Can Politics Turn Gold into Dross? The Story of Alaska's Pebble Mine

How the EPA, other federal agencies, in collusion with environmental activists corrupted the codified decision-making process regarding the largest known undeveloped copper and gold deposit on the planet.

Introduction

As noted earlier, there are several ways in which science can be corrupted. The incentive structure certainly results in a canon of knowledge that is massively littered with false positive results. But another problem might be termed "corruption by authority". In this book we showed how the National Academy of Sciences, through its National Research Council, can assemble apparently definitive panels to study a certain subject, but in fact the results of the study would largely be known beforehand because of the track records of the chosen participants. In this manner, it's very easy to suppress dissenting views even while having their proponents on the panel. That is clearly what happened with Walter Coles, Jr. and Virginia Uranium, Inc.

Here we will see how the EPA colluded with environmental organizations to create what could only be termed a science fiction report to prevent the exploitation of the largest known copper, molybdenum and gold deposit on earth.

The "Pebble Project", located in southwest Alaska, on state lands in southwest Alaska (Figure 1) that were accepted by Alaska as part of a land swap with the federal government, specifically for its mineral potential. In addition, the site has been designated through two public land-use planning processes for mineral exploration and development.[1] The deposit was discovered in 1987 by Cominco, a modest concern headquartered in Vancouver, British Columbia.

But this story is not about what will happen at the Pebble mine, if it is ever approved, but rather this is about the previous administration's policies and actions. It is a remarkable tale of

[1] Schwartz, Richard, Attorney for Northern Dynasty Minerals Ltd., Request for Investigation Concerning EPA Bristol Bay Watershed Assessment, to the Inspector General, Environmental Protection Agency, January 9 and February 18, 2014, http://www.northerndynastyminerals.com/i/pdf/ndm/bbwa/PLP_EPA_Exhibit%2012_Sep2014.pdf

agency overreach, unethical behavior, intrigue, and what can only be termed "fake science". Prior to the current administration, the Pebble story is yet another example of empowered agencies and entities bending (and sometimes creating) science with the sole purpose of executing a policy. In this case, as was the case for Virginia Uranium, it also entailed a mine

In the previous administration, the EPA, environmental non-government organizations (NGOs), and the environmental lobby managed to short-circuit the law that initially created the President's Council on Environmental Quality (CEQ) via the National Environmental Policy Act (NEPA) enacted on January 1, 1970. On December 2 of that year, President Nixon, on the advice of the CEQ, created the EPA.

NEPA is the government's main decision "tool" for the disposition of all proposed projects that could have significant environmental impact on air, land, water, and human health and welfare. The relevant question for Pebble is why did the EPA circumvent NEPA, whose process is quite clear and explicit, rooted in the law itself, from which is supposed emanate equal justice. That was hardly the case for Pebble.

The CEQ or the EPA determine what activities require a formal Environmental Impact Statement (EIS). Clearly, a substantial mine in sparsely populated country near Federal wilderness areas, such as Pebble, would (and should) be required to be reviewed under a formal EIS. Small streams that drain the Pebble property also eventually flow into Bristol Bay, home to the world's largest sockeye salmon fishery, but they contribute a very small increment compared to all the other drainages into the massive bay.

But that was not the case here. Instead of having Pebble proceed with its own EIA, the EPA substituted its own assessment of the impact of the Pebble Project on the Bristol Bay Watershed—in place of the formal and comprehensive NEPA environment impact statement (EIS) decision process.

It appeared in the form of a report. In May, 2012, the EPA issued a review draft called "An Assessment of the Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska". On April

20th, shares on Northern Dynasty Minerals (NYSE:NAK) traded at $5.80, and the stock was considered a fairly conservative investment, and certainly a staple in many Canadian retirement accounts. After discovering the massive deposit, NAK acquired major financial backing from one of the world's largest mining concerns, Anglo-American, who invested over $500 million into startup expenses for NAK. By May 25, NAK sold for $2.48. The *draft* EPA report had stripped nearly 60 percent of the stock's value in a month.

Investors were aware of, and rightfully feared, the Administration's (and the previous Clinton Administration's) way of summarizing science pertaining to politicized issues. With regard to an analogous assessment of global climate change effects on the U.S., when it was in review draft form it was discovered that its core models were worse than using a table of random numbers to predict the U.S. temperature history of the 20th century. The Chair of the committee, Thomas Karl, of the then-National Climatic Data Center, and responsible for the report, knew it too, was additionally informed of the problem by an outside expert reviewer of the draft, and yet it proceeded with the bad core models anyway.[2] Surely the game plan for Pebble would be to similarly ignore any serious criticisms of any prospective negative report, too.

