

**COMMITTEE ON OVERSIGHT AND GOVERNMENT
REFORM
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**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
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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.³⁴ 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.

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.

⁸ Press Release, EPA, EPA plans scientific assessment of Bristol Bay Watershed (Feb. 7, 2011), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/8c1e5dd5d170ad99852578300067d3b3!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

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

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

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 Percy, 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

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 Percy, Or. St. Univ. and Daniel Schindler, Univ. of Wash. (Dec. 31, 2009), EPA-PNL-3662.

³⁷ Email from Daniel Schindler, 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 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?

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;¹² (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;¹³ (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,¹⁴ subsistence and recreation, including in combination with increased population, access and competition for fish and game;¹⁵ (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 undocmented 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 nearby 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.¹⁶ 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.

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.

North provided legal analysis for Parker's clients. Cohon also highlighted ethical concerns about Parker's conversations with Parkin and North. Cohon wrote:

We are engaged in a potentially adverse proceeding with them (the petition, possible litigation), and he's a lawyer who's kind of pumping us (me included) for information he can use to help his client. It sounds like he is talking to Phil about their 404(c) petition, the status of it, and how to help it move forward – he certainly did so with me (see below). He's also using Rick and Phil (and me) as legal authorities.⁴⁸

Keith Cohon attorney-client communication privileged; do not... 12/22/2010 11:35:54 AM

From: Keith Cohon
To: Cara Steiner-Riley Parkin, Richard North Phil
Date: 12/22/2010 11:35 AM
Subject: Phone conversation with Jeff Parker

attorney-client communication
privileged; do not release

I had a conversation with Jeff Parker about the trust responsibility and other stuff, and I wanted to fill you in.

The conversation was yesterday (12/21).

1. My observation: Jeff is talking straight to Rick and Phil, regarding a matter in which EPA is represented by counsel (Cara). I'm sure the Rules of Professional Responsibility in Alaska are like they are everywhere, and that they prohibit Jeff from talking to either Rick or Phil without Cara's consent. It's kind of up to Cara to call him on this, if we care; we also might want to have an internal discussion about whether whether Phil and/or Rick want to refer him to Cara as well. We are engaged in a potentially adverse proceeding with them (the petition, possible litigation), and he's a lawyer who's kind of pumping us (me included) for information he can use to help his client. It sounds like he's talking to Phil about their 404(c) petition, the status of it, and how to help move it forward -- he certainly did so with me (see below). He's also using Rick and Phil (and me) as legal authorities.

A few hours later, Cohon replied to his own email and clarified his concerns. He stated:

I just want to clarify that I'm not against helping Jeff or his clients, or siding with them on the substantive issues. . . . I just have some concerns that [Parker] is mining his conversations with Phil and Rick for legal principles and arguments, and also getting second hand info from Phil about what Rick is saying in internal e-mail messages.⁴⁹

⁴⁸ Email from Keith Cohon, EPA, to Cara Steiner-Riley, Richard Parkin & Phil North, EPA (Dec. 22, 2010), EPA-BBL-6076.

⁴⁹ *Id.*

Keith Cohon

I just want to clarify that I'm not against helping...

12/22/2010 12:23:35 PM

From: Keith Cohon [REDACTED]
To: Phil North [REDACTED]; Cara Steiner-Riley [REDACTED];
Parkin, Richard [REDACTED]
Date: 12/22/2010 12:23 PM
Subject: Re: Phone conversation with Jeff Parker

I just want to clarify that I'm not against helping Jeff or his clients, or siding with them on the substantive issues. I just have some concerns that Jeff is mining his conversations with Phil and Rick for legal principles and arguments, and also getting second hand info from Phil about what Rick is saying in internal e-mail messages. Both of these create a lot of risk of Jeff misunderstanding and misstating the law and/or EPA's position on the law, which isn't in anyone's interest.

Keith Cohon, Assistant Regional Counsel
EPA Region 10
phone: [REDACTED]

Cohon's email creates the appearance that North's contacts with Parker included passing along internal EPA information, and that those contacts were fairly well known within EPA. Ultimately, Parkin and North agreed that they would forward Parker's emails to Steiner-Riley instead of contacting him directly.

