



**Report of An Independent Review Of
The United States Environmental Protection Agency's
Actions In Connection With Its Evaluation Of
Potential Mining In Alaska's Bristol Bay Watershed**

Executive Summary

Secretary William S. Cohen
The Cohen Group
DLA Piper LLP (US)

October 6, 2015

COHEN
GROUP

EXECUTIVE SUMMARY

In fall 2014, I was approached by the Pebble Partnership (“Pebble Partnership” or the “Partnership”) to review the actions of the United States Environmental Protection Agency (“EPA”) in connection with its evaluation of potential mining in southwest Alaska’s Bristol Bay watershed. The Partnership holds mineral claims to lands owned by the State of Alaska in the headwaters of the Nushagak and Kvichak Rivers of the Bristol Bay watershed (the “Pebble Deposit Area”).ⁱ This area contains one of the largest known undeveloped deposits of copper in the world, and the Pebble Partnership has been exploring the development of a mine there for more than a decade.ⁱⁱ The area is also home to one of the most prolific salmon runs in the world.ⁱⁱⁱ The commercial salmon industry dominates the private sector economy of the Bristol Bay region, and Alaska Natives who reside there have maintained a salmon-centered culture and subsistence-based lifestyle for thousands of years.^{iv} In July 2014, EPA proposed substantial limits on development in the Pebble Deposit Area.^v

The Pebble Partnership has expressed the concern that EPA’s decision-making process and proposed limits were unfair and wanted an objective party to examine those concerns. The Partnership asked me to review EPA’s actions through the lens of how Cabinet-level agencies make decisions on important public policy questions, given my experience in the Legislative and Executive branches of government. I agreed to undertake a review of EPA’s actions, assisted by my staff at The Cohen Group and the law firm DLA Piper LLP. I advised the Partnership that I would not review whether a mine should be built; such a determination would require engineering and scientific expertise beyond my capabilities. Nor would I comment on the legality of EPA’s actions; that is a question for the courts. But I did feel qualified to review the

process by which EPA assessed, and proposed restrictions to reduce, the environmental risks associated with potential mining in the Bristol Bay watershed.^{vi}

I undertook the review on conditions of complete independence. I would follow the facts wherever they might lead, and any conclusions would be mine alone. The Pebble Partnership would have no rights to edit or censor my views. The Partnership agreed to this and to compensate my firm and DLA Piper according to commercially standard terms. No portion of our compensation was contingent upon the result of the review or the content of the report.^{vii}

To produce the most thorough and balanced review, we interviewed more than 60 people, including three former EPA administrators. The people interviewed represented all points of view on EPA's actions. (EPA declined my request to make current personnel available for interviews.) We reviewed thousands of documents from EPA, other federal agencies, the State of Alaska, Congressional committees, the Pebble Partnership, and other sources. My team also visited the Pebble Deposit Area to observe the Bristol Bay watershed.^{viii}

The decision about whether mining should occur in this area, as well as the process of making such a decision, has been highly controversial and has generated intense passions on all sides. The controversy has prompted an Inspector General's investigation, Congressional hearings, and litigation.^{ix}

A. Background Facts

The question of the appropriate process to make a determination to permit, limit, or ban development is at the heart of this review. EPA elected to proceed under Section 404(c) of the Clean Water Act to limit development within the Pebble Deposit Area.^x EPA undertook its Section 404(c) action before the Partnership filed a permit application, but after EPA had conducted an assessment of the potential effects of mining in the region, principally on fish.^{xi}

The State of Alaska and the Pebble Partnership have argued that EPA should have used the process that is customarily employed when assessing the effects of potential development; that is, the permit application process.^{xii}

Congress passed the Clean Water Act in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”^{xiii} Under the Act, if a development would result in the discharge of dredged or fill materials in the nation’s waters (as would be the case here), the developer must first receive a permit from the U.S. Army Corps of Engineers (the “Corps”).^{xiv} The Corps evaluates a permit application (proposing a specific mine with specific control and mitigation measures) using guidelines it developed in conjunction with EPA and complies with the National Environmental Policy Act (“NEPA”) and regulations developed by the Council on Environmental Quality.^{xv} NEPA mandates that the Corps coordinate with EPA and other interested agencies, prepare an environmental assessment, consider an array of public interest factors and the beneficial effects of the proposed project, assess mitigation plans, and evaluate alternatives.^{xvi} The Corps then either issues a permit and imposes conditions or denies the permit application.^{xvii} We refer to this as the “Permit/NEPA Process.” The Permit/NEPA Process has been widely endorsed by environmental groups, including the Natural Resources Defense Council.^{xviii}