According to the EPA, it became involved in the permitting of the project because of petitions against the mine from Native Alaskan tribes in 2010. Verbal statements from EPA employees and official agency documents actually reveal the existence of an internal EPA "options paper" that make clear the agency opposed the mine on ideological grounds and had *already decided* to veto the proposal in the spring of 2010. The draft Bristol Bay report was not released until two years later.

Much of this information was found out through legal discovery related to a case that Pebble brought against the EPA, alleging that EPA had violated the Federal Advisory Committee Act (FACA) by colluding with anti-Pebble activists to preemptively prevent Pebble from even applying for a permit to mine, which is an integral part of the NEPA process. That discovery indicates beyond

[2] First documented in Michaels, P.J., *Alchemy of Policymaking*.

doubt that the Pebble Project was being denied entry to the well-established and accepted NEPA process.

The Pebble Project pits the environmental activist industry versus the resource industry, and if the mine is not permitted, the playbook, which includes arbitrarily circumventing the Code of the United States, bodes poorly for other proposed mines. In an ironic twist, many of the minerals and metals that could be mined at Pebble are precisely the materials needed to propel "renewable" energy like wind and solar. Hybrid and electric vehicles also require large amounts of copper.

The Importance of Pebble

The Pebble Project has the potential to supply as much as one-quarter of the United States' copper needs over more than a century of production, in addition to large quantities of gold, silver, molybdenum and other minerals.[3]

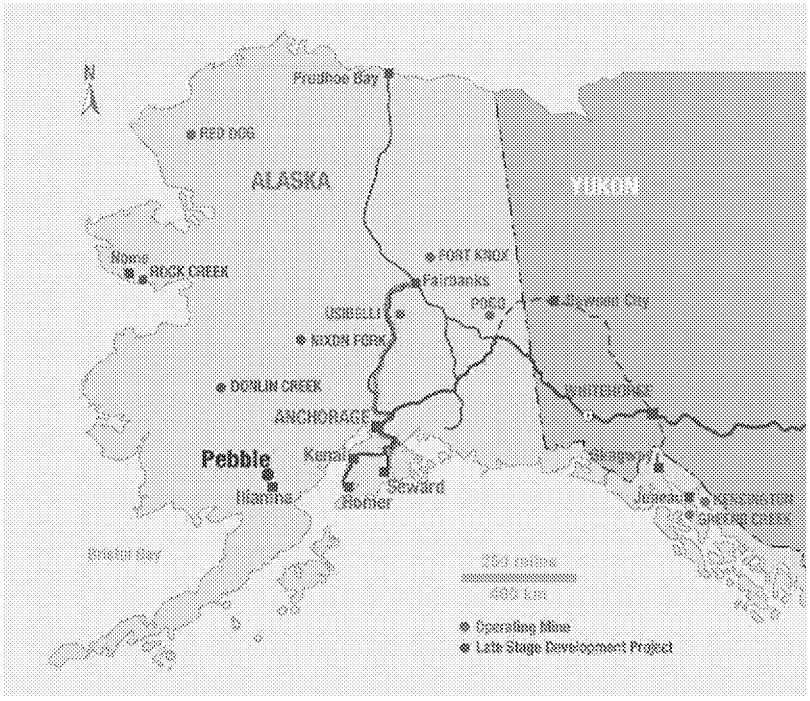

Figure 1. Location of Pebble Deposit in Southwest Alaska[1]

[3] Watson, Andrew, Mining Properties and Prospects, Geology for Investors, February 2016

There are several important stakeholders; environmentalists, sportsmen, and the fishing industry are concerned that mining the deposit will despoil Bristol Bay, home of the world's largest sockeye salmon fishery. Investors in the Pebble Partnership obviously want the site developed, which has been opened for mineral development by the State of Alaska. Additionally, there are local economic issues. Substantial unemployment in south coastal Alaska is endemic, and, according to Pebble, the original and related construction and support activity should provide around 15,000 jobs and contribute more than $2.5 billion to the country's GDP each year. The current design footprint is somewhat smaller—therefore the jobs and GDP numbers will vary accordingly.

