, EPA, to Bill Pearcy, Or. St. Univ. and Daniel Schindler, Univ. of Wash. (Dec. 31, 2009), EPA-PNL-3662.
[37] Email from Daniel Schnidler, Univ. of Wash., to Phil North, EPA (Jan. 4, 2010), EPA-PNL-3662.

Phil North Worked With the Tribes Who Petitioned the EPA

Finding 3: EPA employees frequently provided sensitive information to mine opponents. One EPA employee helped draft the tribal petition that the agency later claimed to have relied on.

EPA attempted to downplay North's role in steering the agency towards a preemptive 404(c) decision on numerous occasions. At a Committee hearing, Administrator Gina McCarthy remarked that North was "a fish biologist, he is not a decision maker at the agency."[38] Documents show, however, that North was in direct contact with two of the major anti-Pebble Mine advocates: Geoffrey (Jeff) Parker, an Alaska attorney representing the six tribes that first petitioned the EPA for action, and Shoren Brown, Bristol Bay Director at Trout Unlimited, a conservation group that also petitioned EPA for a preemptive 404(c) veto of the Pebble Mine.

North's close relationship with the anti-Pebble Mine groups gave him intimate knowledge of the impending preemptive 404(c) letter from the tribes, allowing him to prepare briefing documents to send out to Region 10 managers once the petition was received. The tribes' petition letter, addressed to Administrator Jackson and Regional Administrator Dennis McLerran, is dated May 2, 2010, and was transmitted to EPA on May 21, 2010.[39]

Documents show North edited the tribes' petition before it was sent to EPA in May 2010. On April 12, 2010 North emailed Parker from his personal account and attached a draft version of the tribal letter. The email stated: "A few suggested edits. I keep trying to include ecological impacts but if they make the sentences awkward then delete. Of course ignore any suggestions anyway."[40]

From: Phil [redacted]
Sent: Monday, April 12, 2010 9:22 PM
To: jeff parker
Subject: Re: Three decisions for Tribes, AIFMA and TU to make

A few suggested edits. I keep trying to include ecological impacts but if they make the sentences awkward then delete Of course ignore any suggestions anyway

[38] *Management Failures: Oversight of the EPA: Hearing before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 113-138 (2014).
[39] Letter from Six Federally-recognized Tribes to Hon. Lisa P. Jackson, Adm'r, EPA & Dennis McLerran, Adm'r, EPA Region 10 (May 21, 2010), EPA-BBL-447.
[40] Email from Phil North, EPA, to Jeff Parker, Attorney at Law (Oct. 15, 2014).

The draft letter contained several edits and a comment from North: "Is there room here for ecological impacts not directly related to commercial or subsistence fisheries?" The final version of the letter from the tribes incorporated North's edits.[41] With respect to North's comment, the final version of the letter cited seventeen ecological impacts, up from the eight cited in the draft that North reviewed.

[41] Draft of letter edited by Phil North from six Federally-recognized Tribes to Hon. Lisa P. Jackson, Adm'r, EPA & Dennis McLerran, Adm'r, EPA Region 10 (On file with Committee staff).

BEFORE

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 risk; (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?

Is there room here for ecological impacts not directly related to commercial or subsistence fisheries?

AFTER

Because a Pebble mine, associated facilities, and similar metallic sulfide mines could also have various direct, cumulative, secondary adverse effects in combination with other impacts over a vast area, our tribes recommend that EPA consider a wide geographic area of the Kvichak and Nushagak drainages for purposes of § 404(c), at least initially for a public process. Our reasons include: (1) the importance of the Kvichak and Nushagak drainages for fish, wildlife, and commercial, subsistence and recreational use of fish and wildlife; and the abundance of waters and wetlands that support fish, wildlife and public uses; (2) the location of the Pebble deposit at a divide between Upper Talarik Creek, which flows directly to Iliamna Lake (a significant rearing lake for sockeye salmon) in the Kvichak drainage, and the North and South Forks of the Koktuli River in the Nushagak drainage; (3) the large scale of the deposit and a Pebble mine;[11] (4) the acid generating potential of the host rock, voids, wastes, and dust; (5) the necessity of dewatering a vast area, likely to great depths; (6) the fact that no comparable mine apparently exists in terms of risk to commercial salmon fisheries, subsistence, recreation, and abundance of wetlands and water proximate to ground level; (7) the apparent existence of other metallic sulfide deposits in the Pebble area and perhaps at Kemuk Mountain; (8) the likelihood that discharge of dredge and fill material, including mine wastes from a Pebble mine or similar mines, and dewatering, will adversely affect vast amounts of wetlands and waters; (9) the facts that the behavior of metallic sulfide mines is difficult to predict; that the record of preventing water pollution from them is not good; that acid mine drainage is a major risk; and that this risk is perhaps increased by abundance of surface and groundwater;[12] (10) the facts that Pebble implies a huge quantity of potential mine waste (perhaps ten billion tons), uncertainty over how wastes might be handled, and that pipelines could move wastes to various discharge sites; (11) the immensity of the task of containing contaminants forever, including acid drainage; (12) the magnitude of potential direct, cumulative, and secondary effects on commercial fishing,[13] subsistence and recreation, including in combination with increased population, access and competition for fish and game;[14] (13) the ecological functions that salmon perform throughout their life cycle in marine and fresh waters; (14) the fact that juvenile salmon have been shown to be present in many waters within the Pebble claims where salmon had been undocumented previously for purposes of the state's Anadromous Fish Act; (15) the likelihood that a transportation route to Cook Inlet could implicate significant beach spawning of sockeye salmon in the north-eastern portion of Iliamna Lake; (16) the likelihood that a Pebble mine, its transportation corridor, and nearly settlement areas could adversely affect areas previously identified as by the State as (a) "essential" moose wintering areas, or "important" spring-, summer- and fall moose habitats, (b) "essential" caribou calving grounds, and (c) "essential" brown bear concentration streams; and (17) the vast amount of compensatory mitigation likely to be required and its questionable sufficiency.[15] All these reasons justify a broad initial scope for a 404(c) process.