Section 404(c) authorizes EPA to “prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site . . . whenever [the Administrator] determines . . . that the discharge of such materials into such area will have an unacceptable adverse effect” on the environment.^{xix} EPA may act under Section 404(c) whenever it has “reason to believe” based on available information that “‘an unacceptable adverse effect’ could result from the specification or use for specification of a defined area for the disposal of dredged or fill

material[.]”^{xx} Regulations promulgated by EPA in 1979 allow it to initiate a process to deny or restrict the use of an area for the disposal of dredged or fill material before a project proponent has submitted a permit application.^{xxi}

The decision regarding which process to use—the Permit/NEPA Process or the preemptive Section 404(c) process—has been a focal point of this controversy. Since passage of the Clean Water Act, EPA has exercised its authority under Section 404(c) thirteen times, in each case relying on a permit application that had already been filed.^{xxii} As an internal EPA document reveals, a truly preemptive Section 404(c) action had “[n]ever been done before in the history of the [Clean Water Act].”^{xxiii}

Since the early 2000s, EPA has communicated with a variety of stakeholders who hold a wide range of views concerning mining in the Bristol Bay watershed and the potential development of a Pebble mine.^{xxiv} Support for EPA’s actions centers on concerns about the environmental impacts of mining and the perceived incompatibility of large-scale mining with the maintenance of a healthy ecosystem and salmon fishery and the preservation of the area residents’ way of life.^{xxv} Opposition to EPA’s actions is based largely on the potential economic benefits mining may yield for the region, basic “due process” and sovereignty considerations, and the Partnership’s belief that mining can occur in the Pebble Deposit Area without harming the salmon fishery.^{xxvi}

In May, 2010, six federally-recognized tribes from the Bristol Bay watershed asked EPA to invoke Section 404(c) to protect the region from metallic sulfide mining, including a potential Pebble mine.^{xxvii} In the following months, others urged EPA to take action under Section 404(c), noting the cultural, ecological, and economic importance of the watershed and the magnitude of a potential Pebble mine.^{xxviii} The State of Alaska, the Pebble Partnership, certain tribes, and

other stakeholders opposed the request that EPA preemptively apply Section 404(c), questioning the timing of and EPA's authority for such action and urging EPA to allow the Permit/NEPA Process to take place.^{xxix}

On February 7, 2011, EPA announced its plan to conduct an assessment of the Bristol Bay watershed (the "BBWA") to determine the significance of its ecological resources and evaluate the potential effects of large-scale mining development.^{xxx} EPA invited various federal agencies to participate in the BBWA.^{xxx} The Corps declined to participate in order to maintain its independence in any subsequent Permit/NEPA Process.^{xxxii} The State of Alaska participated in EPA's assessment while also registering its objection to the process.^{xxxiii} With EPA's assurance that it was not using the BBWA to make a decision under Section 404(c), the Pebble Partnership also participated in the assessment notwithstanding its objection to the study.^{xxxiv}

To conduct the BBWA in the absence of any permit application, EPA made assumptions about potential mine operations in the Pebble Deposit Area and created hypothetical mine scenarios based largely on a preliminary economic analysis prepared for the Pebble Partnership.^{xxxv} Over the course of three years, EPA prepared and issued two BBWA drafts for public comment and peer review.^{xxxvi} The considerable public participation in response to the BBWA drafts reflected a wide diversity of opinion as to the quality and comprehensiveness of the BBWA.^{xxxvii} Environmental non-governmental organizations, commercial fishermen, many Alaska Native tribes and tribal organizations, and some state legislators commended EPA on its effort and praised the scientific rigor of the BBWA drafts.^{xxxviii} The State of Alaska, the Pebble Partnership, and other Alaska Native tribes and interested parties identified technical and legal issues they believed undermined the validity of the BBWA, including reliance on hypothetical

mine scenarios and failure to consider mitigation strategies to compensate for the loss of wetland habitat caused by mine development.^{xxxix}

Some peer reviewers raised concerns about the use of hypothetical mine scenarios in the BBWA—noting that this approach limited the utility of the study in such a way that the assessment might not “provide risk decision-makers with sufficient information upon which to make long-term project decisions”—and about the aforementioned failure to address mitigation.^{xl} EPA defended its work, asserting that “all mining plans are hypothetical” and that analyzing efforts to mitigate adverse effects “would be addressed through a regulatory process that is beyond the scope of this assessment.”^{xli}

EPA published the final BBWA on January 21, 2014.^{xlii} EPA stated that the BBWA was not designed to duplicate or replace the Permit/NEPA Process and acknowledged that certain analyses were not undertaken in the BBWA that would occur during the Permit/NEPA Process.^{xliii} Among the most significant gaps was that the BBWA employed hypothetical assumptions as to mine operation and mitigation rather than considering the techniques a developer would propose in an actual permit application.^{xliv} EPA nevertheless expressed confidence that its analyses were conservative and that compensatory mitigation techniques were unlikely to offset impacts of the nature described in the BBWA.^{xlv}