The Pebble Mine is part of a larger "leave it in the ground" movement, and it has become a proxy for undesired mining projects. In 2014, the EPA was under pressure from a Native American tribe to veto an iron ore mine in Iron County, Wisconsin. Similarly, an environmental group in Minnesota lobbying against a nickel-platinum-palladium mine in the northeastern part of the state. EPA is also being urged to veto a planned nickel mine in Oregon near a tributary of the Smith River.[4]

However, the details of these four mining projects, including Pebble, are still on the drawing boards, and they have not gone through the normal NEPA environmental impact analysis. Writing in *The Wall Street Journal,* Daniel McGroarty noted,

"What the Wisconsin, Minnesota, and Oregon mine projects have in common is that none has put forward an actual mine plan. Neither has Pebble. Submitting a mine plan would trigger a thorough mine plan review as required under NEPA (the National Environmental Policy Act enacted by Congress in 1970). For more than 40 years NEPA has defined process by which a mine or any other resource project is evaluated. Under the law, every one of the concerns raised by the opponents to the Wisconsin, Minnesota, and Oregon mines would be aired as public comments, and examined by scientists and technical experts, before approval is granted or denied. Using the Pebble mine as precedent, anti-mining activists are urging the EPA to ignore NEPA and bar mining projects with no review necessary."[5]

---

[4] McGroarty, Daniel, Miners Struggle With a Federal Cave-In, Wall Street Journal, July 24, 2014, https://www.wsj.com/articles/daniel-mcgroarty-miners-struggle-with-a-federal-cave-in-1406243847

[5] ibid

In the case of Pebble and the other projects, environmentalists are urging EPA to measure environmental impact in a way that suggests each project is a threat. As McGroarty further stated:

"...Current law requires an environmental impact statement which is an extensive assessment of the mine's potential impact weighed against mitigating safeguards. But anti-mining activists are pushing for a switch to 'cumulative effects assessments', which would take into account past, present and future actions in the project vicinity. Under such an approach, a mine could be vetoed because other proposed mines in the region could *at some point* in the future collectively contribute to deleterious environmental effects. Even the most meticulously engineered mine plan can be undone by a parade of hypothetical horribles".[6]

Indeed, the EPA designed a fictional Pebble mine in its 2014 *Bristol Bay Watershed Assessment,* which it then used to pre-empt Pebble under the Clean Water Act.

Clean Water Act Invoked to Halt Pebble

The Clean Water Act (CWA) was passed by Congress in 1972. It establishes the basic structure for regulating pollutant discharges into the waters of the United States, giving EPA the authority to implement pollution control programs such as setting wastewater standards for industry. In 2010, before Pebble even submitted an application for a mining permit, the EPA used a specific provision of the Clean Water Act known as Section 404(c), to preempt the mine permit application. According to the Act, the Pebble Partnership is entitled to apply for a permit and the Army Corps of Engineers (ACE) has the responsibility to approve or disapprove the application. However, in a clearly unintended consequence, the EPA veto called into question the legality of preempting the issuance of a permit before the permit application had been submitted for review, as required under the Act, because it was based upon a fictional, worst-case mine design that originated within the Agency itself.[7]

How was Section 404(c) used to halt the Pebble Project? According to the EPA, the Act authorizes the U.S. Army Corps of Engineers through Section 404(a) or an approved state through Section 404(h) to issue permits for discharges of dredged or fill material at specified sites in waters

[6] ibid

[7] McGroarty, Daniel, EPA's Bristol Bay Watershed Assessment: A Factual Review of a Hypothetical Scenario, Testimony presented at the U.S. House of Representatives Committee on Science, Space & Technology Subcommittee, August 1, 2013, http://americanresources.org/epas-bristol-bay-watershed-assessment-a-factual-review-of-a-hypothetical-scenario/

of the United States. Section 404(c), however, authorizes EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. EPA believes it has "veto authority" under Section 404(c), and may initiate a public process to prohibit or restrict the specification by the Army Corps or by a state, for the discharge of dredged or fill material at a particular site.[8]

According to the Clean Water Act, Section 404(c) authority may be exercised before a permit is applied for, while an application is pending, or after a permit has been issued. Because Section 404(c) actions have mostly been taken in response to unresolved Army Corps permit applications, this type of action is frequently referred to as "an EPA veto of a Corps permit." Although the Army Corps authorizes approximately 68,000 permit activities in the U.S. waters each year, EPA has used its Section 404(c) authority very sparingly, exercising it thirteen times in the forty plus year history of the Act, with only two determinations being made in the last twenty years. There are eleven instances were Section 404(c) denials were issued from 1980 to 1991, then none for almost two decades, until Pebble.[9]

Although used sparingly, EPA's authority under Section 404(c) is well-tested in the courts. District Courts have overturned (reversed) such determinations on a variety of project-specific grounds; however, those reversals of EPA's determinations did not survive the appeal process. Legal opinions vary but most agree that "...avoiding a withdrawal of the waters at issue under 404(c) may be the best plan that the Pebble Partnership has in keeping its project alive. It has been easier for Pebble to defend such a decision in court rather than challenge an adverse decision made by EPA."[10]

