



**The Demeaning of Independence:**

**Response to the Pebble Limited Partnership-Funded  
Cohen Review of EPA's Proposal to  
Protect Salmon from Large-Scale Mining in  
Bristol Bay, Alaska**

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## EXHIBITS

1. Letter from U.S. Assistant Attorney General John Cruden
2. Letter from Senator Lisa Murkowski
3. British Columbia Company Summary For 1047208 B.C. LTD.
4. Letter from NRDC attaching Huffington Post Column

## I. EXECUTIVE SUMMARY

On October 6, 2015, The Cohen Group, led by former Secretary of Defense William Cohen, in association with the law firm DLA Piper LLP, issued a report (“Cohen Report”)<sup>1</sup> commissioned by their client The Pebble Limited Partnership (“PLP”) critiquing the U.S. Environmental Protection Agency’s (“EPA”) review and proposed action with respect to PLP’s Pebble Mine, proposed to be constructed in the headwaters of Bristol Bay, Alaska. The Natural Resources Defense Council (“NRDC”)<sup>2</sup> responds here to that report.

Bristol Bay is “one of America’s greatest national treasures.”<sup>3</sup> The Bristol Bay watershed—and the salmon, wildlife, and Native communities that call it home—exist in a rare and pristine state of self-sustainability, undisturbed by significant human development. The watershed is home to the largest wild sockeye salmon fishery in the world, supporting half of the world’s wild sockeye salmon and generating \$1.5 billion annually and 14,000 jobs.<sup>4</sup> Approximately 70% of the salmon returning to spawn are harvested, and the commercial salmon harvest has been successfully regulated to maintain a sustainable fishery and, in turn, sustainable salmon-based ecosystems. The Bristol Bay watershed, with its high quality commercial, recreational, and subsistence fisheries, represents an aquatic resource of national—and global—importance. Indeed, its sensitive streams and wetlands are cherished not only because they are essential to the well-being of the region’s world-class wild salmon fisheries, but also because they serve as the lifeblood of Alaska Native cultures that have thrived there for millennia—as well as world-class sports fishing and tourism industries that the region’s hydrology supports.

Bristol Bay is threatened by large-scale mining like the proposed Pebble Mine, a giant gold and copper mine that, if built, would: produce up to 10 billion tons of mining waste; destroy salmon spawning and rearing habitat, including up to 94 miles of streams; devastate 5,350 acres of wetlands, ponds, and lakes; significantly impact fish populations in streams surrounding the mine site; alter stream flows of up to 33 miles of salmon-supporting streams, likely affecting ecosystem structure and function; and create a transportation corridor to Cook Inlet crossing wetlands and approximately 64 streams and rivers in the Kvichak River watershed, 55 of which are known or likely to support salmon. Culvert failures, runoff, and spills of chemicals would put

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<sup>1</sup> The Cohen Group, *Report of An Independent Review Of The United States Environmental Protection Agency’s Actions In Connection With Its Evaluation Of Potential Mining In Alaska’s Bristol Bay Watershed* (Oct. 6, 2015), available at <http://files.cohengroup.net/Final/Final-Report-with-Appendices-compressed.pdf> [hereinafter “Cohen Report”].

<sup>2</sup> NRDC is a nonprofit organization of 500 scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment in the United States and internationally, with offices in New York, Washington D.C., Montana, Los Angeles, San Francisco, Chicago, and Beijing. Founded in 1970, NRDC uses law, science and the support of 2.4 million members and online activists to protect the planet’s wildlife and wild places and to ensure a safe and healthy environment for all living things.

<sup>3</sup> Tanya Somanader, *5 Things You Need to Know About Alaska’s Bristol Bay*, The White House Blog (Dec. 16, 2014 at 5:12 PM), <https://www.whitehouse.gov/blog/2014/12/16/5-things-you-need-know-about-alaskas-bristol-bay>.

<sup>4</sup> Gunnar Knapp et al., Univ. of Alaska Anchorage Inst. of Soc. & Econ. Research, *The Economic Importance of the Bristol Bay Salmon Industry* at 1 (2013), available at <http://fishermenforbristolbay.org/wp-content/uploads/2013/02/CFBB-ISER-FINAL-REPORT-5-10-2013.pdf>; see also U.S. EPA, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, 910-R-14-001ES (2014), available at [http://www2.epa.gov/sites/production/files/2015-05/documents/bristol\\_bay\\_assessment\\_final\\_2014\\_vol1.pdf](http://www2.epa.gov/sites/production/files/2015-05/documents/bristol_bay_assessment_final_2014_vol1.pdf) [hereinafter “BBWA”].

salmon spawning areas at risk and require the collection, storage, treatment and management of extensive quantities of mine waste, leachates, and wastewater during mining and “long after mining concludes.”<sup>5</sup>

Given Bristol Bay’s economic and ecological importance—and the potentially “catastrophic”<sup>6</sup> risks of large-scale mining on the watershed—EPA adopted a methodical scientific review process for (1) assessing the potential impacts of large-scale mining in the region and (2) determining whether a proposed determination under Section 404(c) of the Clean Water Act<sup>7</sup> is warranted and, if so, what that determination should be. This process – conducted over a period of four years – was designed to ensure that the assessment would be informed both by extensive public participation and by significant scientific peer review.

Secretary Cohen and DLA Piper LLP have acknowledged that they were hired and paid by PLP, the proponent of the proposed Pebble Mine, and that should be kept in mind when evaluating the independence of their report. More specifically, though, and as described in detail below, the Cohen Report’s criticisms of EPA are entirely unfounded on the merits as a matter of fact and law. For the reasons summarized below, the Report should be disregarded in its entirety:

First, contrary to the allegations in the report, EPA’s proactive approach in the pre-permit timeframe is common in a variety of environmental decision-making contexts. The fact that a proactive approach has only rarely been used in the Clean Water Act Section 404 permitting context does not render EPA’s use of this approach in Bristol Bay unprecedented, novel, or illegitimate in any way. Second, following PLP’s lead in attacking EPA for allegedly pre-determining the outcome of its administrative review process, the Cohen Report repeats similar arguments on PLP’s behalf and ignores the extraordinarily comprehensive and inclusive public process that accompanied every stage of EPA’s review, including repeated opportunities for public comment and two scientific peer reviews. Third, the Cohen Report authors’ make it sound as if the use of hypothetical scenarios in environmental decision-making is unusual or in some way inadequate, when this is routinely done in many contexts. Fourth, the Cohen Report’s assertion that EPA has not fully explained the basis for its 404(c) proposal is belied by the extensive record, including both EPA’s comprehensive scientific watershed assessment and the agency’s proposed determination. Finally, in contrast to EPA’s actions, it is the Cohen Report that lacks transparency and reflects bias.

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<sup>5</sup> U.S. EPA, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, 910-R-14-001ES (2014), available at [http://www2.epa.gov/sites/production/files/2015-05/documents/bristol\\_bay\\_assessment\\_final\\_2014\\_voll.pdf](http://www2.epa.gov/sites/production/files/2015-05/documents/bristol_bay_assessment_final_2014_voll.pdf) [hereinafter “BBWA”]; see also Press Release, U.S. EPA, *EPA Releases Bristol Bay Assessment Describing Potential Impacts to Salmon and Water From Copper, Gold Mining / Agency launched study after requests for action to protect Bristol Bay watershed from large-scale mining* (Jan. 15, 2014), available at <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/eab0fc9ea00209d785257c610069e88f!OpenDocument>.

<sup>6</sup> BBWA at 9-2.

<sup>7</sup> 33 U.S.C. § 1344(c).

## II. STATUTORY BACKGROUND

EPA's primary mission is to "ensure that ... all Americans are protected from significant risks to human health and the environment where they live, learn and work,"<sup>8</sup> and one of EPA's top strategic priorities is "Protecting America's Waters," which means "[p]rotect and restore waters to ensure that drinking water is safe and sustainably managed, and that aquatic ecosystems sustain fish, plants, wildlife, and other biota, as well as economic, recreational, and subsistence activities."<sup>9</sup>

In Section 404(c) of the Clean Water Act ("CWA"),<sup>10</sup> Congress gave EPA broad authority to protect water resources from unacceptable adverse effects "whenever" the time is right.<sup>11</sup> It is beyond dispute that the CWA authorizes EPA to undertake 404(c) action in a proactive manner to prevent certain areas from being used as disposal sites for mining waste or other dredged or fill material. As explained by the D.C. Circuit, the statute "imposes no temporal limit" on EPA's authority to exercise its 404(c) authority "*whenever*" it makes a determination that an "unacceptable adverse effect" would result because, by using the "expansive conjunction 'whenever,' the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time."<sup>12</sup> In light of this "unambiguous" and "manifest" intent of Congress,<sup>13</sup> the Cohen Report "[a]ccept[s] EPA's statutory authority to take action to protect the environment whenever it determines unacceptable adverse effects may result from development activities."<sup>14</sup>

EPA has articulated several policy rationales in support of pre-permitting action in the 404(c) context. Where EPA has reason to believe that "unacceptable adverse effects" would result from the specification of an area for disposal of dredged or fill material, acting on that belief before a permitting process has begun is beneficial because it provides certainty for developers and avoids wasting their time and money:

EPA also feels that there are strong reasons for including this pre-permit authority in the present regulations. Such an approach will facilitate planning by developers and industry. It will eliminate frustrating situations in which someone spends time and money developing a project for an inappropriate site and learns at an advanced stage

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<sup>8</sup> U.S. EPA, *Our Mission and What We Do* (Nov 2, 2015, 10:35 AM), <http://www2.epa.gov/aboutepa/our-mission-and-what-we-do>.

<sup>9</sup> U.S. EPA, *An Introduction to the Water Elements of EPA's Strategic Plan*, (Nov. 2, 2015, 10:56 AM), [http://water.epa.gov/aboutow/goals\\_objectives/goals.cfm](http://water.epa.gov/aboutow/goals_objectives/goals.cfm).

<sup>10</sup> EPA's mandate under Section 404(c) is to prohibit, deny, restrict, or withdraw dredge and fill projects that are reasonably likely to have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. § 1344(c).

<sup>11</sup> 33 U.S.C. § 1344(c).

<sup>12</sup> *Mingo Logan Coal v. EPA*, 714 F.3d 608, 613 (D.C. Cir. 2013) (emphasis in original).

<sup>13</sup> *Id.*

<sup>14</sup> *Cohen Report*, at 2.

that he must start over. In addition, advance prohibition will facilitate comprehensive rather than piecemeal protection of wetlands.<sup>15</sup>

These policies underscore the appropriateness of proactive 404(c) action in Bristol Bay. Waiting for a permitting process to begin would only be more damaging as more time, energy, and money would be invested by industry, permitting agencies, and the public.<sup>16</sup> Moreover, the disruption and anxiety arising from the potential for large-scale metallic sulfide mining to cause “unacceptable adverse effects” in vital salmon habitat would continue for many more years. The Pebble deposit presents one of the rare cases when the right time for EPA to exercise its authority happens to be before the proponent has filed a permit application.

### III. DISCUSSION

#### A. EPA’s Proactive Approach Is Common in Environmental Decision-Making, Not Unprecedented or Novel.

The fundamental premise of the Cohen Report is that environmental decision-making should begin when a project proponent submits a permit application and that proactive agency decision-making prior to that starting point lacks legitimacy.<sup>17</sup> In particular, the Cohen Report lauds the dredge-and-fill permitting program under Section 404(a) of the CWA as a “well-established, widely-endorsed, and court-tested process,”<sup>18</sup> while denigrating the proactive restriction of disposal sites under Section 404(c) as an “unprecedented” and “novel” “experiment” that is “not fair to all stakeholders.”<sup>19</sup> This argument is fundamentally wrong because, even apart from the congressionally enacted 404(c) process itself, it ignores decades of environmental decision-making in which EPA and other federal and state agencies routinely set parameters for permitting in the pre-permit timeframe similar to the restrictions EPA established in its Proposed Determination regarding the Pebble deposit.<sup>20</sup>

For example, also under the CWA, EPA and states establish parameters for industrial permitting and agricultural development in the pre-permit timeframe under the CWA’s total maximum daily

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<sup>15</sup> U.S. EPA, *Denial or Restriction of Disposal Sites; Section 404(c) Procedures*, 44 Fed. Reg. 58076, 58077 (Oct. 9, 1979).

<sup>16</sup> According to a recent GAO report, the average time from initiation to completion of an EIS is 4.6 years. See U.S. GAO, *National Environmental Policy Act: Little Information Exists on NEPA Analyses*, GAO-14-370 at 14 (April 2014), available at <http://www.gao.gov/assets/670/662546.pdf> (Noting that it would be wasteful and inefficient for all involved to complete an EIS process for a mining project without taking into account 404(c) restrictions from the outset).

