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DRAFT Meeting Notes

Agency Discussion of Pebble Limited Partnership, Technical Working Groups (TWGs).
February 20, 2009
Anchorage Federal Building, Conference Room 154 (MML # 907-271-6338)
This meeting was scheduled by invitation from Marcia Combes, Director, US EPA, Alaska Operations Office.

Attending
National Park Service: Debora Cooper
National Marine Fisheries Service: Jeanne Hanson, Heather Blough, Doug Limpinsel, Bryan Lance
US Army Corps of Engineers: Bill Keller, Dave Casey
US Environmental Protection Agency: Greg Kellogg, John Pavitt, Patty McGrath (telephone)
US Fish and Wildlife Service: Ann Rappoport, Francis Mann
AK Department of Environmental Conservation: Lynn Kent
AK Department of Fish and Game: Kerry Howard, Michael Daigneault
AK Department of Natural Resources: Ed Fogels, Tom Crafford Al Ott (telephone)

Review of Meeting Agenda (Attached)

Welcome (Greg Kellogg, US EPA).
EPA's role is changing in relation to the proposed development, considering EPA's delegation of the NPDES program to the State of Alaska. The purpose of this meeting is to affirm our expectations of Pebble Limited Partnership (PLP) in the Technical Working Group (TWG) process. Our relationship with PLP is changing over time and we need to be aware of that.

Purpose of the Meeting (John Pavitt, US EPA).
As EPA's Project Manager for the PLP project, he's been hearing from agency TWG participants that the process is not working well for them. They feel as if their comments, suggestions and questions are not being reflected in the record of study plans, data collected and meeting notes. When the TWGs were started, we established Operating Protocols and Guidelines (handout) which laid out a process of communications, and our expectations of how it would work. This meeting is an opportunity to reaffirm those guidelines and communicate back to PLP and hopefully get the process working better.

Introductions (around the room).

General Comments
Tom Crafford (AK DNR). Tom recalled the origins of the TWGs, which began at the request of Northern Dynasty (ND). ND advocated the formation of TWGs as forums for discussion of technical issues related to conducting studies of the proposed mine site. For example, when sampling fish tissue, should tissue be collected with skin, or with skin off of samples? The Steering Committee worked on setting Operating Protocols and

Guidelines (see meeting agenda attachment), and struggled with how to deal with conflict in the TWGs. He said the expectation of the Steering Committee was not that there'd be consensus, but rather that opinions would be freely expressed. He said the Steering Committee also sought a balance of getting TWG participants to freely express their thoughts and getting public input, and settled on making meetings open to the public and they are given the opportunity at the end of meetings to make a statement or ask questions.

He described the current process for recording TWG discussions: Charlotte is the notetaker; Charlotte distributes notes to the respective TWG lead; the TWG lead distributes notes to the TWG for review and comment; TWG lead responsible for final product, which is posted on DNR website.

DNR has MOU with Pebble; Pebble pays DNR for engaging in this process. For that reason, the TWGs are led by state representatives.

He also said the TWGs are working at different levels of quality, in the sense that some are working reasonably well, while others are experiencing more conflict and are not making progress. He said some TWGs are more winding up educating the agency participants, as opposed to getting comments from the agencies.

Discussion of Issues Affecting the Performance of TWGs

Ed Fogels (AK DNR) said that this is not the "normal" process. Usually, mining companies don't share this much information this early on and ask for agency input. He referenced the Donlin Mine as an example; indicating agencies were not involved in an pre-application review for this project.

Patty McGrath (US EPA) said there's a fine line between early review of data and doing a National Environmental Policy Act (NEPA) review. She said that four baseline environmental documents were reviewed for the Donlin mine. She wondered when PLP would actually be submitting a permit application.

Jeanne Hanson (NMFS) said it's not so unusual for a developer to give data early on and gave an example of the BP, Endicott development. She said agencies reviewed baseline data and commented on *how* the developer was collecting data.

Fogels said we don't usually view data early on in the process.

Debora Cooper (NPS) asked if there is the perception that PLP controls the process.

Crafford thought that perception is not held by the agencies. He said the schedule for PLP submitting a permit application seems to be slipping from mid-2009 until mid-2010, and perhaps even further out.

Lynn Kent (ADEC) said that if the agencies don't get involved early and give input, then there's a risk of significant delay when PLP does apply for a permit. The agency that

doesn't get involved early on risks being accused of being the source of a delay in getting the application processed.

Frances Mann (USFWS) agreed that is a risk. If the reviewing agencies say "you've collected the wrong data" at the time of permit application, then of course the company will be frustrated.