---

[8] EPA, Clean Water Act, Section 404(c), "veto authority", https://www.epa.gov/sites/production/files/2016-03/documents/404c.pdf

[9] Steding, Doug, EPA's Initiation of a Clean Water Act Section 404(c) Review for the Mining of the Pebble Deposit: What is the History of EPA's Other 404(c) Determinations?, Science, Law, and the Environment, March 3, 2014, http://www.sciencelawenvironment.com/2014/03/epas-initiation-of-a-clean-water-act-section-404c-review-for-the-mining-of-the-pebble-deposit-what-is-the-history-of-epas-other-404c

[10] *Ibid.*

Bristol Bay Assessment Crafted to Kill Pebble

EPA claims that their 2014 veto of Pebble under Section 404(c) was based on "scientific evidence" presented in the Bristol Bay Watershed Assessment (BBWA), commissioned by the EPA in February 2011. After producing two drafts versions, (2012 and 2013), the final BBWA was published in 2014—supposedly to present the "science" behind the impacts of Pebble on Bristol Bay.[11]

However, because there was never any mining permit application, and therefore no submission of a mine plan design, EPA charged a senior biological scientist named Philip North, to design a worst case scenario, an open-pit "hypothetical mine" that would have no chance of being approved in a review by a professional mining engineer. In fact, Pebble's real intentions for mining the deposit and their mine plan design have never been completely disclosed, although very recently Northern Dynasty announced that only portion of the deposit would be exploited.[12] Nevertheless, Mr. North proceeded with his fictional mine and its fictional impacts.[13]

The Pebble Partnership knew it would be required to file a detailed environmental impact statement for the entire proposed mining operation along with any application for a permit. Consequently, it spent approximately $150 million and nearly ten years compiling a massive study of the biology, ecology, and dynamics of the Bristol Bay watershed. Incredibly, EPA and Mr. North simply ignored this comprehensive repository of information.[14] Both Mr. North and other EPA officials have admitted under oath that during the entire time that the Bristol Bay Watershed Assessment was being written (2011-2014), the study was never really intended to provide a scientific foundation for regulatory decision-making, after all.[15] One is tempted to ask the question, then, of why it proceeded to design a fictional mine.

---

[11] Strassel, Kimberley, The EPA's Pebble Blame Game, Wall Street Journal, May 21, 2015, https://www.wsj.com/articles/the-epas-pebble-blame-game-1432250642

[12]

[13] Mamula, Ned and Patrick J. Michaels, Special Report; A Green Mess: Is EPA in Hot Water Over Alaska's Bristol Bay? The American Spectator, February 11, 2016, https://spectator.org/65450_green-mess-epa-hot-water-over-alaskas-bristol-bay/

[14] Pebble Partnership, Environmental Baseline Document, https://pebbleresearch.com/ and https://pebbleresearch.com/download/

[15] United States District Court for the District of Alaska, videotaped deposition of Phillip North, https://www.peer.org/assets/docs/ak/4_4_16_Day1_Pebble_depo.pdf

There is more to the story. While creating his open pit mine, Mr. North, while an EPA employee, also coached anti-Pebble activists on how to petition EPA to stop any real mine permit application. Actually, it appears he wrote the petitions. When these actions surfaced in early 2013, the U.S. House of Representatives Oversight Committee requested to speak with Mr. North about his role at EPA in the Pebble application. His response was to flee the country, which resulted in a subpoena being issued in August 2015 by a federal judge who directed Mr. North to appear before the House Committee. He was finally served subpoena papers in Australia in January 2016, and was deposed in April 2016 by attorneys for the Pebble Partnership and staff attorneys from the House Committee on Science, Space, and Technology.[16,17]

There are nearly ten years of emails and internal memos that indicate collusion between EPA officials and environmental activists opposing Pebble—much of which was produced from Freedom of Information Act (FOIA) requests from Northern Dynasty. EPA's Region 10 Administrator that covers Alaska, Mr. Dennis McLarren, was deposed by the House Committee in 2016 because he was thought to have played some role in Pebble's application denial. Much has been learned through discovery pertaining to a subsequent Northern Dynasty action with EPA about how individuals within the agency handled the Pebble Project.[18,19,20]

The weight of evidence mounting from depositions and FOIA requests about the absence of impartiality in EPA's adjudication of the Pebble Proposal over many years finally reached a critical stage. IN 2015, attorneys representing Northern Dynasty petitioned the EPA Office of the Inspector General (OIG) to conduct an investigation concerning the BBWA. Northern Dynasty's petition made