<sup>17</sup> See *Cohen Report*, at 2 (describing Secretary Cohen’s “central concern” as being “that EPA took regulatory action under Section 404(c) of the Clean Water Act substantially limiting potential development without first having reviewed a permit application for any proposed project”).

<sup>18</sup> *Cohen Report*, at 84.

<sup>19</sup> *Id.*, at 82, 83, ES-8 (“This project is too important, for all stakeholders, to pilot a new, untested decision-making process.”).

<sup>20</sup> U.S. EPA, *Proposed Determination of the U.S. Env’tl. Prot. Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act Pebble Deposit Area, Southwest Alaska* (July 2014) [hereinafter “Proposed Determination”].

load (“TMDL”) program.<sup>21</sup> States identify and rank impaired waters and then, for each, they develop a TMDL and corresponding effluent limitations for particular pollutants.<sup>22</sup> These are submitted to EPA for approval as part of a continuing planning process.<sup>23</sup> One example is the large-scale TMDL designed to restore clean water in the Chesapeake Bay and its tributaries.<sup>24</sup> The Chesapeake Bay TMDL sets limits on nitrogen, phosphorous, and sediment pollution, and it allocates pollution budgets to the surrounding states.<sup>25</sup> Each of these states has submitted implementation plans to EPA for approval, and they are in the process of implementing them and developing follow-up plans.<sup>26</sup> The implementation plans establish restrictions on industrial and agricultural activities that release the types of pollutants subject to the TMDL.<sup>27</sup> Permits cannot be approved for new industrial or agricultural activities unless they are consistent with the TMDL and applicable implementation plans.<sup>28</sup>

Similarly, under the Clean Air Act (“CAA”), EPA and states establish parameters for the permitting of industrial facilities near National Parks and other Class I areas through the CAA’s visibility and regional haze programs.<sup>29</sup> States are required to develop programs and strategies designed to assure “reasonable progress” toward the national policy goal of remedying impairment and preventing future impairment of visibility in Class I areas.<sup>30</sup> These programs and strategies are incorporated into each state implementation plan (“SIP”) addressing regional haze,<sup>31</sup> and permits for new and modified major stationary sources of air pollution—such as power plants and manufacturing facilities—cannot be issued unless the permits comply with the visibility provisions of the SIP.<sup>32</sup> Arizona, for instance, has provisions in its SIP establishing guidelines and requirements for the permitting of several large coal-fired power plants situated near the Grand Canyon National Park as a means to protect visibility at this treasured national landmark.<sup>33</sup>

In short, the fact that environmental decision-making in the CWA dredge-and-fill context is

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<sup>21</sup> See 33 U.S.C. § 1313(d).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* § 1313(d)-(e).

<sup>24</sup> See generally U.S. EPA, *Chesapeake Bay Total Maximum Daily Load (TMDL)*, (Oct. 25, 2015, 10:57 AM), <http://www2.epa.gov/chesapeake-bay-tmdl>.

<sup>25</sup> See U.S. EPA, *Chesapeake Bay TMDL Fact Sheet*, (Oct. 25, 2015, 9:32 AM), <http://www2.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-fact-sheet>.

<sup>26</sup> See *id.*

<sup>27</sup> See U.S. EPA, *Sector-Specific EPA Oversight in the Chesapeake Bay Watershed*, (Nov. 2, 2015, 11:02 AM), <http://www2.epa.gov/chesapeake-bay-tmdl/sector-specific-epa-oversight-chesapeake-bay-watershed>.

<sup>28</sup> See, e.g., Virginia Dept. Env'tl. Quality, *Chesapeake Bay TMDL Action Plan Information*, (Oct. 26, 2015, 3:22 PM), <http://www.deq.virginia.gov/Programs/Water/StormwaterManagement/VSMPPPermits/MS4Permits/ChesBayTMDLActionPlanInformation.aspx>.

<sup>29</sup> See generally 42 U.S.C. § 7491; 40 C.F.R. §§ 51.300-.309.

<sup>30</sup> See 42 U.S.C. § 7491(a)(1),(b)(2); 40 C.F.R. § 51.300(a).

<sup>31</sup> See 40 C.F.R. § 51.300(b), .302(a).

<sup>32</sup> See 40 C.F.R. §§ 51.307, 51.166.

<sup>33</sup> See generally U.S. EPA, *Regional Haze in Arizona*, (Oct. 30, 2015, 1:26 PM), <http://www3.epa.gov/region9/air/az/haze/#308>.



usually prompted by the submission of a permit application<sup>34</sup> does not mean that the establishment of restrictions on development prior to the permitting stage is unusual, novel, experimental, or inherently suspect, as argued in the Cohen Report. This type of phased approach is standard practice in environmental decision-making, and EPA's authority under 404(c) to establish up-front limits on dredge-and-fill permitting is simply one instance among many.

Indeed, EPA's proactive authority under 404(c) was explicitly upheld by the D.C. Circuit in *Mingo Logan Coal v. EPA*.<sup>35</sup> There, the court of appeals reversed a district court ruling that EPA lacked statutory authority under 404(c) to withdraw a disposal site specification of the Spruce No.1 Surface Mine permit four years after it was granted to Mingo Logan Coal.<sup>36</sup> In making this determination, the court rejected the mining company's argument that EPA's authority under 404(c) is in any way temporally restricted. The 404(c) term "whenever," the Court held, truly means *whenever*:

Using the expansive conjunction "whenever," the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time.

To find otherwise "would eliminate EPA's express statutory right" and "thereby render 404(c)'s parenthetical 'withdrawal' language superfluous—a result to be avoided."<sup>37</sup>

Claims that EPA must wait to protect Bristol Bay until a mining application has been submitted are equally flawed. This would *both* render superfluous the "whenever" provision of the regulation *and* overtly contradict its plain language:

The Administrator may [] prohibit the specification of a site under section 404(c) with regard to any existing *or potential* disposal site *before a permit application has been submitted* to or approved by the Corps or a state."<sup>38</sup>

The plain language of the regulation contradicts the Cohen Report's—as well as PLP's—position that a "hypothetical" mine scenario is an improper basis for initiating 404(c) action. The regulation clearly contemplates 404(c) protection for "potential" disposal sites "before" submission of an application. For instance, in the 1979 preamble to its regulations implementing 404(c), EPA explained that "the statute clearly allows it to use 404(c) *before an application is filed*" and that "... [S]ection 404(c) authority may be exercised *before a permit is applied for*, while an application is pending, or after a permit has been issued. In each case, the Administrator may prevent any defined area in waters of the United States from being specified as a disposal site, or may simply prevent the discharge of any specific dredge or fill material into a specified

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<sup>34</sup> EPA's 404(c) authority is not "confined to the permitting process under Section 404(a)" as the Cohen Report and mining interests would have us believe, but rather, "[t]he Secretary's authority to specify a disposal site is expressly made subject to subsection (c) of section 404." See *Mingo Logan Coal v. EPA*, 714 F.3d 608, 610 (D.C. Cir. 2013) (internal quotations omitted).

<sup>35</sup> *Mingo Logan Coal v. EPA*, 714 F.3d 608 (D.C. Cir. 2013).

<sup>36</sup> *Id.* at 609.

<sup>37</sup> *Id.* at 613–14.

<sup>38</sup> 40 C.F.R. § 231.1(a) (2012) (emphasis added).



area.”<sup>39</sup> Moreover, contrary to the assertion in the Cohen Report that EPA’s use of its 404(c) authority pre-permit is “unprecedented,”<sup>40</sup> EPA has invoked its 404(c) authority preemptively on at least one prior occasion. In its Henry Rem Estate, Marion Becker, et. al. and Senior Corporation final determination, EPA invoked its 404(c) authority to prevent “proposed *and anticipated* rockpiling activities” regarding three different properties: (1) Rem (whose owner was actively seeking a 404 permit with the Army Corps and the Corps had announced its intention to issue permit), (2) Senior Corporation (whose owners were actively seeking a 404 permit and the Army Corps was in the process of preparing documentation for a permit decision), and (3) Becker (whose owners *had not yet applied for a 404 permit* with the Army Corps).<sup>41</sup> Although the property owners of the Becker site had not yet applied for a 404 permit to rockpile, EPA found that the Army Corps, in the supporting documentation for the permit to be issued to the Henry Rem Estate, had predisposed itself to issuing a permit authorizing rockpiling on the Becker tract. Even though no permit application was pending for the Becker site, EPA included all three properties in its 404(c) determination because they are “ecologically similar portions of the East Everglades wetlands complex,” and there was a high probability the Corps would authorize rockpiling which would result in “similar unacceptable adverse environmental effects.”<sup>42</sup> In making its 404(c) determination, EPA found: “Section 231.1 [of the CFR] ... states that EPA’s Section 404(c) authority may be used to either veto a permit ... (as in the case of the Rem site) *or to preclude permitting* either before the Corps has made its final decision (as in the case of the Senior Corp. site) or *in the absence of a permit application* (as in the case of the Becker site).”<sup>43</sup>

As a factual matter, EPA’s pre-permit restriction under 404(c) is no less viable than a 404(c) response to a permit application, because both are based on a predictive assessment from which “actual events will undoubtedly deviate.” To be sure, “[e]ven an environmental assessment of a proposed plan by a mining company would be an assessment of a scenario that undoubtedly would differ from the ultimate development.”<sup>44</sup>

And EPA’s proactive approach in Bristol Bay is well-grounded in common sense. Pre-permit consideration of 404(c) action is ultimately beneficial even to mine development interests like PLP because it will protect it and other stakeholders with mining claims in the Bristol Bay watershed from investing additional resources in a large-scale mining project manifestly unsuited to the watershed’s pristine and ecologically rich environment. As EPA noted in 1979, the use of pre-application 404(c) protection “may well have some economic benefits that outweigh some of the costs,” because it takes place “before industry has made financial and other commitments.”<sup>45</sup>

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<sup>39</sup> *Denial or Restriction of Disposal Sites; Section 404(c) Procedures*, 44 Fed. Reg. 58,076, 58,076-77 (Oct. 9, 1979) (to be codified at 40 C.F.R. pt. 231) (emphasis added) [hereinafter “Denial or Restriction of Disposal Sites”].

<sup>40</sup> *Cohen Report*, at 83-84.

<sup>41</sup> *See Final Determination of the U.S. EPA’s Assistant Adm’r for Water Concerning Three Wetland Properties (sites owned by Henry Rem Estate, Marion Becker, et. al. & Senior Corp.) for which Rockpiling is Proposed in East Everglades, Dade County, Florida* (June 15, 1988) at 3 (emphasis added), available at <http://water.epa.gov/lawsregs/guidance/wetlands/upload/RemFD.pdf>.

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.* (emphasis added).

<sup>44</sup> *BBWA*, at ES-28. *See also* David M. Chambers, Ctr. For Sci. in Pub. Participation, *Comments on Docket #EPA-HQ-ORD-2013-0189* (June 28, 2013) (hardrock mines frequently expanded beyond their initially permitted size).

<sup>45</sup> *Denial or Restriction of Disposal Sites*, at 58077 (“EPA feels that the statute clearly allows it to use 404(c) before

For mining interests that have emphasized the hundreds of millions of dollars they have invested in the Pebble project to date,<sup>46</sup> the *Mingo Logan* opinion—allowing for the withdrawal of a mining permit years after additional funds have been expended for research, development, and construction are complete—is a clear testament to the value of the advance 404(c) determination proposed by EPA here. It would also address State concerns raised in the *Mingo Logan* case: namely, that delayed 404(c) action results in a “squandering” of State resources (i.e., reviewing permit applications and issuing permits and water quality certifications),<sup>47</sup> which could otherwise have been avoided by an earlier determination. Industry cannot have it both ways, complaining about proactive restrictions that provide regulatory certainty and avoid the fruitless commitment of resources while simultaneously arguing that restrictions imposed later squander resources and somehow infringe on rights.

## **B. EPA’s Scientific Assessment and 404(c) Processes Have Unquestionably Been Fair and Inclusive.**

The stated purpose of the Cohen Report was to determine “whether EPA acted fairly” in evaluating potential mining in the Bristol Bay watershed,<sup>48</sup> and the Report sets forth a host of specious arguments in support of PLP’s view that EPA failed to do so.<sup>49</sup> In fact, as appears in detail below, the processes for both the Bristol Bay Watershed Assessment (“BBWA”) and the Proposed Determination under Section 404(c) have been extraordinarily inclusive—perhaps among the most inclusive in EPA’s history.