Based on the BBWA, EPA issued its notice of intent to proceed under Section 404(c) on February 28, 2014.^{xlvi} EPA gave the Corps, the State of Alaska, and the Pebble Partnership 60 days to submit information to demonstrate that no unacceptable adverse effects to aquatic resources would result from any associated mining discharges.^{xlvii} The Corps declined to provide substantive comments on the ground that there was no pending permit application.^{xlviii} The State of Alaska and the Pebble Partnership reiterated their respective positions that the Section 404(c)

action was premature and that the BBWA was flawed.^{xlix} Their response letters did not persuade EPA to change course, and EPA moved forward with its Section 404(c) action.¹

On July 18, 2014, EPA Region 10 issued a Proposed Determination relating to development in the Pebble Deposit Area.^{li} EPA premised its regulatory action on a hypothetical scenario assessed in the BBWA.^{lii} EPA proposed restrictions based on its conclusion that an “unacceptable adverse effect on fishery areas” would result from development that would cause estimated losses of habitat greater than those associated with the hypothetical 0.25 billion-ton mine it evaluated in the BBWA.^{liii} Since that time, litigation has ensued, and there is currently an injunction in place temporarily prohibiting EPA from further proceedings.^{liv}

B. Observations and Conclusion

Over the course of this review, I have arrived at a number of observations, including:

- The issue of whether mining should occur in the Bristol Bay watershed is of the utmost importance to the State of Alaska’s environment, economy, people, and fish and wildlife;
- To date, the Pebble Partnership has not submitted a permit application. Thus, EPA relied on hypothetical scenarios rather than the characteristics of a mine as it was actually planned to be built and maintained;
- EPA failed to address important considerations that would be included in the NEPA/Permit Process, including meaningful participation by other state and federal government agencies, mitigation and controls as proposed by the developer, and an array of public interest factors;
- The Permit/NEPA Process has been used for decades and has been widely endorsed by environmental groups;
- EPA relied upon the BBWA in its Proposed Determination but acknowledged that there were significant gaps in its assessment and that it was not designed to duplicate or replace the Permit/NEPA Process; and
- EPA’s unprecedented, preemptive use of Section 404(c) inhibited the involvement of two key participants: the Corps and the State of Alaska.^{lv}

These observations have informed my conclusion that that EPA's application of Section 404(c) prior to the filing of a permit application was not fair to all stakeholders.^{lvi} I find that:

The fairest and most appropriate process to evaluate possible development in the Pebble Deposit Area would use the established regulatory Permit/NEPA Process to assess a mine permit application, rather than using an assessment based upon the hypothetical mining scenarios described in the BBWA as the basis for imposing potentially prohibitive restrictions on future mines.^{lvii}

The Permit/NEPA Process is more comprehensive than the preemptive Section 404(c) process employed here. EPA conceded in comments to peer reviewers that there were gaps in its assessment that would be addressed during a Permit/NEPA Process.^{lviii}

While I recognize EPA's authority to initiate Section 404(c) actions, here EPA acknowledged it did so in an unprecedented manner. EPA's use of Section 404(c) before a permit filing compounded the shortcomings of the BBWA noted by several peer reviewers, the State of Alaska, and the Pebble Partnership: the use of hypothetical assumptions that may or may not accurately or fairly represent an actual project; and the failure to take into account mitigation and control techniques a developer might propose.^{lix}

An environmental impact assessment is bound to provide more accurate information if it assumes that the mine will be built in accordance with the developer's plans, rather than a hypothetical mine plan which even EPA acknowledges is likely to be different from a developer-submitted plan. This project is too important, for all stakeholders, to pilot a new, untested decision-making process. The fairest approach is to use the well-established Permit/NEPA Process, and I can find no valid reason why that process was not used.^{lx}

The statements and actions of EPA personnel observed during this review raise serious concerns as to whether EPA orchestrated the process to reach a predetermined outcome; had inappropriately close relationships with anti-mine advocates; and was candid about its decision-

making process. I have not attempted to reach conclusions on these issues. First, any such findings would not affect my overarching conclusion about the process that should have been followed. Second, the record remains incomplete on these issues. EPA declined my requests to cooperate with this review, so I allow there may be benign explanations for these actions. There are also troubling gaps in the documents EPA has produced in response to Freedom of Information Act requests, including those said to be lost as a result of a computer crash and EPA personnel's use of personal email.^{lxi}

I believe the information unearthed to date merits the development of a complete record by those who have the subpoena power necessary to look at these questions more closely. Government oversight by the proper authorities must play an active role in ensuring that agencies do not engage in preordained decision-making. Thus, I urge the EPA's Inspector General and Congress to continue to explore these questions which might further illuminate EPA's motives and better determine whether EPA has met its core obligations of government service and accountability.^{lxii}