[16] U.S. House of Representatives, Committee on Science, Space and Technology, deposition of Phillip North, April 15, 2016, https://science.house.gov/sites/republicans.science.house.gov/files/documents/Deposition%20Transcript.pdf

[17] Richardson, Valerie, EPA accused of collusion after staffer admits he aided Pebble Mine foes, Washington Times, April 28, 2016, http://www.washingtontimes.com/news/2016/apr/28/epa-accused-of-collusion-after-staffer-admits-he-a/

[18] U.S. House of Representatives, Committee on Science, Space and Technology, April 28, 2016, depositon of Dennis McLerran, http://docs.house.gov/meetings/SY/SY00/20160428/104889/HHRG-114-SY00-20160428-SD002.pdf

[19] Strassel, Kimberley, The EPA's Own Email Problem, Wall Street Journal, August 27, 2015, https://www.wsj.com/articles/the-epas-own-email-problem-1440718297

[20] Sohn, Tim, The EPA Ecologist Who Became a Wanted Man, May 3, 2016, The New Yorker, http://www.newyorker.com/tech/elements/phil-north-the-e-p-a-ecologist-who-ran-away

several powerful evidence-based points that had been uncovered by FOIA requests and in House Committee proceedings.[21]

1. EPA's seeking to veto Pebble did not originate from complaints of federally recognized tribes in Alaska, but came from within the agency itself:

   This evidence, obtained under the Freedom of Information Act from EPA, suggests that EPA officials in Alaska began musing about the potential for a preemptive 404(c) veto of the project, and lining up other federal agencies to support this plan, some two years before the first petition was received from federally recognized tribes.

2. EPA's BBWA was designed to support a veto, rather than being an objective inquiry:

   The Assessment evaluates a mine scenario co-authored by Mr. North [EPA's principal early advocate for a veto of the Pebble project] who has publicly admitted that he did not include state of the art technology because he assumed that mining companies would not use what is available. This critical flaw was recognized by numerous independent peer reviewers (selected by EPA), who said precisely the opposite--that the permitting process would require much more and better technology than what EPA used for its Assessment. This Assessment uses a mine scenario that fails to meet legal *requirements* to protect against harm to salmon, by assessing a fictional mine that does not meet modern standards for environmental protection."

3. EPA biased the peer-review process:

   EPA manipulated the peer review of the Assessment itself in a way designed to minimize criticism of the Assessment. EPA violated its own standards when, during the first peer review, it unduly restricted the schedule, shielded the peer reviewers from public comments, and then held a closed-door meeting with the peer review panel. During the second peer review, EPA shut out the public entirely, completely violating its own standards for transparency.

[21] Schwartz, Richard, Attorney for Northern Dynasty Minerals Ltd., Request for Investigation Concerning EPA Bristol Bay Watershed Assessment, to the Inspector General, Environmental Protection Agency, January 9 and February 18, 2014, http://www.northerndynastyminerals.com/i/pdf/ndm/bbwa/PLP_EPA_Exhibit%2012_Sep2014.pdf

In summary, Section 404(c) of the Clean Water Act was used to halt the Pebble mine from moving forward, but the Bristol Bay Watershed Assessment was used to attempt to kill the project outright because, according to EPA, it is based on *"science"*. The mine plan fabrication is an egregious example of federal agency deception and distortion of "science" reported in a "scientific assessment". The application of this process to deny a person or a corporation of its property rights is hardly unique, as shown in the Virginia Uranium story, also in this volume.

Circumventing the NEPA Process—EPA's Most Troubling Action

The House Oversight Committee, in a November 4, 2015 letter to the EPA Administrator, characterized the agency's actions regarding Pebble's rights under NEPA as "highly questionable and lacking legal basis", and urged the administrator to "allow the project proposals to go forward under the Clean Water Act and National Environmental Policy Act (NEPA)." EPA's preemptive veto of Pebble project has a deeper meaning that should disturb environmentalists much more than the proposed mine: it preempted the NEPA process—the "Magna Carta" of environmental laws—from being triggered to study the mining proposal in detail, as thousands of proposals have been studied over the past 45 years. EPA appears to have issued their veto to avoid the "risk" of a possible NEPA-approved mining operation that they did not "want", and the discovery process has clearly borne that out. EPA has set a very negative precedent by circumventing NEPA—which is responsible for its very existence.[22]

In reality, NEPA applies whenever a proposed activity or action:[23]

- Is proposed on federal lands, or
- Requires passage across federal lands, or
- Will be funded in part or in whole by federal money, or
- Will affect the air or water quality that is regulated by federal law.