Although nowhere conceded by the Cohen Report or by PLP, which commissioned it, these processes included a wide array of mechanisms designed to promote engagement with PLP, other agencies, tribal entities, local communities, and the general public. In anticipation of PLP’s submission of mining permit applications, for example, from July 2007 through November 2009, EPA staff participated in over 20 technical working group (“TWG”) meetings<sup>50</sup> as a means to “facilitate pre-application state and federal agency discussions with the project proponent.”<sup>51</sup> The TWG meetings included representatives from PLP, technical consultants, staff from several State of Alaska agencies, staff from other federal agencies, and members of the public.<sup>52</sup> PLP

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an application is filed.”).

<sup>46</sup> Interview by Monica Trauzzi with John Shively, CEO, Pebble Ltd. P’ship, on OnPoint (June 13, 2013), available at <http://www.eenews.net/tv/videos/1698/transcript>.

<sup>47</sup> Randy Huffman, Brief of Amicus Curiae on Behalf of the State of W. VA. & in his Official Capacity as Cabinet Sec’y of the W. VA. Dep’t of Env’tl. Prot., in Support of Appellee Mingo Logan Coal at 12, *Mingo Logan Coal*, 714 F.3d 608 (D.C. Cir. 2013).

<sup>48</sup> *Cohen Report*, at 82.

<sup>49</sup> *See id.*, at 82-94.

<sup>50</sup> *See* Div. of Mining, Land & Water, Alaska Dep’t of Natural Res., *Pebble Project Archive—Technical Working Groups*, (Nov. 2, 2015, 11:38 AM), <http://dnr.alaska.gov/mlw/mining/largemine/pebble/twg/> [hereinafter “Pebble Project Archive”] (compiling meeting minutes from a total of 30 TWG meetings); *see also Proposed Determination*, at 2-3 to 2-4 (describing EPA’s meetings, communications, and information exchange with PLP and its affiliates from 2004 through 2011).

<sup>51</sup> *Pebble Project Archive*, *supra*.

<sup>52</sup> *See id.*

*unilaterally withdrew from this process in January 2010.*<sup>53</sup> This move generated strong criticism and frustration in local communities, and it served as the backdrop for the submission of 404(c) petitions to EPA starting in May 2010.<sup>54</sup> As explained by Senator Lisa Murkowski in 2013, PLP had been announcing “imminent” action on the mine for “nearly a decade,” but “after years of waiting, it is anxiety, frustration and confusion that have become the norm” in many Alaska communities.<sup>55</sup>

EPA commenced a scientific assessment of the Bristol Bay watershed in February 2011,<sup>56</sup> and thereafter EPA provided PLP and other mining interests with repeated opportunities for participation and information exchange. The following are a few examples:

- EPA carefully considered information provided by PLP and its affiliates in the voluminous Wardrop Report and Environmental Baseline Document prepared by Northern Dynasty Minerals and PLP respectively.<sup>57</sup>
- EPA invited the public, including PLP, to nominate candidates for the Peer Review Panel, a panel comprised of 12 independent scientists who reviewed the scope and content of the BBWA and offered suggestions which EPA then incorporated into both its revised and final assessment.<sup>58</sup>
- EPA invited the public to comment on the proposed peer review “charge questions,”<sup>59</sup> and PLP and its affiliates submitted comments on these questions.<sup>60</sup>

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<sup>53</sup> See E-mail from Charlotte McCay, Manager of Permitting, PLP, to TWG Members (Jan. 12, 2010, 10:23 a.m.), available at <http://dnr.alaska.gov/mlw/mining/largemine/pebble/twg/twgsuspended.pdf>.

<sup>54</sup> Joint Letter from Six Federally-Recognized Tribes to Lisa P. Jackson & Dennis J. McLerran, EPA (May 2, 2010) at 5-6 (“The magnitude of the issues and PLP’s recent decision to terminate its Technical Working Groups justify an EPA decision to commence a 404(c) process at this time.”); see also Declaration of Richard B. Parkin at 9, *Pebble Ltd. v. U.S. EPA*, 604 Fed.Appx. 623 (9th Cir. 2015) (No. 3:14-cv-00171 HRH) (“uncertainty about the future of Bristol Bay’s resources remained, as evidenced by the petitions submitted to EPA in 2010”).

<sup>55</sup> Ex. 2, Letter from Lisa Murkowski, United States Senator, to John Shively, CEO, Pebble Ltd. et. al., (July 1, 2013).

<sup>56</sup> Press Release, U.S. EPA, *EPA Plans Scientific Assessment of Bristol Bay Watershed* (Feb. 7, 2011), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/8c1e5dd5d170ad99852578300067d3b3>.

<sup>57</sup> See BBWA (citing the Wardrop Report as “Ghaffari, et al. 2011” and the Environmental Baseline Document as “PLP 2011” throughout).

<sup>58</sup> See *Assessment of Potential Large-Scale Mining on the Bristol Bay Watershed of Alaska: Nomination of Peer Reviewers*, 77 Fed. Reg. 11,111-01 (Feb. 24, 2012) (notice of call for nominations); 77 Fed. Reg. 14,011-02 (Mar. 8, 2012) (extension of the time period for nominations); see also VERSAR, INC., FINAL PEER REVIEW REPORT: EXTERNAL PEER REVIEW OF EPA’S DRAFT DOCUMENT: AN ASSESSMENT OF POTENTIAL MINING IMPACTS ON SALMON ECOSYSTEMS OF BRISTOL BAY, ALASKA 1 (2012) [hereinafter FINAL PEER REVIEW REPORT], available at <http://www2.epa.gov/bristolbay/peer-review-bristol-bay-assessment>.

<sup>59</sup> *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska—Peer Review Panel Members and Charge Questions*, 77 Fed. Reg. 33,213-02, 33,214 (June 5, 2012) (notice of availability and public comment period).

<sup>60</sup> See, e.g., Letter from John Shively, Chief Executive Officer, The Pebble P’ship, to U.S. EPA on Peer Review Panel Members and Charge Questions (June 25, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0358-0017>; Letter from Ronald W. Thiessen, N. Dynasty Minerals Ltd., to U.S. EPA on Peer Review Panel Members and Charge Questions (June 26, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0358-0018>.

- EPA held a 60-day public comment period on the first draft of the BBWA,<sup>61</sup> and during this period, EPA held eight public hearings in six Bristol Bay communities as well as in Anchorage and Seattle.<sup>62</sup> The hearings were attended by approximately 2,000 people, and EPA received more than 233,000 public comments.<sup>63</sup> Over 90 percent of those comments supported EPA.<sup>64</sup> PLP staff and other mining industry representatives participated in the hearings,<sup>65</sup> and PLP submitted multiple sets of written comments to EPA.<sup>66</sup>
- EPA held a three-day Peer Review meeting in Anchorage in August 2012.<sup>67</sup> The first day of the meeting was open for public participation, and EPA heard testimony from approximately 95 people,<sup>68</sup> including PLP staff and other mining industry representatives.<sup>69</sup>
- EPA held a 60-day public comment period on the second draft of the BBWA in April through June 2013,<sup>70</sup> and EPA received more than 890,000 public comments.<sup>71</sup> Once again, a substantial majority of those comments supported EPA: 73 percent of all comments, 84

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<sup>61</sup> *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, AK*, 77 Fed. Reg. 31,353-01 (May 25, 2012) (notice of public comment period).

<sup>62</sup> See *BBWA*, *supra*, at 1-5.

<sup>63</sup> See *id.*

<sup>64</sup> Joel Reynolds, *Unprecedented Coalition in Washington, D.C. Next Week Urging EPA to Protect Bristol Bay, Alaska*, NRDC Switchboard, (Feb. 20, 2014), available at [http://switchboard.nrdc.org/blogs/jreynolds/unprecedented\\_coalition\\_in\\_was.html](http://switchboard.nrdc.org/blogs/jreynolds/unprecedented_coalition_in_was.html).

<sup>65</sup> See, e.g., U.S. Env'tl. Prot. Agency, Draft Bristol Bay Watershed Assessment: Record of Public Comment Meeting: Nondalton, Alaska 8 (testimony of PLP employee Valerie Engebretsen) (June 7, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-4830>; U.S. Env'tl. Prot. Agency, Draft Bristol Bay Watershed Assessment: Record of Public Comment Meeting: New Stuyahok, Alaska 22 (testimony of PLP employee Sarah McCarr) (June 7, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-4154>; Transcript, Anchorage Public Hearing 30–32 (testimony of Bryan Clemenz, Board Member of Alaska Support Industry Alliance) (June 4, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-1289>; *id.* at 52–53 (testimony of John Shiveley, Chief Executive Officer of PLP); Transcript, EPA Bristol Bay Watershed Assessment Public Hearing, Seattle, Washington 30–31 (testimony of NDM employee Sean Magee); *id.* at 47-48 (testimony of Anglo American employee Jason Brune) (May 31, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-1270>.

<sup>66</sup> See, e.g., Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. EPA, on Comments of PLP and Various Experts (July 23, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-5419>; Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. EPA on Legal Analysis of EPA's Bristol Bay Watershed Assessment and Authority Under Section 404(c) (July 22, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-4960>; Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. EPA, with White Papers (July 23, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-ORD-2012-0276-5416>.

<sup>67</sup> See *Notice of Peer Review Meeting for EPA's Draft Report: An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, AK*, 77 Fed. Reg. 40,037-01 (July 6, 2012).

<sup>68</sup> See Final Peer Review Report at 3, *supra*.

<sup>69</sup> See, e.g., *EPA Peer Review Continues Today*, PEBBLEWATCH, (Aug. 8, 2012), available at <http://www.pebblewatch.com/index.php/443-epa-peer-reviewers-hear-public-testimony> (discussing the testimony of employees of PLP, NDM, and Anglo American during August 7, 2012 peer review meeting).

<sup>70</sup> *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, 78 Fed. Reg. 25,266-01 (Apr. 30, 2013) (notice of public comment period); *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, 78 Fed. Reg. 34,093 (June 6, 2013) (extension).

<sup>71</sup> *BBWA*, *supra*, at 1-5.

percent of individual comments from within Alaska and a staggering 98 percent of individual comments from within the Bristol Bay region supported EPA action.<sup>72</sup> And once again PLP submitted multiple sets of written comments.<sup>73</sup>

- EPA released the final BBWA in January 2014,<sup>74</sup> and in March 2014, EPA released detailed responses to public comments totaling 1,225 pages,<sup>75</sup> including extensive responses to the comments submitted by PLP.<sup>76</sup>

EPA's commitment to open dialogue with affected mining interests has continued during the 404(c) review process. EPA commenced its review of potential 404(c) action by sending an initial consultation letter to PLP, the State of Alaska, and the Army Corps in February 2014.<sup>77</sup> In response to requests from PLP and the State of Alaska, EPA extended the initial consultation period from 15 to 60 days and emphasized that the initial consultation was "just one of many opportunities" for PLP and others to submit comments and participate in the 404(c) review process.<sup>78</sup> As part of this initial consultation, PLP and the State of Alaska submitted written comments in late April 2014.<sup>79</sup> Along with the formal comment and consultation opportunities

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<sup>72</sup> Taryn Kiekow Heimer, *The Message to EPA is Clear: It's Time to Stop Pebble Mine*, NRDC Switchboard (Sept. 17, 2013), available at [http://switchboard.nrdc.org/blogs/tkiekow/the\\_message\\_to\\_epa\\_is\\_clear\\_it.html](http://switchboard.nrdc.org/blogs/tkiekow/the_message_to_epa_is_clear_it.html).

<sup>73</sup> See, e.g., Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. EPA, on Comments of Pebble Ltd. P'ship (June 28, 2013), available at <http://www.regulations.gov#!documentDetail;D=EPA-HQ-ORD-2013-0189-5535>; Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. EPA, on Comments of Scientific and Technical Experts (June 28, 2013), available at <http://www.regulations.gov#!documentDetail;D=EPA-HQ-ORD-2013-0189-5536>; Letter from John Shively, Chief Executive Officer, The Pebble P'ship, to U.S. EPA, on Submittal of Report on the Economic and Employment Contributions of a Conceptual Pebble Mine to the Alaska and United States Economies (June 28, 2013), available at <http://www.regulations.gov#!documentDetail;D=EPA-HQ-ORD-2013-0189-5534>.

<sup>74</sup> *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, 79 Fed. Reg. 3,369-02 (Jan. 21, 2014) (notice of availability of final report).

<sup>75</sup> See U.S. EPA, Response to Public Comments on the May 2012 Draft of *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (Mar. 2014), available at <http://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=241743>; U.S. EPA, Response to Public Comments on the April 2013 Draft of *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (2014) [hereinafter EPA Second Round Response], available at <http://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=242810>.