Ann Rappoport (USFWS) said that on the surface, it looks like the TWG process is working, but substantively the data is not there to do our review. We need to document our concerns with data for the record.

Heather Blough (NMFS) asked if the PLP management is present during TWG meetings or if the TWGs are relying on Charlotte (and meeting notes) to communicate agency concerns to PLP management.

Tom said that the PLP representative is primarily Charlotte McCay. Additional PLP managers have participated from time to time. Tom said it's important to remember that in this process, agencies are preserving their rights to be critical on baseline data at a later point, regardless of having participated in the TWG process. In essence, he said, nothing in the TWG meetings constitutes agency approval of PLP's study plans.

Deb discussed the issue of note-taking at TWG meetings. She said that if PLP controls the meeting notes, then that affects the Administrative Record of the discussion that took place, and may not show the entire dialog. The record will be inaccurate.

Lynn suggested we make the effort to paper our decisions. For example, by sending a letter to PLP to say we're commenting on the data, we're not accepting the data (or some portion of it). That way, the record will reflect that we made the comment, even if meeting notes don't show it. She also questioned whether DNR should post such agency records as well as TWG meeting notes.

Ann said there is a danger of just relying on meeting notes, because they could give the illusion of consensus, when that's not the case.

Ed said that if anyone believes the meeting notes are inaccurate, DNR will take them down from their web site.

Tom said the Steering Committee has discussed having a professional note taker.

John said that the Steering Committee had a professional facilitator make a presentation at the January meeting. The described the services they can provide to help organize and run meetings, including note taking.

Tom said that after the presentation, he approached PLP and asked if they'd pay for this service. They (PLP) are worried about the added cost.

Debra questioned whether the agencies could pool monies to cover the cost of a transcriptionist.

Heather asked who is the TWG process supposed to be serving. If this is to help PLP prepare for permitting, then they are the party that would most benefit from meeting notes that accurately capture the concerns of the TWGs and should be ~~willing to~~responsible for paying for that service.

Francis said that until they apply for a permit, there is little we can make them do. Because the process hasn't been working well, the agencies have been hampered in the review of the data. That's why the Fish TWG is re-doing the protocols, so the process will work better in the future. For the agencies, the protocol is their part of the administrative record. It will identify that "these are the questions ~~we are going to need~~we'll want answered ~~at the end~~before issuing a permit…"

Jeanne, getting back to Lynn's idea of papering the record, asked the group: should we have multiple agencies signing these letters to PLP? If we develop a ~~more general protocol (such as the Fish TWG Protocol)~~group letter, then is it necessary to go through legal review? If so, it could take a long time to get that out.
Ed said he likes the idea of sending a specific letter as issues arise, as opposed to ~~re-doing a TWG protocol~~developing group letters.

Doug Limpinsel (NMFS) said the Fish TWG Protocol is still under development, but will include specific examples of problems the agencies have with the study design.

Greg said, getting back to his original comments, that we are establishing a relationship with PLP. He said each agency comes at this with different perspectives and have different needs for what to get out of it in the end. He said we each need to decide what we need in order to continue, and to decide if we're not getting what we need out of it, as ACOE did (by withdrawing from the TWGs). By staying engaged, we all have an opportunity to shape the outcome.

Break

After resuming the meeting, John summarized the discussions so far that morning. After discussi~~e~~ng the scope of the problem agencies are experiencing with the TWG process, two possible solutions were identified. One idea is to revise a TWG protocol ~~is~~ to list expectations and highlight the agency recommendations for collecting data, such as the process the Fish TWG is undertaking. The other suggestion was that individual agencies send letters to PLP when they have a specific issue that they want to make sure is reflected in the record.

Patty said EPA has already sent letters to PLP on specific issues, so that's not unusual. She said EPA always prefaces the letter with a disclaimer that "the project, as it appears now…" because the company's plans can and have changed.

Tom asked the group if the focus should be to 1) judge the adequacy of the studies to meet baseline-quality data, or 2) provide technical comments on study designs.

Debora said let's send specific letters with specific data needs, as they come up.

Jeanne ~~said~~suggested if there is general agreement that DNR should post agency correspondence along with TWG meeting notes, then ~~-~~we could start by requesting DNR post the correspondence the agencies have already sent the EPA and Pebble regarding the proposed project and the TWG process~~it's very important to post agency correspondence, as part of the public record~~. This would help alleviate concerns about the public record.

John said that posting agency comments benefits the public and compared that to an EPA program – the Toxics Release Inventory (TRI). Under the TRI program, companies must report their releases to the environment, and the information is publicly available. The reporting companies thereby have an incentive to reduce their releases because the public is looking at the information. The same could be true for the TWGs – if agency comments are posted, then it would seem more likely they would address those comments promptly. If nothing else, it shows the public that we are actively reviewing the study plans and are engaged.