Documents obtained by the Committee also show EPA attempted to hide information from the public via an end-run around the Freedom of Information Act (FOIA). On December 29, 2010, Parkin asked Steiner-Riley if it is possible to protect email from the FOIA process. In fact, Parkin wanted to "routinely" mark emails about the 404(c) petitions as privileged so they would not be released to FOIA requesters. Parkin wrote:

Cara, in terms of the record for the decision making on the 404(c) petitions, are message chains such as this one, protectable from FOIA? should we be concerned with that? Should are [sic] subject line include something like Atty/Client Privileged or what ever? Should we just do that routinely? For example the message chain between me and Patty that I cc'd you on showed disagreement within the agency about the 404(c) so I added a privileged statement to it and sent it to you. Should we implement something like that among the team for all messages in which we are deliberating about the 404(c)?⁵⁰

⁵⁰ Email from Richard Parkin, EPA, to Cara Steiner-Riley, EPA (Dec. 29, 2010), EPA-BBL-6076.

Former EPA Administrator Lisa P. Jackson's Role

Finding 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.

A delegation representing the Iliamna Corporation, an Alaskan native group that supports the Pebble Mine project, requested a meeting with Administrator Jackson in Washington, D.C. in December 2010. Iliamna Corporation representatives traveled to Washington to meet with the Administrator because they felt they were excluded from the Administrator's trip to Alaska in July 2010, when she met only with tribal groups near Dillingham, Alaska, home to tribes supportive of a preemptive veto for Pebble Mine. Administrator Jackson refused to meet with the Iliamna Corporation delegation.⁵¹

In one instance, a staffer for then-Senator Mark Begich of Alaska forwarded the request to meet with Administrator Jackson to Arvin Ganesan, who was then head of EPA Congressional and Intergovernmental Relations.⁵² Ganesan forwarded the request to EPA Senior Policy Advisor Bob Sussman, and asked: "this is not a good meeting for lpj, right?"⁵³

Sussman replied: "She [Jackson] shouldn't take this. She'll end up mtg with everyone."⁵⁴ It is not clear whether Administrator Jackson met with anyone who advised against using a preemptive veto to stop Pebble Mine.

On March 30, 2011, former U.S. Supreme Court Justice Sandra Day O'Connor hosted a reception at the U.S. Supreme Court to "celebrate the economic, cultural and ecological values of Alaska's Bristol Bay Watershed."⁵⁵ The event was sponsored by a coalition of Pebble Mine opponents who supported EPA's use of a preemptive 404(c) veto. This coalition included the Wild Salmon Center, Trout Unlimited, Natural Resources Defense Council, Tiffany & Co. Foundation, and others.⁵⁶ Administrator Jackson delivered a speech at the event outlining EPA's plan for the recently announced Bristol Bay Watershed Assessment. However, other high-level EPA officials declined to attend the reception, citing concerns about creating the appearance of bias.⁵⁷ Region 10 Administrator Dennis McLerran voiced concerns about attending the event in an email. McLerran stated: "I need to retain objectivity during the time we are conducting the

⁵¹ Email from Bob Sussman, EPA, to Arvin Ganesan, EPA (Jan. 3, 2011), EPA-BBL-260.

⁵² Email from Bob King, Staffer for Senator Mark Begich, to Arvin Ganesan, EPA (Dec. 23 2010), EPA-BBL-226.

⁵³ Email from Arvin Ganesan, EPA, to Bob Sussman, EPA (Dec. 23 2010), EPA-BBL-226.

⁵⁴ Email from Bob Sussman, EPA to Arvin Ganesan, EPA (Jan. 3, 2011), EPA-BBL-260.

⁵⁵ Email from Trozell Weaver, Wild Salmon Center, to EPA (Mar. 7, 2011), EPA-1184.