<sup>76</sup> See, e.g., *EPA Second Round Response*, *supra*, at 8, 22–23, 31–43, 45–46, 53–58, 73–76, 90–100, 129–45, 167–95, 256–69, 294–316, 345–68, 372–82, 388–406, 425–28, 440–44, 446–47, 451–53, 456–58, 462, 463, 466–67, 478–95.

<sup>77</sup> See Letter from Dennis J. McLerran, Reg'l Adm'r, U.S. EPA, to PLP, Alaska Dep't of Natural Res., and U.S. Army Corps of Eng'rs (Feb. 28, 2014) (initiating consultation regarding commencement of 404(c) review), available at <http://www2.epa.gov/sites/production/files/2014-02/documents/bristol-bay-15day-letter-2-28-2014.pdf>.

<sup>78</sup> Letter from Dennis J. McLerran, Reg'l Adm'r, U.S. EPA, to Tom Collier, Chief Executive Officer, Pebble Ltd. P'ship (Mar. 13, 2014), available at <http://www2.epa.gov/sites/production/files/2014-03/documents/bristol-bay-15day-letter-extension-3-13-2014.pdf>.

<sup>79</sup> See Letter from Thomas Collier, Chief Executive Officer, Pebble Ltd. P'ship, to Dennis J. McLerran, Reg'l Adm'r, U.S. EPA (Apr. 29, 2014), available at <http://corporate.pebblepartnership.com/perch/resources/plp-submittal-to-epa-apr-2014.pdf>; Letter from Michael C. Geraghty, Attorney Gen., Alaska Dep't of Law, to Dennis McLerran, Reg'l Adm'r, U.S. EPA on State of Alaska's Response to EPA's Notice of Intent to Issue a Public Notice of Proposed Section 404(c) Determination (Apr. 29, 2014), available at: [http://dnr.alaska.gov/commis/cacfa/documents/MeetingInformation/2014Fairbanks/Executive\\_Directors\\_Report/BristolBayWatershedAssessment/14\\_4\\_30SOA\\_Response\\_to\\_EPA\\_re\\_Clean\\_Water\\_Act.pdf](http://dnr.alaska.gov/commis/cacfa/documents/MeetingInformation/2014Fairbanks/Executive_Directors_Report/BristolBayWatershedAssessment/14_4_30SOA_Response_to_EPA_re_Clean_Water_Act.pdf).



listed above, EPA held at least 20 meetings with PLP during the BBWA and early 404(c) processes.<sup>80</sup>

Moreover, after issuing its Proposed Determination under Section 404(c) of the CWA in July 2014,<sup>81</sup> EPA held another 60-day public comment period and public hearings in six Bristol Bay communities and in Anchorage.<sup>82</sup> EPA received approximately 670,000 written comments through this process,<sup>83</sup> including lengthy submissions from PLP.<sup>84</sup> Before EPA's Proposed Determination is finalized (assuming it proceeds to that end), EPA Region 10 will issue a Recommended Determination to the EPA Administrator, and PLP will have yet another opportunity for consultation with EPA.<sup>85</sup>

EPA's processes relating to Bristol Bay have greatly exceeded the requirements set forth in federal executive branch and EPA-specific policies supporting public participation and transparency.<sup>86</sup> Indeed, EPA's Bristol Bay process more than fulfilled its policy to "provide[] the public with many avenues, including public meetings, webinars, and conferences, to learn about, participate in, and collaborate with us on our processes and meeting the Agency's mission."<sup>87</sup> Furthermore, EPA fully satisfied its tribal consultation and coordination responsibilities, pursuant to which EPA must "ensure[] the close involvement of tribal governments and give[] special consideration to their interests whenever EPA's actions may affect Indian country or

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<sup>80</sup> See U.S. EPA, *Senior Manager Schedules*, Dennis J. McLerran, Regional Administrator, EPA Region 10 (Oct. 2010 to Oct. 2014), available at [http://yosemite.epa.gov/opa/admpress.nsf/Calendars\\_3?OpenView&RestrictToCategory=Dennis%20J.%20McLerran.%20Regional%20Administrator,%20US%20EPA%20Region%2010&count=10000](http://yosemite.epa.gov/opa/admpress.nsf/Calendars_3?OpenView&RestrictToCategory=Dennis%20J.%20McLerran.%20Regional%20Administrator,%20US%20EPA%20Region%2010&count=10000); U.S. EPA, *Senior Manager Schedules*, Gina McCarthy, EPA Administrator (Aug. 2013 to Oct. 2014), available at [http://yosemite.epa.gov/opa/admpress.nsf/Calendars\\_3?OpenView&RestrictToCategory=Gina%20McCarthy.%20Administrator,%20Environmental%20Protection%20Agency&count=10000](http://yosemite.epa.gov/opa/admpress.nsf/Calendars_3?OpenView&RestrictToCategory=Gina%20McCarthy.%20Administrator,%20Environmental%20Protection%20Agency&count=10000); See also, e.g., U.S. EPA, *Meetings with Multiple Stakeholders* (Aug. 27, 2013), available at [http://yosemite.epa.gov/opa/admpress.nsf/Calendars\\_3/85256CBD007E4BB785257BCE006F5727?OpenDocument](http://yosemite.epa.gov/opa/admpress.nsf/Calendars_3/85256CBD007E4BB785257BCE006F5727?OpenDocument).

<sup>81</sup> See *Proposed Determination*, *supra*.

<sup>82</sup> See U.S. EPA, *Proposed Determination to Restrict the Use of an Area as a Disposal Site: Pebble Deposit Area, Southwest Alaska*, 79 Fed. Reg. 42,314 (July 21, 2014) (notice of public comment period and public hearings); 79 Fed. Reg. 56,365 (September 19, 2014) (extension). PLP representatives testified at these public hearings. See, e.g., Alaska Dispatch, *Hundreds Make Their Case on Pebble Mine to EPA in Anchorage Hearing* (Aug. 12, 2014), available at <http://www.adn.com/article/20140812/hundreds-make-their-case-pebble-mine-epa-anchorage-hearing> (discussing testimony of PLP CEO Tom Collier); KDLG, *Alaska Natives Have Strong Presence at EPA Hearing* (Aug. 18, 2014), available at <http://kdlg.org/post/alaska-natives-have-strong-presence-epa-hearing> (discussing testimony of PLP employees at Dillingham hearing).

<sup>83</sup> See *Opposition to Pebble Ltd. P'ship's Motion for expedited Discovery at 7, Pebble Ltd. v. U.S. EPA*, 604 Fed.Appx. 623 (9th Cir. 2015) (No. 3:14-cv-00171-HRH).

<sup>84</sup> See *Pebble Limited P'ship, Comments on Proposed Determination* (Sept. 19, 2014), available at <http://www.regulations.gov/#!documentDetail;D=EPA-R10-OW-2014-0505-3777>.

<sup>85</sup> See 40 C.F.R. § 231.6; U.S. EPA, *Bristol Bay 404(c) Process*, (Nov 2, 2015, 1:37 PM) <http://www2.epa.gov/bristolbay/bristol-bay-404c-process>.

<sup>86</sup> See e.g., *Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 4685 (Jan. 26, 2009); 40 C.F.R. pt. 25 (general EPA public process requirements); 40 C.F.R. pt. 231 (Clean Water Act section 404(c) public process requirements); U.S. EPA, *Open Initiative Homepage*, (Nov. 2, 2015, 1:40 PM) <http://www2.epa.gov/open>.

<sup>87</sup> U.S. EPA, *Open Government Plan 3.0*, at 7 (June 2014), available at <http://www2.epa.gov/sites/production/files/2014-06/documents/epaopengovernmentplan3.pdf>.

other tribal interests.”<sup>88</sup>

Despite the exceptional extent of EPA’s public engagement, the Cohen Report nevertheless argues that EPA “inhibited the involvement” of the Army Corps and the State of Alaska by failing to wait for PLP to submit a permit application.<sup>89</sup> Yet the Cohen Report acknowledges that, despite having multiple opportunities to participate, both the Corps and the State of Alaska refused to do so.<sup>90</sup> The Cohen Report does not point to a single specific issue or category of information for which Corps or State input was indispensable. Nor, in any case, could it do so, because, in spite of Corps and State refusal to participate, EPA—with the help of contractors, peer reviewers, and enormous input from PLP, other stakeholders, and the public—has developed a body of scientific and technical information that robustly supports the Proposed Determination.

EPA has also proceeded in a manner fully compliant with all applicable regulations and procedures. For instance, the BBWA was prepared in accordance with the demanding peer review requirements applicable to highly influential scientific assessments (“HISAs”).<sup>91</sup> HISA guidelines are designed to “enhance the quality and credibility of the government’s scientific information” by ensuring that peer review is transparent, that the reviewers possess the necessary expertise, and that the agency addresses the reviewers’ potential conflicts of interests and independence from the agency.<sup>92</sup> HISAs are subject to “stricter minimum requirements” for peer review than other types of scientific assessments.<sup>93</sup> EPA has also complied with all aspects of the procedures specified in its regulations for 404(c) determinations.<sup>94</sup>

The Cohen Report does not dispute that EPA has complied with these procedural requirements. Nor, as far as we know, has such compliance been disputed by PLP.

### **C. NEPA Review Is Not Necessary for an EPA 404(c) Decision.**

The Cohen Report’s contentions regarding EPA’s ability to develop adequate scientific and technical information outside the permitting context are equally unfounded.<sup>95</sup> The Report discusses at great length the benefits of review under the National Environmental Policy Act (“NEPA”)<sup>96</sup> for informing agency decision-making, and it argues that the NEPA approach is

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<sup>88</sup> U.S. EPA, *EPA Policy on Consultation and Coordination with Indian Tribes* at 4 (2011), available at <http://www2.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>. See generally U.S. EPA, *Region 10 Tribal Consultation and Coordination Procedures* (2012), available at <http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100FFEY.txt>.

<sup>89</sup> *Cohen Report*, at 87.

<sup>90</sup> *Cohen Report*, at 47-48, 68-69, 87-89.

<sup>91</sup> See U.S. EPA, *Frequently Asked Questions About Bristol Bay Assessment* (Oct. 26, 2015) <http://www2.epa.gov/bristolbay/frequently-asked-questions-about-bristol-bay-assessment>

<sup>92</sup> See OMB, *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664, 2665 (Jan. 14, 2005), available at [http://www.ers.usda.gov/media/138535/peerreviewbulletin\\_1\\_.pdf](http://www.ers.usda.gov/media/138535/peerreviewbulletin_1_.pdf).

<sup>93</sup> See *id.*

<sup>94</sup> See 40 C.F.R. Part 231; U.S. EPA, *Bristol Bay*, (Oct. 26, 2015) <http://www2.epa.gov/bristolbay>.

<sup>95</sup> See *Cohen Report*, at 59-61, 84-85.

<sup>96</sup> 42 U.S.C. § 4321 *et seq.*



superior to the manner in which EPA developed information supporting its Proposed Determination in Bristol Bay.<sup>97</sup> This line of reasoning is a red herring, however, because it ignores the long established fact that EPA’s authority to restrict large-scale mining in Bristol Bay using its 404(c) Clean Water Act authority is separate and distinct from any process under NEPA.

Here, in the absence of a 404 permit application (which is solely within PLP’s power to file), the requirements of NEPA are not triggered. Because PLP has not applied for a 404 permit with the Army Corps to dispose of dredged or fill material from the Pebble Mine, EPA’s review is based solely on its authority under Section 404(c) of the Clean Water Act. Contrary to PLP’s claims, review under NEPA is not required before EPA may invoke its authority under Section 404(c). In other words, NEPA does not somehow entitle PLP to separate NEPA review before EPA can prohibit or restrict Pebble Mine under the Clean Water Act.

NEPA was enacted in 1969 precisely to ensure that projects like the one pursued by PLP cannot be approved without environmental review. NEPA was never intended to burden EPA actions necessary under Section 404(c) to prevent large-scale mining from contaminating a resource like Bristol Bay under the Clean Water Act. In fact, EPA action under Section 404(c) triggers separate notice and comment requirements under the Clean Water Act—a rigorous process subject to similar standards of transparency, public participation and informed agency decision making as NEPA. It deserves special emphasis that PLP itself had the power to secure the full NEPA review that it allegedly seeks, and it could do so by filing a permit application—something, again, it has failed for years to do. By this failure—for reasons known only to itself—PLP has created an environment of anxiety and uncertainty in the Bristol Bay region, despite a decade of promises that such an application is imminent. As Senator Lisa Murkowski observed, PLP has promised “imminent” action for “nearly a decade” but “after years of waiting, it is anxiety, frustration, and confusion that have become the norm” in many Alaska communities.<sup>98</sup> It is precisely because of these years of anxiety and confusion—created entirely by PLP—that federally recognized tribes, the Bristol Bay Native Corporation, the commercial and sport fishing industries of Bristol Bay, and numerous conservation groups petitioned EPA to initiate 404(c) action to protect Bristol Bay.