It is my hope that the policymakers involved in charting the course of the Bristol Bay watershed's future find this report helpful. I have tried to describe the history of EPA's actions accurately and objectively. As we look to the future, I urge policymakers to consider requiring the use of the Permit/NEPA Process. This process, which entails compliance with NEPA and other regulatory requirements, an environmental impact statement, and input from EPA, other relevant agencies, and the State of Alaska, will supply the gaps in information which the BBWA left outstanding. This decision is too important to be made with anything less than the best and most comprehensive information available.^{lxiii}

ⁱ See Background Facts at Sections II.D.1 and II.D.3.

ⁱⁱ See *id.* at Sections II.A and II.D.3.

ⁱⁱⁱ See *id.* at Section II.A.

^{iv} See *id.* at Section II.C.

^v See *id.* at Section IX.

^{vi} See Independence and Methodology.

^{vii} See *id.*

^{viii} See *id.*

^{ix} See *id.*

^x See Background Facts at Sections IV.A, IV.C, IV.E, and VIII.

^{xi} See *id.* at Sections II.D.3, VII, and IX.

^{xii} See *id.* at Sections IX.C-D.

^{xiii} Clean Water Act § 101(a), 33 U.S.C.A. § 1251(a) (West 2015); see Background Facts at Section I.A.

^{xiv} See Background Facts at Section I.B.

^{xv} See *id.*

^{xvi} See *id.*

^{xvii} See *id.*

^{xviii} See *id.*

^{xix} 33 U.S.C.A. § 1344(c); see Background Facts at Section I.C. The full text of Section 404(c) provides that:

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

^{xx} 40 C.F.R. § 231.3(a) (2010); see Background Facts at Section I.C.

^{xxi} See Background Facts at Section I.C.

^{xxii} *See id.* Technically, in one of these cases, there was no permit application, however EPA did rely on the permit application of two adjacent and separately-owned parcels to make the determination. EPA deemed the parcel to have the same characteristics as the other two properties and applied its Section 404(c) action to all three properties based on their coextensive characteristics. *See Chronology of 404(c) Actions*, EPA (Sept. 23, 2013), <http://water.epa.gov/lawsregs/guidance/wetlands/404c.cfm>.

^{xxiii} EPA, DISCUSSION MATRIX (Sept. 8, 2010), at 1; *see* Background Facts at Section IV.E.

^{xxiv} *See* Background Facts at Section III.C.

^{xxv} *See id.* at Sections III.D, IV.B, VI.A.2, and VI.B.

^{xxvi} *See id.* at Sections III.E, IV.B, VI.A.2, VI.B, and IX.C-D.

^{xxvii} *See id.* at Section IV.B.

^{xxviii} *See id.*

^{xxix} *See id.*

^{xxx} *See* Background Facts at Section V.B.

^{xxxi} *See id.* at Sections IV.D, IV.G, and V.B.

^{xxxii} *See id.* at Section V.B.

^{xxxiii} *See id.*

^{xxxiv} *See id.*

^{xxxv} *See id.* at Section VII.A.

^{xxxvi} *See* Background Facts at Sections VI-VII.

^{xxxvii} *See id.* at Sections VI.A.2 and VI.B.

^{xxxviii} *See id.*

^{xxxix} *See id.*

^{xl} EPA, RESPONSE TO PEER REVIEW COMMENTS ON THE MAY 2012 AND APRIL 2013 DRAFTS OF AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY 65-66 (2014); *see* Background Facts at Section VI.A.3.

^{xli} EPA, RESPONSE TO PEER REVIEW COMMENTS ON THE MAY 2012 AND APRIL 2013 DRAFTS OF AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY 65-66, 114-115 (2014); *see* Background Facts at Section VI.A.3.

^{xlii} *See* Background Facts at Section VII.

^{xliii} *See id.* at Section VII.A.

^{xliv} *See id.*

^{xlv} *See id.*; *see also id.* at Section IX.

^{xlvi} *See id.* at Section VIII.

^{xlvii} *See* Background Facts at Sections VIII, VIII.B-C.

-
- xlviii *See id.* at Section VIII.A.
- xlix *See id.* at Sections VIII.B-C.
- ¹ *See id.* at Section VIII.D.
- li *See id.* at Section IX.
- lii *See id.*
- liii *See* Background Facts at Section IX.
- liv *See id.* at Section X.E.
- lv *See* Conclusion and Observations.
- lvi *See id.*
- lvii *See id.*
- lviii *See id.*
- lix *See id.*
- lx *See id.*
- lxi *See* Conclusion and Observations.
- lxii *See id.*
- lxiii *See id.*