⁵⁶ *Id.*

⁵⁷ Email from Nancy Stoner, EPA, to Gregory Peck, EPA (Mar. 31, 2011), EPA-3088.

assessment of the Bristol Bay watershed and have the 404(c) petitions in front of us.”⁵⁸ Acting Administrator for the Office of Water Nancy Stoner also declined the event and was “surprised” Administrator Jackson attended.⁵⁹

Administrator Jackson’s comments at the reception showed EPA’s predisposition toward using the watershed assessment to inform her decision whether to take action under 404(c).⁶⁰ In an email chain started by Palmer Hough, an Environmental Scientist in the Wetlands Division at EPA, EPA employees discussed the concept of linking the Watershed Assessment directly to a 404(c) decision. At issue was the fact that EPA headquarters intended the Watershed Assessment to identify options to improve environmental protections in Bristol Bay; whereas, Region 10 assumed the purpose of the document was to inform on the use of a preemptive 404(c) determination.⁶¹ Hough and others specifically discussed the use of specific language to respond to letters asking about the watershed assessment. The language in question was:

The short term goal of this assessment will be to inform my decision whether to initiate a 404(c) action in advance of permitting. The ultimate goal, of course, is the protection and sustainability of the Bristol Bay fishery and ecosystem.⁶²

However, Hough noted that the Administrator connected the assessment to Pebble Mine when she addressed the audience at the Supreme Court reception the night before. Hough stated:

LPJ [Administrator Jackson] did make this kind of direct connect during her talk last night at the Supreme Court but that was verbally and to a very small crowd which is very much in favor of EPA action.⁶³

From this point forward, EPA publicly acknowledged that the Watershed Assessment would inform its decision on a preemptive 404(c). The fact that a critical component of EPA’s posture toward the Pebble Mine project appears to have been developed based on a remark by the Administrator at a social event organized by mine opponents raises concerns that the outcome of the assessment was pre-determined.

⁵⁸ Email from Dennis McLerran, Adm’r, EPA Region 10, to Kendra Tyler & Matthew Magorrian, EPA, et al. (Mar. 8, 2011), EPA-1184.

⁵⁹ Email from Nancy Stoner, EPA, to Gregory Peck, EPA (Mar. 31, 2011), EPA-3088.

⁶⁰ Email from Palmer Hough, EPA, to Denise Keehner, David Evans & Jim Pendergast, EPA (Mar. 31, 2011), EPA-2552.

⁶¹ Email from Gregory Peck, EPA, to Palmer Hough, EPA, et. al. (Mar. 31, 2014), EPA-2552.

⁶² Email from Palmer Hough, EPA, to Denise Keehner, David Evans & Jim Pendergast, EPA (Mar. 31, 2011), EPA-2552.

⁶³ *Id.*

EPA Did Not Maintain Neutrality With Respect to Pebble Mine

By February 2011, EPA had decided to prepare an assessment of the Bristol Bay ecosystem before announcing a decision on a 404(c) preemptive veto. In a February 7, 2011 press release announcing the Bristol Bay Watershed Assessment, EPA stated:

This action today does not represent any regulatory decision by the agency; instead it represents EPA's proactive steps to better understand the watershed and gather important scientific information. This information gathered will inform any future guidelines or actions about how to protect the waters and promote sustainable development.⁶⁴

On the day of that announcement, Trout Unlimited's Shoren Brown, a mine opponent, forwarded a press release from Senator Lisa Murkowski (R-AK) that welcomed further study in advance of a final decision by EPA to EPA employees Palmer Hough, Phil North, and Bill Dunbar.⁶⁵ Hough then forwarded Brown's email to several other EPA employees. One responded: "Interesting spin on EPA's announcement/decision - her communications would suggest no 404(c) would be done until all the science is in (EIS?). Obviously, that's not what we have in mind. . . ."⁶⁶

This statement creates the appearance that the EPA employees working on the BBWA assessment were never interested in conducting an objective review of all the studies on the impact of the proposed mine.