Indeed, even outside the NEPA context, EPA has ample capability to develop the scientific and technical information necessary to support a proactive 404(c) determination. For instance, EPA has broad research and investigation authority,<sup>99</sup> and it employs scientists, engineers, and other staff who are experienced in making a wide range of complex determinations regarding the protection of water resources.<sup>100</sup>

The Cohen Report also argues that the “well-established Permit/NEPA process is the most

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<sup>97</sup> See *Cohen Report*, at 8-17, 84-85.

<sup>98</sup> See Ex. 2, Letter from Lisa Murkowski, United States Senator, to John Shively, CEO, Pebble Ltd. et. al., (July 1, 2013).

<sup>99</sup> 33 U.S.C. § 1254.

<sup>100</sup> See generally U.S. EPA, *About the Office of Water*, (Oct. 26, 2015), available at <http://www2.epa.gov/aboutepa/about-office-water>.

accurate means of assessing environmental impacts of proposed development.”<sup>101</sup> This argument rests on the false premise that the issues being addressed and the decisions being made in the pre-permit context are the same as those in the permitting stage, which is simply not the case.

In the offshore oil and gas context, for example, the Bureau of Ocean Energy Management (“BOEM”) argued that any error resulting from its use of a one billion barrel estimate for total offshore oil production could be corrected during the exploration and development stages of the process.<sup>102</sup> The Ninth Circuit disagreed, explaining that:

An appropriate time to estimate the total oil production from the lease sale is the time of the lease sale itself. ... A later project or site-specific environmental analysis is an inadequate substitute for an estimate of total production from the lease sale as a whole. It is only at the lease sale stage that the agency can adequately consider cumulative effects of the lease sale on the environment, including the overall risk of oil spills and the effects of the sale on climate change. It is also only at the lease sale stage that the agency can take into account the effects of oil production in deciding which parcels to offer for lease.<sup>103</sup>

So, too, in the Bristol Bay context, EPA’s goal was to evaluate a range of different levels of mining activity and establish parameters that would guide all future mine development and prevent an “unacceptable adverse effect” on Bristol Bay salmon resources. It is entirely reasonable for EPA to conclude in this instance—based on its 404(c) authority—that this type of broad, programmatic analysis and decision-making is best done in the pre-permit context. The Cohen Report erroneously characterizes as “admissions” EPA’s statements distinguishing between the nature and purpose of its proposed 404(c) action—establishing parameters for future permitting and mine development—and the site-specific issues that would be addressed in a future permitting process relating to a particular mine proposal—facility design, permit conditions, mitigation measures, economic impacts, etc.<sup>104</sup>

#### **D. Hypothetical Scenarios Are Standard in Environmental Decision-making, Not an Unusual Approach.**

The Cohen Report’s arguments regarding EPA’s use of hypothetical scenarios similarly reflect a limited understanding of environmental law and practice.<sup>105</sup> If there were something inherently problematic about relying on hypothetical scenarios, this would call into question the standard practices of numerous federal and state agencies over the past four decades or more.

EPA’s contaminated site cleanup rules, for example, require EPA and other agencies to “ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate

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<sup>101</sup> *Cohen Report*, at 84.

<sup>102</sup> *See Native Village of Point Hope v. Jewell*, 740 F.3d 489, 504 (9<sup>th</sup> Cir. 2014).

<sup>103</sup> *Id.*

<sup>104</sup> *See Cohen Report*, 59-61, 84-85.

<sup>105</sup> *See id.*, at 84-85.

remedy selected.”<sup>106</sup> Remedial action typically proceeds in two phases. Hypothetical remedial alternatives are considered during the remedial investigation /feasibility study phase.<sup>107</sup> After the remedial approach has been selected, the details of the project are then developed during the remedial design/remedial action phase.<sup>108</sup>

The same general approach is used in NEPA, as NEPA requires federal agencies to evaluate hypothetical alternatives at both the programmatic stage and the permitting stage for a wide variety of projects and actions.<sup>109</sup> Many states likewise require analysis of hypothetical alternatives under state laws modeled after the federal NEPA statute.<sup>110</sup>

In short, the use of hypothetical scenarios is standard practice in environmental decision-making, and there is nothing about them that undermines the validity of EPA’s scientific assessment or its proposed 404(c) determination.

Furthermore, the Cohen Report dismisses the fact that EPA appropriately relied on PLP’s own project data and plans to form its assumptions and baseline data. PLP’s materials provided detailed information, maps, and descriptions on which to assess realistic, fact-based mining scenarios. Indeed, Northern Dynasty Minerals itself characterized the plans as set out in its Wardrop Report<sup>111</sup>—which, along with PLP’s Baseline Document, EPA used to develop its mining scenarios—as economically viable, technologically achievable and permissible.

It is Northern Dynasty Minerals and PLP’s use of material—not EPA’s—that is questionable, since those companies have willfully disseminated contradictory information to the public. As described in a letter from Senator Maria Cantwell to the U.S. Securities and Exchange Commission,<sup>112</sup> Northern Dynasty Minerals submitted its Wardrop Report to meet filing requirements with the SEC on February 24, 2011. When it did so, it informed the SEC and investors that the proposed project design and specifications contained therein were “feasible and permissible.” EPA relied on this language in its BBWA, stating that Pebble 2.0 and Pebble 6.5 are among the most likely to be developed in the watershed, as they “reflect projects based on extensive exploration, assessment, and preliminary engineering, which are described in [the Wardrop Report] as ‘economically viable, technically feasible and permissible’.”<sup>113</sup>

Yet, in order to block EPA’s efforts, PLP referred to the “very same Wardrop Report” as a

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<sup>106</sup> 40 C.F.R. § 300.430(e)(1).

<sup>107</sup> See 40 C.F.R. § 300.430.

<sup>108</sup> See 40 C.F.R. § 300.435.

<sup>109</sup> See 40 C.F.R. § 1502.14 (requiring agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives”).

<sup>110</sup> See, e.g., Washington State Environmental Policy Act, Wash. Rev. Code § 43.21C.030; Mont. Code Ann. § 75-1-201.

<sup>111</sup> See Wardrop, *Preliminary Assessment of the Pebble Project: Sw. Alaska* (Feb. 17, 2011), available at [http://www.northerndynastyminerals.com/i/pdf/ndm/Pebble\\_Project\\_Preliminary%20Assessment%20Technical%20Report\\_February%2017%202011.pdf](http://www.northerndynastyminerals.com/i/pdf/ndm/Pebble_Project_Preliminary%20Assessment%20Technical%20Report_February%2017%202011.pdf).

<sup>112</sup> See Letter from Senator Maria Cantwell, to Elisse B. Walter, Chairman, U.S. Securities & Exchange Comm’n (Mar. 18, 2013), available at <http://www.cantwell.senate.gov/public/cache/files/169563c5-e840-4021-911d-74f63d55e13f/SEC%20pebble%20final%2003182013.pdf>. [hereinafter, “Senator Cantwell Letter”].

<sup>113</sup> BBWA, at 6-2-.

“fantasy proposal” when it delivered formal testimony to the EPA in August of 2012,<sup>114</sup> and, in its submission to EPA regarding the first draft Assessment, as a “generic mine development scenario” that “is missing critical information.”<sup>115</sup> These conflicting formal statements to two different federal agencies—statements that cannot both be true—leave the public, corporate investors, and two United States regulatory bodies to wonder if Northern Dynasty Minerals is misleading its investors and the Securities and Exchange Commission, or intentionally providing misleading testimony to EPA.

#### **E. EPA Has Fully Explained the Basis for Its Proposed Determination.**

In defiance of the record, the Cohen Report contends that “the Proposed Determination contains no explanation by EPA as to how it concluded that the ‘Pebble 0.25 mine’ was not reasonably likely to cause an unacceptable adverse impact, but that a larger mine was reasonably likely to do so.”<sup>116</sup> Yet EPA has offered the following detailed explanation of precisely that issue:

The 0.25 stage mine is based on the worldwide median size porphyry copper deposit (Singer et al. 2008). Although this smaller size is dwarfed by the mine sizes that NDM put forward to the SEC (Ghaffari et al. 2011, SEC 2011), its impacts would still be significant.

In total, the Bristol Bay Assessment estimates that habitat losses associated with the 0.25 stage mine would include nearly 24 miles (38 km) of streams, representing approximately 5 miles (8 km) of streams with documented anadromous fish occurrence and 19 miles (30 km) of tributaries of those streams (EPA 2014: Chapter 7). Total habitat losses would also include more than 1,200 acres (4.9 km<sup>2</sup>) of wetlands, lakes, and ponds, of which approximately 1,100 acres (4.4 km<sup>2</sup>) are contiguous with either streams with documented anadromous fish occurrence or tributaries of those streams. For the largest mine that NDM put forward to the SEC (the 6.5 stage mine), stream losses would expand to 94 miles (151 km), representing over 22 miles (36 km) of streams with documented anadromous fish occurrence and 72 miles (115 km) of tributaries of those streams (EPA 2014: Chapter 7). Total habitat losses for the 6.5 stage mine would also include more than 4,900 acres (19.8 km<sup>2</sup>) of wetlands, lakes, and ponds, of which approximately 4,100 acres (16.6 km<sup>2</sup>) are contiguous with either streams with documented anadromous fish occurrence or tributaries of those streams.

To put these numbers in perspective, stream losses for just the 0.25 stage mine would equal a length of more than 350 football fields and the 0.25 stage mine wetland losses would equal an area of more than 900 football fields. Although Alaska has many streams and wetlands that support salmon, individual streams, stream reaches, wetlands, lakes, and ponds play a critical role in protecting the genetic diversity of

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<sup>114</sup> Senator Cantwell Letter, *supra*, at 2.

<sup>115</sup> Pebble Limited Partnership (Crowell & Moring LLP) Comments on *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, in Docket Number #EPA-HQ-ORD-2012-0276, at 49 (July 23, 2012), available at <http://www.northerndynastyminerals.com/i/pdf/ndm/attachment-3-of-8.pdf>.

<sup>116</sup> Cohen Report, at 92.

Bristol Bay's salmon populations. Individual waters can support local, unique populations (Quinn et al. 2001, Olsen et al. 2003, Ramstad et al. 2010, Quinn et al. 2012). Thus, losing these populations would erode the genetic diversity that is crucial to the stability of the overall Bristol Bay salmon fisheries (Hilborn et al. 2003, Schindler et al. 2010, EPA 2014: Appendix A).

These stream, wetland, and other aquatic resource losses also would reverberate downstream, depriving downstream fish habitats of nutrients, groundwater inputs, and other subsidies from lost upstream aquatic resources. In addition, water withdrawal, capture, storage, treatment, and release at even the 0.25 stage mine would result in streamflow alterations in excess of 20% in more than 9 miles (nearly 15 km) of streams with documented anadromous fish occurrence. These streamflow changes would result in major changes in ecosystem structure and function and would reduce both the extent and quality of fish habitat downstream of the mine to a significant degree. The impacts from the larger mine sizes NDM has forecasted would be significantly higher. The 2.0 and 6.5 stage mines would result in streamflow alterations in excess of 20% in more than 17 miles (27 km) and 33 miles (53 km), respectively, of streams with documented anadromous fish occurrence (EPA 2014: Chapter 7).

Moreover, EPA's proposed restrictions under Section 404(c) flow directly from the agency's findings in the BBWA, contrary to the Cohen Report's assertion that there is a "fundamental inconsistency between the BBWA and the Proposed Determination."<sup>117</sup> For instance, in language that mirrors the BBWA, the Regional Administrator for EPA Region 10 proposed that EPA "restrict the discharge of dredged or fill material related to mining the Pebble deposit into waters of the United States within the potential disposal site that would, individually or collectively, result in any of the following" stream or wetland losses:<sup>118</sup>

- 5 or more linear miles of streams with documented anadromous fish occurrence;<sup>119</sup>
- 19 or more linear miles of stream tributaries where anadromous fish occurrence is not currently documented, but that are tributaries to streams with documented anadromous fish occurrence;<sup>120</sup>
- 1,100 acres or more of wetlands, lakes, or ponds contiguous with either streams with documented anadromous fish occurrence or tributaries of those streams;<sup>121</sup> and

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<sup>117</sup> *Cohen Report*, at 91.

<sup>118</sup> *PD*, at 5-1.