[22] U.S. Environmental Protection Agency, National Environmental Policy Act, https://www.epa.gov/nepa
[23] U.S. Environmental Protection Agency, National Environmental Policy Act—Policies and Guidance, https://www.epa.gov/nepa/national-environmental-policy-act-policies-and-guidance

Concerns about EPA side-stepping the NEPA process for the Pebble proposal were expressed by other stakeholder federal agencies, such as the U.S. Geological Survey (USGS). One of their scientist contributors to the BBWA stated the following:

"...the thing that has always bothered me about the assessment [BBWA] is that there is a mechanism in place to review mine permit applications [the NEPA process]. The process was created by EPA, yet the decision was made by EPA to short-circuit their own process and explore a 404(c) veto action."

"From my perspective, Northern Dynasty and the Pebble Limited Partnership acted in good faith and went well beyond what would be considered standard practice for a mine permitting exercise anywhere in the United States or in the world. I took their extraordinary effort to reflect their appreciation of the sensitivity of the environment where they are working."

"The NEPA process seemed to be working perfectly fine at Pebble and I see no reason why the NEPA process should not be allowed to render a final verdict rather than having this other path bar it."

Because of the irregularities noted above, a district court judge in May 2014 issued a preliminary injunction against any further efforts by EPA to deny Pebble its due process rights to develop and submit a permit application.

Based on Congressional inquiries and political pressure, the EPA decided to conduct an internal review regarding its "conduct" during the BBWA process. The EPA charged their agency with determining whether they had conducted the BBWA in a biased manner, predetermined the outcome, and followed policies and proper procedures for ecological risk assessment, peer review, and information quality. Based on available information, the EPA Office of the Inspector General claimed to have found no evidence of bias in how the agency conducted its assessment, or that the BBWA team members, or agency leadership, predetermined the assessment outcome.

EPA on January 13, 2016 published its findings of how it conducted the assessment in the three primary phases discussed in the agency's ecological risk assessment guidelines. The review indicated that EPA's work on the assessment met requirements for peer review, provided for public

involvement throughout the peer review process, and followed procedures for reviewing and verifying the quality of information in the assessment before releasing it to the public.[24]

EPA Stands by Their Bristol Bay study

EPA's OIG review was prompted by a request from the Pebble Partnership, the State of Alaska, and other parties to investigate allegations of bias, predetermination of outcomes, inappropriate collusion with special interest groups and other process abuses with respect to EPA's BBWA, and subsequent regulatory action to preemptively veto the Pebble Project under Section 404(c) of the Clean Water Act. While acknowledging significant 'scope limitations' in its (EPA) review and subsequent report, the OIG concluded that: "we found no evidence of bias in how the EPA conducted its assessment of the Bristol Bay watershed, or that the EPA pre-determined the assessment outcome," but that an EPA Region 10 employee may have been guilty of "a possible misuse of position."[25] This, of course, was the infamous Mr. North.

Several previous investigations of EPA conduct towards Pebble contradict the OIG Report. The House Committee on Oversight and Government Reform found "that EPA employees had inappropriate contact with outside groups and failed to conduct an impartial, fact-based review of the proposed Pebble mine." Former US Senator and Secretary of Defense William Cohen, who produced his own analysis as a consultant to Northern Dynasty said his investigation "raise(s) serious concerns as to whether EPA orchestrated the process to reach a pre-determined outcome; had inappropriately close relationships with anti-mine advocates, and was candid about its decision-making process."[26]

After EPA published its internal review of the BBWA process, the Pebble Partnership in January 2016 countered with a response to EPA's OIG report. It is the Pebble Partnership's view that the OIG investigation into EPA misconduct was so narrow as to materially distort the reality of the agency's actions. Further, it is Pebble's view that the 'possible misuse of position' cited by the OIG with respect to an EPA employee in Alaska underestimates the seriousness of agency misconduct,

---

[24] U.S. Environmental Protection Agency, EPA's Bristol Bay Watershed Assessment: Obtainable Records From the Office of the Inspector General, Show EPA Followed Required Procedures Without Bias or Predetermination, but a Possible Misuse of Position Noted, January 13, 2016, https://www.epa.gov/sites/production/files/2016-01/documents/20160113-16-p-0082.pdf