Documents show that employees in Region 10 favored using the preemptive 404(c) action from the early stages of this process. For example, a draft presentation for then-Administrator Lisa Jackson from late October 2010 stated, under the heading "Purpose": "To recommend and advance 404(c) process and receive Administrator Jackson's input and approval."⁶⁷

On January 28, 2011, Phil North and others at EPA received an email with a self-described "rant" from a Region 10 employee against Alaska state fishery management practices.⁶⁸ North forwarded the email to Hough with further criticism of the state's habitat protection policies and stated: "This is directly relevant to why we need to use 404(c) in Bristol Bay."⁶⁹

⁶⁴Press Release, EPA, EPA plans scientific assessment of Bristol Bay Watershed, (Feb. 7, 2011) <http://yosemite.epa.gov/opa/admpress.nsf/e51aa292bac25b0b85257359003d925f/8c1e5dd5d170ad99852578300067d3b3!OpenDocument&Highlight=0,bristol,bay>

⁶⁵ Email from Shoren Brown, Trout Unlimited, to Bill Dunbar, Phil North & Palmer Hough, EPA (Feb. 7, 2011), EPA-BBL-6416.

⁶⁶ Email from David Evans, EPA, to Palmer Hough, EPA (Feb. 7, 2011), EPA-BBL-6416.

⁶⁷ Email from Michael Szerlog, EPA, to Allyn Stern, EPA, et. al. (Oct. 28, 2010), EPA-BBL-4224.

⁶⁸ Email from Matthew LaCroix, EPA, to Tracy Degering, EPA, et. al. (Jan. 28, 2011), EPA-PNL-1623.

⁶⁹ Email from Phil North, EPA, to Palmer Hough, EPA (Jan. 28, 2011), EPA-PNL-1623.

In a May 2010 email, North wrote: “It seems that nobody disagrees with the likelihood of a 404(c). Within Region 10 we seem to only disagree on the process for getting there.”⁷⁰

In other emails from 2010 with Michael J. Szerlog, Manager of the Aquatic Resources Unit in Region 10 and other EPA employees, North referenced “part of our effort to advance 404(c) sooner than later”⁷¹ and that “[t]he only conservation provision on the list that is timely and effective is 404(c).”⁷²

Opposition toward the Pebble Mine project was widely referenced among Region 10 employees. This fact raises questions about the objectivity and reliability of the BBWA, which many of these employees made major contributions to. Moreover, since the BBWA appears to be the primary driver of EPA’s preemptive 404(c) action, the entirety of EPA’s actions in Bristol Bay is called into question.

Conclusion

At a hearing before the Committee in 2014, Administrator McCarthy was asked about potential collusion between EPA and Pebble Mine opponents.⁷³ The Administrator admitted that she had heard that “people expressed concerns about [collusion] and it has been referred to the inspector general and he is looking into it.”⁷⁴ Administrator McCarthy was then asked if EPA would be willing to cease its 404(c) action until all the facts regarding collusion were known. She replied: “No sir. I don’t see any evidence that there was collusion here.”⁷⁵

Proof of collusion is in fact a basis to reconsider EPA’s 404(c) action against Pebble Mine. EPA’s actions with respect to Pebble Mine, and especially the conduct of Phil North, represent an unprecedented change in the agency’s process for regulating resource and development projects. Based on this new information, EPA should withdraw the Proposed 404(c) Determination for the Pebble Deposit and the Bristol Bay Watershed Assessment; cease all preemptive 404(c) activity; and, allow for project proposals in Bristol Bay to undergo the conventional CWA and NEPA processes.

⁷⁰ Email from Phil North, EPA, to Michael Szerlog, EPA (May 20, 2010), EPA-BBL-4284.

⁷¹ Email from Phil North, EPA, to Michael Szerlog, EPA (May 25, 2010), EPA-BBL-4728.

⁷² Email from Phil North, EPA, to Michael Szerlog, EPA (Nov. 22, 2010), EPA-BBL-4441.

⁷³ *Management Failures: Oversight of the EPA: Hearing before the H. Comm. on Oversight and Gov’t Reform, 113th Cong. 113-138* (2014).

⁷⁴ *Id.*

⁷⁵ *Id.*