<sup>119</sup> *Compare Proposed Determination*, at 5-1, with *BBWA*, at ES-14 (concluding that the mine footprint alone for a 0.25 billion ton mine would destroy 5 miles of known salmon spawning or rearing habitat).

<sup>120</sup> *Compare Proposed Determination*, at 5-1, with *BBWA*, at ES-14 (concluding that the mine footprint alone for a 0.25 billion ton mine would destroy a total of 24 miles of anadromous and non-anadromous streams).

<sup>121</sup> *Compare Proposed Determination*, at 5-1, with *BBWA*, at ES-14 (concluding stream flow alterations resulting from the mine footprint alone for a 0.25 billion ton mine would destroy 1,300 acres of wetlands, ponds, and lakes serving as off-channel habitat for salmon and other fishes).

- Greater than 20% of alteration of daily flow in 9 or more linear miles of streams with documented anadromous fish occurrence.<sup>122</sup>

EPA Region 10's proposed restrictions are not only based on the BBWA, but they are conservative, because aquatic resource losses at the levels specified would still amount to massive impacts. Never before has the government authorized a mining project in Alaska with the potential for this extent of anadromous streams and wetland destruction.<sup>123</sup> At Alaska's Rock Creek Gold Mine, for example, the U.S. Army Corps of Engineers permitted discharges into about 347 acres of waters of the U.S. for purposes of mine construction and authorized the permanent loss of about 171 acres of wetlands, but the affected waters were not anadromous.<sup>124</sup> The Red Dog Mine recently obtained approvals for an expansion that involved the placement of dredged or fill material in less than 10 acres of wetlands.<sup>125</sup> At the Kensington Mine in Southeast Alaska, a 404 permit for the construction of new facilities affected approximately 62 acres of anadromous waters and wetlands.<sup>126</sup> And, at Greens Creek Mine, the presence of salmon streams led the U.S. Forest Service to reject the operator's proposed 116-acre tailings expansion, which would have resulted in the direct loss of 1,646 linear feet (0.3 mile) of salmon stream habitat from tailings, in favor of a smaller tailings facility expansion alternative that would not discharge into streams.<sup>127</sup> The Corps has never issued 404 permits in Alaska allowing losses anywhere near 19 miles of non-anadromous streams, 5 miles of anadromous stream losses, or 1,100 acres of

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<sup>122</sup> Compare Proposed Determination, at 5-1, with BBWA, at ES-14 (concluding stream flow alterations exceeding 20% resulting from the mine footprint alone for a 0.25 billion ton mine would adversely affect habitat in 9.3 miles of salmon streams).

<sup>123</sup> For 404 permit documents on large-scale mining projects in Alaska, see Alaska Dep't of Natural Res., *Large Mine Permitting*, (Nov. 2, 2015 2:06 PM) <http://dnr.alaska.gov/mlw/mining/largemine/>.

<sup>124</sup> See Department of the Army, *Permit Evaluation and Decision Document* (Feb. 26, 2007), available at <http://dnr.alaska.gov/mlw/mining/largemine/rockcreek/pdf/rcacoedd.pdf>.

<sup>125</sup> See U.S. Army Corps of Engineers, *Public Notice of Application for Permit* (Apr. 23, 2013), available at [http://www.poa.usace.army.mil/Portals/34/docs/regulatory/publicnotices/POA-1984-12-M49\\_Chukchi%20Sea\\_PN.pdf](http://www.poa.usace.army.mil/Portals/34/docs/regulatory/publicnotices/POA-1984-12-M49_Chukchi%20Sea_PN.pdf) (proposed work included "1.79 acres of excavated wetlands to raise the dam plus 5.7 acres of excavated wetlands and 6.6 acres of excavated uplands to construct the road."). Previous authorizations at Red Dog included proposed work that would "affect 245 acres, of which 119 acres are wetlands."; U.S. EPA, *Red Dog Mine Extension, Aqqaluk Project: Final Supplemental Environmental Impact Statement* (Oct. 2009), available at <http://dnr.alaska.gov/mlw/mining/largemine/reddog/pdf/rdseis2009vol2a.pdf>.

<sup>126</sup> See U.S. Army Engineer District, Alaska, *Department of the Army Permit POA-1990-592-M, Lynn Canal 31* (June 17, 2005), available at <http://dnr.alaska.gov/mlw/mining/largemine/kensington/pdf/kensusacelynn canal05.pdf> (authorizing permittee to "[d]redge, place structures, and discharge an approximate total of 3,487,950 cubic yards of fill and dredged fill materials into an approximate total of 61.7 acres of waters."); see also U.S. Army Corps of Engineers, *Public Notice of Application for Permit POA-1990-592-M6* (July 17, 2009) available at <http://dnr.alaska.gov/mlw/mining/largemine/kensington/pdf/kensusacepnjul09.pdf> ("A total of 83.4 acres of fill was authorized under DA permit modification POA-1990-592-M"). See also, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2464 (2009) ("Over the life of the mine, Coeur Alaska intends to put 4.5 million tons of tailings in the lake. This will raise the lakebed 50 feet—to what is now the lake's surface—and will increase the lake's area from 23 to about 60 acres.").

<sup>127</sup> See Alaska Journal of Commerce, *Greens Creek gets OK for partial expansion of tailings facility* (Sept. 12, 2013), available at <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/September-Issue-3-2013/Greens-Creek-gets-OK-for-partial-expansion-of-tailings-facility/>; see also, U.S. Dep't. of Agriculture, *Greens Creek Mine Tailings Disposal Facility Expansion, Final EIS and ROD Vol. 1* (Aug. 30, 2013), available at [http://dnr.alaska.gov/mlw/mining/largemine/greencreek/pdf/FEIS\\_ROD.pdf](http://dnr.alaska.gov/mlw/mining/largemine/greencreek/pdf/FEIS_ROD.pdf) (selecting alternative D, which was developed to "avoid filling any part of Tributary Creek with tailings.").

wetlands, lakes, or ponds.

Furthermore, the Cohen Report erroneously criticizes the proposed restrictions because they do not take into account the adverse impacts on salmon and their habitat resulting from “wastewater treatment plant failure,” “blockage of culverts,” “multiple failures of infrastructure in the event of a natural or man-made disaster,” and other factors.<sup>128</sup> EPA’s decision to limit the focus of its restrictions to the impacts posed directly by the mine footprint rendered its proposed restrictions very conservative and favorable to mineral development. These other factors are all considerations that EPA could reasonably have relied on in developing its restrictions, and doing so could only have led to a *more* stringent approach.

By using the Pebble 0.25 scenario as a baseline and focusing primarily on the impacts associated with the mine footprint, EPA Region 10 has developed proposed restrictions that are closely tied to and amply supported by the BBWA and administrative record.

#### **F. The Cohen Report Mischaracterizes Normal and Appropriate Government Activities.**

The Cohen Report’s suggestion that EPA may have pre-determined its decision to undertake 404(c) action is meritless and unsupported by the record.

For instance, the Report confuses lower-level staff advocacy within an agency early on in a decision-making process with the final decision made by the upper level agency managers with the benefit of a comprehensive and transparent public process. Even the documents cited in the Report demonstrate that EPA officials, especially higher level officials, have consistently stated throughout the process that scientific review and public comment could cause it to change direction.<sup>129</sup> At no time has a senior management-level official expressed a commitment to a final 404(c) action. Indeed, even today, there is no clear and final decision from EPA Headquarters as to whether the agency will ultimately accept Region 10’s Proposed Determination and proceed to a Final Determination.

The Report also conflates the policymaking process, in which it is standard practice for administrative agency staff members to advocate for their preferred programs and policy directions, with the scientific review process, where a higher level of objectivity is ensured (and was achieved in this instance) through the safeguards offered by a robust peer review process. In light of the record-breaking public comment processes (generating well over one million public comments) and the two rounds of peer review, any viewpoints possibly harbored by individual lower level EPA staff members prior to those processes is wholly irrelevant to the validity of the agency’s final BBWA or Proposed Determination.

Similarly, the Cohen Report’s allegation that “certain EPA officials had inappropriately close relationships with anti-mine advocates” has no factual basis.<sup>130</sup> This contention mischaracterizes normal government interactions with stakeholders that are strongly supported by the EPA and

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<sup>128</sup> *Cohen Report*, at 91.

<sup>129</sup> *Id.* at 13-14, 76, 98, App-97.

<sup>130</sup> *Id.* at 90.



federal government policies discussed above, including outreach, information-gathering, sharing of ideas, brainstorming of solutions, discussion of pros and cons, and submission of relevant information. Indeed, the Cohen Report's contention is belied even by PLP's own repeated statements (documented in the Report<sup>131</sup>) of gratitude and appreciation for EPA's open-door policy, willingness to meet, and strong interest in PLP's scientific data. It would be ironic indeed if the end result of the Cohen Report and PLP's self-serving advocacy for greater transparency is to discourage federal agencies from maintaining open communications with stakeholders.

The Cohen Report's charges relating to EPA's lack of candor and cooperation are equally unfounded.<sup>132</sup> EPA has repeatedly clarified that the BBWA process was a scientific investigation, as opposed to a decision-making process, and that the scientific assessment would inform its later decision-making. The Cohen Report disingenuously points to these clarifying statements as an alleged promise never to undertake a 404(c) action at all—a contention frivolous of its face.

The Report also asserts that EPA has failed to cooperate with congressional inquiries and FOIA requests.<sup>133</sup> This is simply untenable in light of the thousands of documents EPA has disclosed to Congress, and the Alaska federal district court's recent decision finding that EPA conducted an adequate FOIA search and “worked cooperatively” thereafter with PLP representatives to track down additional responsive documents, as well as its finding that there was no evidence of EPA bad faith.<sup>134</sup> With regard to the cooperativeness of EPA's former employee Phil North, it is clear from the contemporaneous email traffic that his computer crash occurred in 2010,<sup>135</sup> long before Congressional inquiries began in 2012, long before PLP submitted its FOIA request to EPA in 2014, and long before the FOIA litigation that ensued. The Cohen Report's insinuation that the computer crash was fabricated as a means to hide documents has no basis whatsoever.

Finally, the off-hand remark on the last page of the Cohen Report suggesting that “watershed planning” is a novel activity that should raise alarm bells and prompt congressional investigation<sup>136</sup> is manifestly frivolous and reflects the authors' limited understanding of the CWA. Watershed planning is commonly undertaken by EPA and states under the TMDL program. For instance, EPA has approved TMDLs for the 40 lakes, rivers, creeks, bays, and harbors identified as impaired by the Alaska Department of Environmental Conservation.<sup>137</sup> The proactive use of 404(c) to prevent such impairment is likewise well within EPA's authority and consistent with its statutory mandate under the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”<sup>138</sup>

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<sup>131</sup> *Id.* at 48, App-5.

<sup>132</sup> *Id.* at 90-91.

<sup>133</sup> *Id.* at 92.

<sup>134</sup> See Order on Motion for Summary Judgment, *Pebble Ltd. Partnership v. U.S. EPA*, (D. Alaska, Aug. 24, 2015) (No. 3:14-cv-0199) 2015 WL 6123614.

<sup>135</sup> *Cohen Report*, at fn 490.

<sup>136</sup> *Id.* at 94.

<sup>137</sup> Alaska Dep't of Env'tl. Conservation, *Approved TMDLs* (Nov. 2, 2015, 2:41 PM) <https://dec.alaska.gov/water/tmdl/approvedtmdls.htm>.

<sup>138</sup> 33 U.S.C. § 1251.

### **G. The Cohen Report Lacks Transparency and Reflects a Biased Perspective.**

Given its criticism of EPA and its process for lack of transparency and “level of candor,” it is both notable and ironic that the Cohen Report lacks even the most basic level of transparency. The report states that “more than 60 individuals ... spoke with me or members of my team,”<sup>139</sup> and yet the Report only identifies three of these people by name.<sup>140</sup> The Cohen Report also fails to disclose any information about the content of these 60 interviews, what information was drawn from them, whose comments and perspectives were incorporated into the Report, and whose comments and perspectives were excluded from the Report.

The Report’s failure to disclose the names and affiliations of the interviewees suggests that this group may have been skewed in favor of mine development and opposition to EPA’s proposed restrictions. This inference is supported by the fact that 140 of the stakeholders Secretary Cohen approached refused to participate.<sup>141</sup> The Report lists several categories of people that were interviewed, and this list notably excludes any representatives from commercial or sports fishing organizations, Bristol Bay tourism operators, public interest organizations, or environmental groups.<sup>142</sup> Since these have been among the strongest supporters of EPA’s proposed restrictions and have participated actively in the administrative decision-making processes for several years, any Report written without their input is bound to reflect a biased perspective.