Tom said the process to post letters would be to send a copy to him and Andrea Meyer at DNR, and they would post them on the Pebble TWG web page He said that so far, our discussions in this meeting today have centered on the TWG process, but what about the issue on agency staff feeling like they're not getting the data they need?

Lynn said the data is under the control of PLP. Our review is limited to what they provide us.

Ed asked if agencies aren't getting data to review, then what's happening at the TWG meetings?

Francis said USFWS experience at the Fish TWG meetings was that they were not getting the data they needed, and so informed PLP they would not attend.

Tom and Jeanne said that we can't make decisions on the adequacy of baseline until we know how PLP intends to develop the mine, but we can decide if the study design is adequate.

Heather asked for more context for Tom's earlier comment, that some TWGs are educating the agency members, instead of the agency participants providing technical comments.

Ann said this is something she's heard before, too. She said that agency staff are not given field study reports in advance of TWG meetings, so of course when the meeting takes place they haven't reviewed the information in advance.

Tom said that's a valid criticism. There have been multiple examples of that.

Ed said to consider that maybe the right people are not attending the TWGs. Perhaps we could share subject experts.

Jeanne said that's an issue that should be tabled for the Steering Committee.

NPDES Delegation to the State of Alaska

Lynn said EPA has approved the State Pollutant Discharge Elimination System (SPDES) request for delegation. Permit applications from dischargers are coming to the State. Lynn said the big difference between the State issuing a discharge permit vs. EPA, is that a State permit will not trigger NEPA review. She said that means USACE will probably be the NEPA lead agency, and not EPA.

She said EPA's remaining responsibility will be to have an oversight role, such as reviewing State discharge permits. EPA can object (pull) a State permit if the differences don't get resolved.

Patty said EPA has to be a NEPA reviewer for every EIS. Generally, EPA does not get involved as early as compared to when we're the lead agency. She said we rate draft Environmental Impact Statements, and a low rating from EPA means it will be appealed to the Council on Environmental Quality.

Wrap Up

The meeting participants acknowledged that the agencies don't all have the same expectations about what they want and need to get out of the TWG process as it moves forward. Therefore, specific concerns about TWGs differ from agency to agency. Each agency needs to decide for itself if the level of effort they're investing is worthwhile. USACE went through this evaluation recently and decided to step back from the TWGs and only participate in the Steering Committee. The group supported having a follow up meeting in about two months, allowing time for the next meeting of the TWG Steering Committee to consider the outcome of today's meeting. The follow up to this meeting would invite senior management from PLP to attend. The purpose of that meeting would be to communicate agency concerns about the TWG process and recommend improvements.

Tom Crafford volunteered to contact John Shively, PLP CEO, and invite him to our follow up meeting.

The meeting participants discussed a number of concerns about the PLP TWG process. These concerns include:

- Agency staff participating in TWGs are not getting the level of data they need to do the review they feel is needed;
- Comments and suggestions offered by agencies are not consistently captured in meeting notes and/or study designs;

- The administrative record is inaccurate when agency comments and critiques are not captured in meeting notes;
- Agencies can supplement the administrative record by documenting their concerns in correspondence to the federal action agency and/or to Pebble. But this does not address concerns that the public perceives the TWG process is working well for the agencies and will streamline the permitting process.
- Agency participants are oftentimes not receiving advance copies of field studies and study designs. This means they are less likely to show up ready to offer technical comments at TWG meetings,
- Other?

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Possible Solutions include:

- To bolster the administrative/public record, agencies can
  - submit letters to PLP (or the federal action agency, as appropriate) identifying specific concerns about data quality, study designs or other issues as they come up;
  - Notify DNR if they believe TWG meeting notes are inaccurate
  - re-work protocols to address concerns in a more general, systematic way. This approach is more likely to succeed when there is broad agreement across agencies on the issues for a TWG.
  - Request DNR post agency correspondence on the TWG website
- PLP should provide TWG participants with field studies and study designs in advance, so they can come prepared to offer technical comments;
- Agencies should examine whether they have the right people attending, in those cases where TWG participants are in the role of being educated by the consultants, rather than providing technical comments.
  - Agencies can consider sharing experts, rather than each providing staff.
  - This topic will be added to the agenda of the next Steering Committee meeting, scheduled for March 26, 2009

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Next Agency Meeting: Tuesday April 21, 2009. 9:00 am – 12 noon. John Shively will be invited.