[25] ibid

[26] U.S. House of Representative, Committee on Oversight and Government Reform, November 4, 2015, https://oversight.house.gov/wp-content/uploads/2015/11/2015-11-04-JC-CL-JJ-to-McCarthy-EPA-Bristol-Bay-due-11-18.pdf

and diminishes accountability for the misconduct to a single individual despite evidence that senior EPA staff at Region 10 (Seattle) and at headquarters in Washington, D.C., were aware of and complicit in inappropriate activities.[27]

A cursory review of the scope of the OIG investigation demonstrates why it was unable to expose EPA misconduct with respect to the BBWA and subsequent efforts to veto the Pebble Project. Despite more than 100 EPA employees playing a role in the agency's efforts to preemptively veto Pebble, the OIG only reviewed emails for three EPA officials. Despite the close collaboration of dozens of anti-mine activists in EPA's actions at Pebble, the OIG only reviewed emails from one anti-mine activist.

While the EPA's BBWA study process was initiated in February 2011 and concluded in January 2014, and the agency's Section 404(c) veto was initiated in February 2014 and suspended in November 2014 following a preliminary injunction issued by a federal court judge, the OIG only reviewed EPA emails through May 2012. During the 2½ years of activity unexamined by the OIG, EPA issued two more versions of the BBWA including its final report, conducted multiple disputed peer review processes, and initiated their preemptive 404(c) veto.[28]

Philip North was found to have no emails available for a 25-month period of time within the OIG's already limited 52-month window of investigation. The OIG did not seek to recover any emails from three key EPA officials. Indeed, their emails may have been deleted prior to the onset of its investigation. Rather than review all retrieved emails, the OIG utilized undisclosed search terms to further narrow its review. Finally, the OIG did not seek records from the private email accounts of EPA officials, despite evidence that officials used private email accounts to conduct government business, against all federal employee protocols.[29]

Despite its wide-ranging investigative authority, the OIG issued just one subpoena with respect to its Pebble review. That subpoena, issued in August 2015 by a federal judge to counsel for a former EPA official (Phillip North), who played a central role in the BBWA study and for whom 25

---

[27] U.S. Environmental Protection Agency, EPA's Bristol Bay Watershed Assessment: Obtainable Records From the Office of the Inspector General show EPA Followed Required Procedures Without Bias or Predetermination, but a Possible Misuse of Position Noted, January 13, 2016, https://www.epa.gov/sites/production/files/2016-01/documents/20160113-16-p-0082.pdf

[28] ibid

[29] Hattem, Julian, *The Hill*, May 1, 2013. http://thehill.com/regulation/energy-environment/297255-former-epa-chief-under-fire-for-new-batch-of-richard-windsor-emails

months of email records are missing, was summarily ignored.[30] Meanwhile, the OIG only inspected emails with EPA from one anti-mine activist group, despite the fact there were many. In fact, to force investigation of EPA actions by the OIG, Pebble Partnership reviewed more than 50,000 documents received via Freedom of Information Act ("FOIA") requests, and submitted a total of 19 letters spanning 214 pages and appending nearly 600 exhibits.

The FOIA requests to the addressed a wide range of concerns about EPA actions, presented corresponding evidence, and called upon the OIG to utilize its subpoena powers and other authority to more fully investigate EPA actions involving Pebble. While the OIG Report finds no evidence of bias or predetermination of outcomes with respect to the BBWA, it provides no findings at all on a large number of other important matters, such as the collusion between North and the native Tribes with regard to a preemptive veto. Nor does the OIG Report comment on the evidence provided by Pebble Partnership in raising its concerns.

Important issues raised by the Pebble Partnership that are ignored by the OIG Report include the following:[23]

1. EPA actively involved anti-mine activists in preparing an internal "Options Paper" to guide decision-making on Pebble.
2. It selected authors and contributors to the BBWA who had openly expressed opposition to Pebble.
3. It also secretly peer reviewed studies by anti-mine activists and cited them prominently in the BBWA, while ignoring the enormous environmental background studies already conducted by Pebble.

When the OIG charged North with the vague 'possible misuse of position', there was nothing mentioned about his use of a private email account in 2011 to coordinate with an anti-mine activist in the preparation of a tribal petition that was cited by EPA as the sole catalyst for its BBWA study and preemptive 404(c) regulatory action.[31]

---

[30] Pebble Limited Partnership, Examining The Facts: A Response to the U.S. Environmental Protection Agency's (EPA) Office of Inspector General Report Regarding EPA's Bristol Bay Watershed Assessment, letter dated February 29, 2016, https://science.house.gov/sites/republicans.science.house.gov/files/documents/02.29.16%20SST%20Letter%20to%20EPA%20OIG%20Elkins%20re%20Bristol%20Bay%20Rep