This skewed nature of the report is underscored by the fact the U.S. Department of Justice refused to allow current federal employees at EPA and other federal agencies to participate in the investigation.<sup>143</sup> Indeed, U.S. Assistant Attorney General John Cruden sent a strongly worded letter to Secretary Cohen in April 2015 urging him and his firm to “desist” in the PLP-sponsored “private investigation.”<sup>144</sup> Mr. Cruden emphasized that “no valid purpose could be served” by this effort.<sup>145</sup> He further explained that the Cohen review “overlaps with the pending litigation” and is “in tension with the preliminary injunction” that PLP obtained, purportedly to maintain the status quo rather than provide an opportunity for PLP to conduct civil discovery outside of the appropriate channels.<sup>146</sup> Accordingly, Mr. Cruden advised that the United States would not cooperate in the development of the Cohen Report, and he requested prior notice before any contact with employees of the EPA, U.S. Fish and Wildlife Service, National Park Service, or U.S. Geological Survey in order to allow the government to “take appropriate actions.”<sup>147</sup> It is hard to imagine any other credible and serious investigation pushing forward despite zero participation from the principal actors involved and then (1) making bold conclusions critical of those actors and (2) recommending that they be scrutinized even more closely than they already

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<sup>139</sup> *Cohen Report*, at 4.

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *Id.* at 4; *see also* Ex.4, Letter from Joel Reynolds, NRDC, to C. Scheeler, DLA Piper (Mar. 30, 2015) (attaching a blog highlighting the many reasons why NRDC declined to participate).

<sup>142</sup> *Cohen Report*, at 4.

<sup>143</sup> *Id.* at 5.

<sup>144</sup> *See* Ex. 1, Letter from J. Cruden, U.S. Asst. Atty. Gen. to W. Cohen, The Cohen Group (April 23, 2015).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

are by Congress and EPA's Office of Inspector General.

Other aspects of the Cohen Report are troubling with respect to transparency and bias as well. The heavy imbalance of sources cited in the footnotes is illustrative:

- The Wardrop Report commissioned by Northern Dynasty Mineral and the Environmental Baseline Document prepared by PLP were cited a total of at least 31 times.
- Letters from PLP, Northern Dynasty Minerals, and Rio Tinto executives were cited at least 33 times.
- Letters from Sean Parnell, Michael Geraghty, Joe Ballash, and other State of Alaska officials strongly opposed to EPA's proposed 404(c) action were cited at least 36 times.
- The comments from six peer reviewers quoted in the footnotes were selectively chosen such that all six comments were negative and critical. No quotations expressing positive or supportive views were included even though there were many such comments in the enormous peer review record.
- Very long excerpts from the comments of those opposed to EPA's 404(c) advocates were included in the footnotes, including about 2 full pages from PLP about 5 full pages from the State of Alaska.

In contrast, the Cohen Report's citations, quotations, and excerpts from correspondence, reports, comments, and other materials prepared by the overwhelming number of supporters of EPA's 404(c) action did not amount to even a small fraction of the citations to sources expressing critical views.

The Cohen Report also lacks transparency regarding the qualifications, experience, and affiliations of its own authors and contributors. The Report is written largely in the first person, expressing the opinions, views, and conclusions of former Secretary of Defense William Cohen. Secretary Cohen's background and expertise is thus highly relevant to the credibility and persuasiveness of his review and conclusions. The Report fails to explain, however, why Secretary Cohen was chosen to conduct this report, other than a vague statement that he has "Cabinet-level experience."<sup>148</sup> Although Secretary Cohen has served as a respected public servant, he lacks experience in environmental law, mine permitting, engineering, fisheries, aquatic ecosystems, and all other legal and scientific disciplines relevant to the subject matter of the Report.<sup>149</sup>

Additionally, Secretary Cohen indicates that he was assisted in his review by his "staff at The

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<sup>148</sup> *Cohen Report*, at 1.

<sup>149</sup> Secretary Cohen obtained a law degree in 1965, but he has not practiced law since approximately 1972, and his few years of legal experience did not include the practice of environmental law. Secretary Cohen's subsequent political career focused on military operations and international relations, and he is not known for having any special expertise in environmental policy. See *William Cohen*, Wikipedia, [https://en.wikipedia.org/wiki/William\\_Cohen](https://en.wikipedia.org/wiki/William_Cohen) (last visited Oct. 24, 2015).

Cohen Group and by the law firm DLA Piper LLP.”<sup>150</sup> Not one of these individuals is mentioned by name or title, however, and no resume or other biographical information is provided for any of them either. Of the 63 staff members at The Cohen Group and the 3,328 attorneys at DLA Piper, many are junior-level associates with little experience in agency administration.<sup>151</sup> Without knowing the names of the individuals who contributed to the Cohen Report, it is impossible to know whether or to what extent those contributors have expertise relevant to the subject matter of the report or whether their prior experiences and affiliations might predispose them toward conclusions critical of EPA and favorable for mine developers.

This lack of transparency regarding the authors and contributors represents a major departure from standard practice in reports analyzing government policies and procedures. For comparison, a recent report analyzing the impacts of EPA decision-making, entitled the *Potential Energy Impacts of the EPA Proposed Clean Power Plan*, was produced by NERA Economic Consulting.<sup>152</sup> The names of the two Project Directors and five Project Team members who prepared the report are listed prominently on the inside cover of the report, and detailed biographical information is readily available about these individuals on NERA’s website.<sup>153</sup> Their biographies demonstrate substantial expertise relevant to the subject matter of the report, as shown in the following example:

Dr. David Harrison is a Senior Vice President at NERA Economic Consulting and Co-Chair of NERA’s Global Environmental Group. ... He participated in the development or evaluation of major greenhouse gas emission trading programs and proposals in the US, including those in California, the Northeast, and the Midwest, and various federal initiatives, as well as programs in Europe and Australia. He and his colleagues assisted the European Commission and the UK government with the design and implementation of the European Union Emissions Trading Scheme ... Most recently, Dr. Harrison and colleagues have used NERA’s proprietary energy-macroeconomic model ... to evaluate the potential economic impacts of a US carbon tax and to evaluate the potential economic impacts of federal regulations on carbon dioxide emissions from existing power plants. ... Dr. Harrison has directed studies of the local and state economic impacts of major energy infrastructure ... transportation infrastructure ... manufacturing and mining activities ... and large commercial and retail developments. ... Before joining NERA, Dr. Harrison was an Associate Professor at the John F. Kennedy School of Government at Harvard University, where he taught microeconomics, energy and environmental policy, ... and other courses for more than a decade. He also served as a Senior Staff Economist on the US government’s President’s Council of Economic Advisors, where he had responsibility for environment and energy policy issues. He is the author or co-author of two books

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<sup>150</sup> *Id.* at 1.

<sup>151</sup> See The Cohen Group, *Who We Are*, (Nov. 2, 2015 2:58 PM), <http://www.cohengroup.net/who-we-are/team>; DLA Piper, *People Search*, (Nov 2, 2015 3:03 PM), <https://www.dlapiper.com/en/us/people/>.

<sup>152</sup> See NERA Economic Consulting, *Potential Energy Impacts of the EPA Proposed Clean Power Plan* (Oct. 17, 2014), available at [http://www.nera.com/content/dam/nera/publications/2014/NERA\\_ACCCE\\_CPP\\_Final\\_10.17.2014.pdf](http://www.nera.com/content/dam/nera/publications/2014/NERA_ACCCE_CPP_Final_10.17.2014.pdf).

<sup>153</sup> See NERA Economic Consulting, *Experts*, <http://www.nera.com/experts.html> (Nov. 2, 2015 5:21 PM).

on environmental policy and numerous articles on various topics in professional journals. ...<sup>154</sup>

In light of these experts' extensive background and expertise concerning the subject matter of their report, their conclusions and recommendations could reasonably be expected to be persuasive to government decision-makers, as well as to members of the public. By contrast, the Cohen Report fails to identify even the names of any of its authors or contributors other than Secretary Cohen, and it provides no information as to their expertise concerning EPA's procedures and policies. The Cohen Report thus appears to be asking readers to accept its conclusions and recommendations based primarily on the name recognition enjoyed by Secretary Cohen. This is not an adequate basis for Congress, the EPA Office of Inspector General, or the general public to give weight to the Cohen Report.<sup>155</sup>

Finally, it appears that a partner at DLA Piper LLP was recently the sole director of a company with a direct financial interest in Northern Dynasty Minerals ("NDM"), now the sole "partner" in the Pebble Partnership. With the exodus by April 2014 of all of its major investors—Mitsubishi in 2011, Anglo American in 2013, and Rio Tinto in 2014—NDM has several times sought to raise capital through the issuance of special warrants.<sup>156</sup> Notably, the most recent sale of NDM special warrants resulted in the investment on August 28, 2015 of about \$3.6 million (8,947,368 Special Warrants at \$0.399/share) by a company named *1047208 B.C. Ltd.*<sup>157</sup> *1047208 B.C. Ltd.* was incorporated on August 27, 2015—the day before the special warrant sale and in advance of the October 6, 2015 release of the Cohen Report critical to EPA's treatment of NDM. The sole director of *1047208 B.C. Ltd* is Stuart B. Morrow, and its registered address is 2800 Park Place, 666 Burrard Street Vancouver, BC V6C 2Z7.<sup>158</sup> Stuart Morrow is a partner at DLA Piper.<sup>159</sup> 666 Burrard Street Vancouver, BC V6C 2Z7 is the same address as DLA Piper's Vancouver office.<sup>160</sup> As described above, the Cohen Report does not provide the level of author detail needed to ascertain Mr. Morrow's involvement, if any.

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<sup>154</sup> *Id.*, at <http://www.nera.com/experts/dr-david-harrison-jr.html>.

<sup>155</sup> See *Cohen Report*, at 93-94.

<sup>156</sup> See, e.g. Northern Dynasty Minerals Ltd., *News Releases: Northern Dynasty to Raise Up to \$20 Million in Financing Transactions*, (Aug. 10, 2015), available at <http://www.northerndynastyminerals.com/ndm/NewsReleases.asp?ReportID=718967>; see also Northern Dynasty Minerals Ltd., *News Releases: Northern Dynasty Completes C\$15.5 Million Financing*, (Jan. 13, 2015), available at <http://www.northerndynastyminerals.com/ndm/NewsReleases.asp?ReportID=690926>.

<sup>157</sup> Northern Dynasty Minerals Ltd., *FORM 45-106F6, British Columbia Report of Exempt Distribution*, (Sept. 8, 2015), available at <http://www.bccsc.bc.ca/ViewDocument.aspx?DocNum=J7G5O6YBB7P3M7J6N6K2Q7O5D7N3>

<sup>158</sup> See Ex. 3, British Columbia Company Summary For 1047208 B.C. LTD.

<sup>159</sup> See DLA Piper, *People Search: Stuart Morrow*, (Nov. 2, 2015, 3:27 PM)

<https://www.dlapiper.com/en/canada/people/m/morrow-stuart/>.

<sup>160</sup> See DLA Piper, *Locations: Vancouver*, (Nov. 2, 2015, 3:29 PM)

<https://www.dlapiper.com/en/canada/locations/vancouver/>.

#### **IV. CONCLUSION**

For all of these reasons, the Cohen Report is neither reliable nor persuasive—and it lacks the essential independence that allegedly underlies its value as an assessment of EPA’s activities related to the Pebble Mine. Indeed, it is the Cohen Report—rather than EPA’s BBWA/Proposed Determination process—that is one-sided, non-transparent, and pre-determined in its findings and recommendations. The Cohen Report nowhere discloses what Secretary Cohen and DLA Piper were paid by PLP to prepare this report on its behalf, and, in the final analysis, it contributes nothing to the proceedings concerning 404(c) action in Bristol Bay beyond the arguments previously articulated on numerous occasions by PLP itself and its consultants. Under these circumstances, it should unquestionably be ignored.

## **EXHIBIT 1**





**U.S. Department of Justice**

**Environment and Natural Resources Division**

*Assistant Attorney General  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001*

*Telephone (202) 514-2701  
Facsimile (202) 514-0557*

**APR 23 2015**

Mr. William S. Cohen  
The Cohen Group  
500 Eighth Street, N.W., Suite 200  
Washington, DC 20004

Dear Mr. Cohen:

This is in response to your letter of March 24, 2015, concerning the retention of the Cohen Group and the DLA Piper law firm by the Pebble Limited Partnership ("Pebble") to conduct a purported "independent review" of what you characterize as "whether the U.S. Environmental Protection Agency ("EPA") has acted fairly in connection with its evaluation of potential mining in the Bristol Bay, Alaska, watershed."