North—who was supposed to be a neutral arbiter with respect to permitting applications—made clear that he was unofficially working with the tribal groups to stop the Pebble Mine project. On May 14, 2010, North emailed an employee at the National Oceanic and Atmospheric Administration about salmon smolt in Bristol Bay. North stated: "Things are moving along in EPA. I remain optimistic. I am hoping that I will be able to work on this more officially soon."[42]

On May 17, 2010, North emailed Christopher Hunter, his colleague in the EPA Office of Wetlands, Oceans, and Watersheds. North attached a memo outlining the Pebble Mine scenario, in which he stated: "I heard through the grape vine that all six of the village signatures have been collected (a logistical nightmare). We can expect the letter late next week."[43]

The Committee obtained documents that show Parker maintained contact with North and other EPA officials after EPA received the tribes' petition for a preemptive veto. In June 2010, Parker sent an email to Cara Steiner-Riley and North with the subject "options paper."[44] In it, Parker mentioned that EPA was working on an options paper to decide how to handle the tribes' preemptive 404(c) position—information he must have received from someone within EPA. Substantively, it appears that Parker suggests proceeding with a 404(c) veto by using a water rights application submitted by PLP's parent company to the state of Alaska in 2006. North forwards Parker's suggestion on to his manager Michael Szerlog as an item "that seems worth considering."[45] The Bristol Bay Watershed Assessment eventually relied on this data to contemplate the Pebble Mine risk analysis.

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[42] Email from Phil North, EPA, to Christopher Hunter, EPA (May 17, 2010), EPA-PNL-2256.
[43] *Id.*
[44] Email from Jeff Parker, Attorney at Law, to Cara Steiner-Riley & Phil North, EPA (June 28, 2010), EPA-BBL-4845.
[45] Email from Phil North, EPA, to Michael Szerlog, EPA (June 29, 2010), EPA-BBL-4845.

From: "jeff parker" [redacted]
To: Cara Steiner-Riley [redacted]
Cc: Phil North [redacted]
Date: 06/28/2010 09:32 PM
Subject: options paper

Cara,

One option that EPA might consider is to commence a 404(c) process based on the 2006 applications. Here is a link to the 2006 applications: http://dnr.alaska.gov/mlw/mining/largemine/pebble/waterapp.htm

EPA could ask PLP for any updated designs (even though they presumably might not be final), and proceed based on the 2006 applications and whatever PLP provides in the way of additional designs, if any

This has advantages. It is similar to Bayou Aux Carps, where there had been designs but no application was then pending And it has advantages in the event that PLP challenges any 404(c).

I am available tomorrow to discuss this if you wish, and I leave for Montana for 10 days on Wed. AM.

Jeff

Parker appeared to have access to other internal EPA information related to Pebble Mine. In November 2010, Parker emailed Palmer Hough, an Environmental Scientist in the Wetlands Division: "it would be in these tribes best interest if EPA initiated its 404(c) action (i.e., issued a 15-day letter) now rather than waiting several months to complete the planned analysis and public outreach."[46] Christopher Hunter responded to Hough: "Also, any explanation on how he knew about it?"[47]

EPA's Awareness of the Contact with Jeff Parker and Agency Reaction

Finding 4: An EPA employee proposed ways to shield the agency's work on the Bristol Bay matter from Freedom of Information Act requests.

Cara Steiner-Riley and Keith Cohon, counsels in EPA's Region 10 office, were aware of the communications that Parker had with both North and EPA Bristol Bay Team Leader Richard Parkin. On December 22, 2010, after Cohon had a phone conversation with Parker, he sent an email stating his concern that Parkin and North may have colluded with Parker and his clients to push the preemptive 404(c) petition, that North fed Parker internal EPA information, and that

[46] Email from Palmer Hough, EPA, to Phil North, EPA, et al. (Nov. 4, 2010), EPA-BBL-842.
[47] Email from Christopher Hunter, EPA, to Palmer Hough, EPA (Nov. 4, 2011), EPA-BBL-842.