[31] U.S. Environmental Protection Agency, EPA's Bristol Bay Watershed Assessment: Obtainable Records From the Office of the Inspector General show EPA Followed Required Procedures Without Bias or Predetermination, but a Possible Misuse of Position Noted, January 13, 2016, https://www.epa.gov/sites/production/files/2016-01/documents/20160113-16-p-0082.pdf

The OIG report found that Mr. North acted alone in this collusion, and that the "employee's supervisor told us that he was not aware that the employee had taken such an action." However, the OIG fails to note the many other substantive interactions Mr. North had with anti-mine activists or the extent to which this collusion was known throughout the agency. In reality, evidence uncovered by Pebble shows that at least six EPA employees knew about the improper collusion between Mr. North and anti-mine activists. As early as 2010, at least two EPA employees alerted senior EPA staff and an EPA attorney about these inappropriate contacts, but no corrective action was taken.[32]

The Congress has authority to provide oversight for inspectors general where an inspector general fails to uncover or report clear misconduct on the part of an agency, and it should be doing so now.

Final Chapter of the Pebble Story—For Now

This history of Pebble begins in 2005, prior to both the Trump and Obama administrations. Market perception was that the incoming Trump Administration intends to reverse some of the previous Administration's opposition to the mine. Northern Dynasty stock doubled in price between the November election and the turn of the year.

But it was the Congress that intervened first. On February 22, Representative Lamar Smith (R-TX), Chair of the Science, Space and Technology Committee, wrote to EPA Administrator Pruitt, urging the agency to normalize the permitting process for Pebble:

The Committee recommends that the incoming administration rescind the EPA's proposed determination to use Section 404(c) in a preemptive fashion for the Pebble Mine in Bristol Bay, Alaska. This simple action will allow a return to the long-established Clean Water Act permitting process—along with NEPA—and stop attempts by the EPA to improperly expand its authority. Moreover, it will create regulatory certainty for future development projects that will create jobs and contribute to the American economy."[33]

---

[32]Pebble Limited Partnership, Examining The Facts: A Response to the U.S. Environmental Protection Agency's (EPA) Office of Inspector General Report Regarding EPA's Bristol Bay Watershed Assessment, letter dated February 29, 2016, https://science.house.gov/sites/republicans.science.house.gov/files/documents/02.29.16%20SST%20Letter%20to%20EPA%20OIG%20Elkins%20re%20Bristol%20Bay%20Rep

[33]

President Trump signed an Executive Order on February 28 directing the Environmental Protection Agency (EPA) to revise its expansive interpretation of the "Waters of the United States" definition, where ditches and drainages would often qualify as "navigable".[34] On March 28 he signed an Executive Order lifting a ban on new mining leases on federal land.

Then, on May 11, 2017, EPA entered into an agreement with Pebble Limited Partnership that ended ongoing litigation and put Pebble squarely on the path to the standard NEPA permitting process described below. According to EPA, the out of court settlement with Pebble would be…"to resolve litigation from 2014 relating to EPA's prior work in the Bristol Bay watershed in Alaska."

EPA stated that the "settlement provides Pebble an opportunity to apply for a Clean Water Act (CWA) permit from the U.S. Army Corps of Engineers before EPA may move forward with its CWA process…". Finally, EPA affirmed "The agreement will not guarantee or prejudge a particular outcome, but will provide Pebble a fair process for their permit application and help steer EPA away from costly and time-consuming litigation.[35]

Looking back over the saga of Pebble, the original claim that EPA had manipulated the scientific integrity of its involvement in the Pebble Mine has been clearly demonstrated. However, EPA can still intervene after the Army Corps of Engineers makes its decision on Pebble's environmental impact statement. That means Pebble permitting will continue to be political, masquerading as scientific. Whether it can veto a permit that has gone through the NEPA process and been accepted by EPA is a controversial matter that would no doubt engender considerable litigation. But surely, if the approval process is not completed by the end of Trump's first term, the ultimate existence of Pebble will lie largely in the hands of voters in the other 49 states.

[34] http://www.nbcnews.com/news/us-news/trump-signs-executive-order-begin-water-rule-rollback-n726781

[35] https://www.epa.gov/bristolbay/2017-settlement-agreement-between-epa-and-pebble-limited-partnership

EPA's creation of a fictional mine to drive the BBWA is testimony to the ability of the federal government to manipulate science for political ends. But the obvious flaws in the BBWA should call into question other EPA scientific summaries. The documents supporting their 2009 "endangerment finding" from carbon dioxide emissions prominently come to mind.

1

2, https://www.epa.gov/sites/production/files/2016-01/documents/20160113-16-p-0082.pdf