The federal courts provide the appropriate forum for resolving Pebble's allegations against EPA. As you are aware, this matter is in litigation in three separate lawsuits filed by Pebble against EPA in connection with EPA's assessment of the potential environmental effects of Pebble's proposed mine activities. First, in May 2014 Pebble filed a lawsuit alleging, among other things, that EPA had exceeded its authority under Section 404(c) of the Clean Water Act by initiating an administrative review process to determine whether to deny or restrict the use of an area as a disposal site before Pebble had submitted a Section 404 permit application. The United States District Court for the District of Alaska dismissed Pebble's suit. As you know, Pebble has appealed that decision and the suit is pending in the Ninth Circuit Court of Appeals. In September 2014 Pebble filed a second lawsuit alleging that EPA violated the Federal Advisory Committee Act (FACA), which remains pending. And, in October 2014 Pebble filed a third lawsuit against EPA under the Freedom of Information Act (FOIA). That suit also remains pending.

Your "review" obviously overlaps with the pending litigation. In this regard, the district court in the FACA lawsuit has, with one limited exception, precluded any discovery until it rules on the government's pending motion to dismiss. Pebble's review is also in tension with the preliminary injunction that it obtained in the FACA lawsuit suspending actions by all persons involved in the Section 404(c) evaluation from proceeding with that process until the court has ruled on the merits of Pebble's complaint. Pebble sought the preliminary injunction purportedly

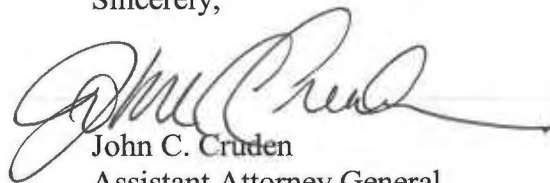
so that it could maintain its legal rights and the status quo, not so that it could launch its own private investigation into the EPA's actions. Pebble is attempting to obtain government information relating to its pending claims against the United States outside of the normal discovery context.

Further, as noted in your letter, in addition to the three separate lawsuits initiated by Pebble, there are multiple, pending investigations or inquiries. The U.S. House of Representatives Committee on Oversight and Government Reform and the U.S. Senate Committee on Environment and Public Works are both examining EPA's actions regarding Pebble's proposed Alaska mining project. Furthermore, EPA's Office of the Inspector General is also conducting a review. By law, the Office of Inspector General is an independent and objective unit, created pursuant to the Inspector General Act of 1978, which is responsible for conducting and supervising audits and investigations relating to the programs and operations of the EPA. There is therefore no valid purpose that could be served by the review that you propose on Pebble's behalf.

For all of the foregoing reasons, the United States will not cooperate with your private evaluation, and we respectfully urge you and your client to desist in this effort. However, should you and your client nevertheless choose to move forward with your review, the Environmental Protection Agency and the Department of Justice request to be contacted before any attempt is made to speak to any persons listed in Attachment A to your March 24th letter, so that we may take appropriate actions.

We also understand that the Cohen Group and the DLA Piper law firm have directly contacted individual employees of the U.S. Fish and Wildlife Service, the National Park Service, and the U.S. Geological Survey, and requested that they participate in your review. You provided no notice to the Department of Justice before making those contacts. We ask that, should you move forward with your review, you contact the Department of Justice and any affected agency before attempting to communicate with that agency's employees.

Sincerely,



John C. Cruden  
Assistant Attorney General

## **EXHIBIT 2**

LISA MURKOWSKI  
ALASKA

COMMITTEES:  
ENERGY AND NATURAL RESOURCES  
RANKING MEMBER  
APPROPRIATIONS  
HEALTH, EDUCATION, LABOR,  
AND PENSIONS  
INDIAN AFFAIRS

## United States Senate

WASHINGTON, DC 20510-0203

(202) 224-6665

(202) 224-5301 FAX

510 L STREET, SUITE 600  
ANCHORAGE, AK 99501-1956  
(907) 271-3735

101 12TH AVENUE, ROOM 329  
FAIRBANKS, AK 99701-6278  
(907) 456-0233

800 GLACIER AVENUE, SUITE 101  
JUNEAU, AK 99801  
(907) 586-7277

805 FRONTAGE ROAD, SUITE 105  
KENAI, AK 99611-9104  
(907) 283-5808

4079 TONGASS AVENUE, SUITE 204  
KETCHIKAN, AK 99901-5526  
(907) 225-6880

851 EAST WESTPOINT DRIVE, SUITE 307  
WASILLA, AK 99654-7142  
(907) 376-7665

July 1, 2013

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

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

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

Messrs. Shively, Cutifani and Thiessen:

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

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

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

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

At least as far back as November 3, 2004, Northern Dynasty Minerals asserted that the submission of permit applications was imminent, stating that the company expected "completion in 2005 of ... permit



applications.”<sup>1</sup> On August 12, 2005, another statement was issued, claiming that “a full permitting process for a port, access road and open pit mine [were] all slated to begin in 2006.”<sup>2</sup>

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

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

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

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

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

Sincerely,

  
Lisa Murkowski  
United States Senator

<sup>1</sup> “Northern Dynasty Secures Listing With Symbol ‘NAK’ on the American Stock Exchange,” Northern Dynasty Minerals Ltd. press release, November 3, 2004, on the Northern Dynasty Minerals Ltd. website, <http://bit.ly/1cmYd03>, accessed June 26, 2013.

<sup>2</sup> “Northern Dynasty Welcomes New Director to Board,” Northern Dynasty Minerals Ltd. press release, August 12, 2005, on the Northern Dynasty Minerals Ltd. website, <http://bit.ly/138vpW1>, accessed June 26, 2013.

<sup>3</sup> “Successful 2008 Study Program Continues At Alaska’s Pebble Project,” Northern Dynasty Minerals Ltd. press release, October 27, 2008, on the Northern Dynasty Minerals Ltd. website, <http://bit.ly/10Vbp7S>, accessed June 26, 2013.

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

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

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

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

<sup>8</sup> Shively, John. Interview by Monica Trauzzi, OnPoint, E&ETV, “Bristol Bay: Pebble mine’s Shively discusses future of project, EPA’s watershed assessment,” June 13, 2013, online, <http://bit.ly/16zAHXq>, accessed June 26, 2013.

<sup>9</sup> AngloAmerican, “Case studies: Pebble partnership,” <http://bit.ly/19tRNeA>, accessed June 26, 2013.

### **EXHIBIT 3**



## BC Company Summary

For  
1047208 B.C. LTD.

**Date and Time of Search:** October 29, 2015 10:27 AM Pacific Time  
**Currency Date:** October 08, 2015

### ACTIVE

**Incorporation Number:** BC1047208  
**Name of Company:** 1047208 B.C. LTD.  
**Recognition Date and Time:** Incorporated on August 27, 2015 09:31 AM Pacific Time  
**Last Annual Report Filed:** Not Available  
**In Liquidation:** No  
**Receiver:** No

### REGISTERED OFFICE INFORMATION

<b>Mailing Address:</b> 2800 PARK PLACE 666 BURRARD STREET VANCOUVER BC V6C 2Z7 CANADA	<b>Delivery Address:</b> 2800 PARK PLACE 666 BURRARD STREET VANCOUVER BC V6C 2Z7 CANADA
--	---

### RECORDS OFFICE INFORMATION

<b>Mailing Address:</b> 2800 PARK PLACE 666 BURRARD STREET VANCOUVER BC V6C 2Z7 CANADA	<b>Delivery Address:</b> 2800 PARK PLACE 666 BURRARD STREET VANCOUVER BC V6C 2Z7 CANADA
--	---

### DIRECTOR INFORMATION

**Last Name, First Name, Middle Name:**  
Morrow, Stuart B.

<b>Mailing Address:</b> 2800 PARK PLACE 666 BURRARD STREET VANCOUVER BC V6C 2Z7 CANADA	<b>Delivery Address:</b> 2800 PARK PLACE 666 BURRARD STREET VANCOUVER BC V6C 2Z7 CANADA
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NO OFFICER INFORMATION FILED .



## **EXHIBIT 4**

# NRDC

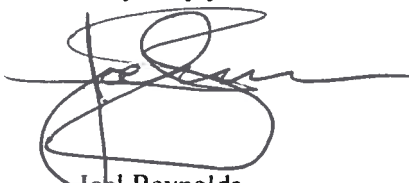
March 30, 2015

Charles P. Scheeler  
The Marbury Building  
6225 Smith Avenue  
Baltimore, Maryland 21209-3600  
[charles.scheeler@dlapiper.com](mailto:charles.scheeler@dlapiper.com)

Dear Mr. Scheeler:

I have received your phone message of today regarding the investigation that DLA Piper and the Cohen Group have undertaken on behalf of The Pebble Partnership. For at least the reasons stated in the attached blog post, NRDC is declining your invitation to participate.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Joel Reynolds', with a large, stylized circular flourish at the end.

Joel Reynolds  
Western Director  
Senior Attorney  
Natural Resources Defense Council  
[jreynolds@nrdc.org](mailto:jreynolds@nrdc.org)

NATURAL RESOURCES DEFENSE COUNCIL

1314 2ND STREET | SANTA MONICA, CA | 90401 | T 310.434.2300 | F 310.434.2399 | [NRDC.ORG](http://NRDC.ORG)

# THE HUFFINGTON POST

FRIDAY MARCH 27, 2015

## The Pebble Partnership and the Demeaning of Independence

By Joel Reynolds



*Joel Reynolds is the Western Director and Senior Attorney of NRDC, Los Angeles*

Leave it to the flailing Pebble Partnership -- now consisting of just one under-funded Canadian company -- to conclude that the only truly "independent" review of its uniquely reckless Pebble Mine is an "independent" review that is bought and paid for by . . . The Pebble Partnership.

Pebble and its Beltway-based CEO announced this week the hiring of two Washington, D.C. consulting firms to "conduct an independent review" of the U.S. Environmental Protection Agency's ("EPA") work on the proposed mine. According to former Defense Secretary William Cohen, principal of the Cohen Group, the "independent" review being undertaken by his firm and the DC law firm DLA Piper will "focus on the fairness of EPA's actions" and "will follow the evidence wherever it might lead . . . as fairly and thoroughly as possible."

Never mind that Mr. Cohen has been hired by the very company whose economic existence depends on building the Pebble Mine.



*Photo Cred: Robert Glenn Ketchum*

Never mind that Mr. Cohen has been hired by the very company that has attacked EPA relentlessly for years, claiming that its Pebble Mine project has been illegally and unfairly targeted by EPA.

Never mind that the residents of Bristol Bay have overwhelmingly opposed the Pebble Mine and supported EPA's involvement to an unprecedented degree, because the mine, if constructed, threatens to contaminate and ultimately destroy the incomparable Bristol Bay wild salmon fishery -- the economic, cultural, and subsistence life-blood of the region, its communities, and its people.

After a four-year, twice peer-reviewed comprehensive scientific risk assessment of the potential impacts on the Bristol Bay watershed from large-scale mining like the Pebble Mine, EPA found "significant" and potentially "catastrophic" impacts on the region -- and on its \$1.5 billion salmon fishery and the 14,000 jobs that it generates.

This was, of course, bad news for The Pebble Partnership, but it was neither illegal nor unfair. In stark contrast to The Pebble Partnership's penchant for high-priced DC lobbyists and lawyers, it reflects our constitutional democracy at its best.

Congress gave EPA the clear legal authority over 40 years ago under the Clean Water Act, and the public record shows that scientific review, public participation, and opportunities for stakeholder input (including time and again by The Pebble Partnership) in EPA's process were extensive and pervasive. By the time the process had

run its course, the agency had received over 1.5 million comments, with an astounding 95 percent supporting EPA's review.

For years, EPA has taken plenty of heat from The Pebble Partnership and from the company's mining industry boosters in Congress, who launched their own investigation and requested that EPA's Inspector General do the same. With no disrespect intended to Mr. Cohen or his firm, there is absolutely nothing credible to be gained from yet-another Pebble-sponsored "independent" review. If Pebble doesn't like EPA's process or the ultimate outcome of that process, it has a right to file an appeal in court, but that review, too, is unlikely to meet Pebble's nonsensical and uniquely self-serving definition of "independence."

"Here we go again," said Alannah Hurley, the Executive Director of United Tribes of Bristol Bay. "This is more of the same desperate PR-stunt, a bought-and-paid-for review, from a company who has lost on the science, who has lost on the truth, who has lost on public opinion."

Sadly, The Pebble Partnership isn't listening. It is hoping that its latest high-priced Beltway consultants can engineer an end-run around the science, the law, and the will of the people of Alaska.

Stop the Pebble Mine. Take action again -- now.