

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051

<http://oversight.house.gov>

November 4, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Administrator McCarthy:

The Committee's investigation of the Environmental Protection Agency's unprecedented actions to block mining operations near the Bristol Bay watershed in Alaska found that EPA employees had inappropriate contact with outside groups and failed to conduct an impartial, fact-based review of the proposed Pebble Mine, among other things. These troubling facts were uncovered pursuant to the Committee's review of events prior to EPA's extraordinary decision to proceed with a veto of mining activities under Section 404(c) of the Clean Water Act, despite the fact that no permit application for mining has been submitted.¹ The Committee's investigative findings raise serious questions about whether EPA should withdraw the Proposed 404(c) Determination for the Pebble Deposit and the Bristol Bay Watershed Assessment (BBWA), which formed the basis for EPA's decision to veto the Pebble Mine project.

A report by former Senator and Secretary of Defense William Cohen reached similar conclusions.² Secretary Cohen found the BBWA made premature and unreliable assumptions regarding mining scenarios in Bristol Bay. Secretary Cohen recommended that the proposed Pebble Mine should be reviewed pursuant to the process set forth in the National Environmental Policy Act (NEPA), as is typical for projects of this kind. Secretary Cohen stated:

The fairest and most appropriate process to evaluate possible development in the Pebble Deposit Area would use the established regulatory Permit/NEPA Process to assess a mine permit application, rather than using an assessment based upon the hypothetical mining scenarios described in the BBWA as the basis for imposing potentially prohibitive restrictions on future mines.³

¹ Press Release, EPA, EPA moves to protect Bristol Bay fishery from Pebble Mine (Feb. 28, 2014), http://yosemite.epa.gov/opa/admpress.nsf/names/r10_2014-2-28_bristol_bay.

² 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), <http://files.cohengroup.net/Final/Final-Report-with-Appendices-compressed.pdf>.

³ 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

In light of the Committee's investigative findings, we agree. We share Secretary Cohen's concerns regarding the wisdom of making decisions based on the BBWA—which relies on hypothetical mining conditions to make specific assessments—when the alternative is to use the conventional 404(c) process, which requires an applicant to submit detailed plans for the proposed mine.

EPA has effectively acknowledged the weaknesses of the BBWA and downplayed its significance by clarifying it was not an environmental impact statement, that it does not represent an economic or social cost-benefit analysis, and that it is not an assessment of any specific mine proposal. Of additional concern is that EPA removed the Army Corps of Engineers from its statutorily-mandated role in the 404(c) process, which moved the agency's actions with respect to Pebble Mine into a legal gray area.⁴

Secretary Cohen's report made several other findings that raise concerns. For example, the report stated:

The statements and actions of EPA personnel observed during this review raise serious concerns as to whether EPA orchestrated the process to reach a predetermined outcome; had inappropriately close relationships with anti-mine advocates; and was candid about its decision-making process.⁵

The Committee reached similar conclusions. The Committee's findings include:

- EPA employees knew that the agency's use of a Section 404(c) preemptive veto was unprecedented.
- EPA planned to halt mining activity in Bristol Bay well before receiving petitions from local tribes that urged EPA to take action. EPA's claim that it took action under Section 404(c) in response to the tribal petitions is not true.
- EPA employees frequently provided sensitive information to mine opponents. One EPA employee helped draft the tribal petition that the agency later claimed to have relied on.
- An EPA employee proposed ways to shield the agency's work on the Bristol Bay matter from Freedom of Information Act requests.
- Former EPA Administrator Lisa Jackson dodged advocates for the mining venture and communicated the agency's decisions regarding Bristol Bay at an event sponsored by anti-mine groups.

WATERSHED: EXECUTIVE SUMMARY, (Oct. 6, 2015), <http://files.cohengroup.net/Final/Final-Executive-Summary.pdf>.

⁴ 33 U.S.C. § 1344

⁵ *Supra* note 3.

The Honorable Gina McCarthy

November 4, 2015

Page 3

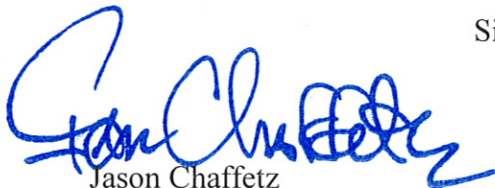
A report prepared by Committee staff is enclosed with this letter for your ready reference. The findings contained therein, in conjunction with the Cohen report, show that EPA's actions with respect to Pebble Mine are highly questionable and lacking a legal basis. The agency has tools at its disposal under the Clean Water Act to properly analyze any permit that might be submitted for mining projects in Bristol Bay. As such, we urge you to withdraw the Proposed 404(c) Determination for the Pebble Deposit and the Bristol Bay Watershed Assessment; cease all preemptive 404(c) activity; and, allow for project proposals in Bristol Bay to undergo the conventional CWA and NEPA processes.

Please update the Committee by November 18, 2015 regarding the EPA's plans to address these concerns.

The Committee on Oversight and Government Reform is the principal investigative committee in the U.S. House of Representatives. Pursuant to House Rule X, the Committee has authority to investigate "any matter" at "any time."

If you have any questions about this request, please contact Ryan Hambleton of the Committee Staff at (202) 225-5074. Thank you for your attention to this matter.

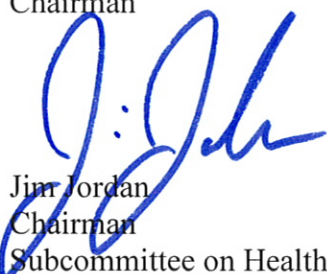
Sincerely,



Jason Chaffetz
Chairman



Cynthia M. Lummis
Chairman
Subcommittee on the Interior



Jim Jordan
Chairman
Subcommittee on Health Care,
Benefits, and Administrative Rules

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member

The Honorable Brenda L. Lawrence, Ranking Member
Subcommittee on the Interior

The Honorable Matthew Cartwright, Ranking Member
Subcommittee on Healthcare, Benefits, and Administrative Rules

The Honorable Gina McCarthy

November 4, 2015

Page 4

The Honorable Ken Calvert, Chairman
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations

The Honorable Betty McCollum, Ranking Member
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations

The Honorable Lisa Murkowski, United States Senator for Alaska

The Honorable Dan Sullivan, United States Senator for Alaska

The Honorable Don Young, Member of Congress
Alaska, At Large

The Honorable Bill Walker
Governor of Alaska

The Honorable Craig W. Richards
Attorney General of Alaska

The Honorable Kevin Meyer, Senate President
Alaska State Legislature

The Honorable Mike Chenault, Speaker of the House
Alaska State Legislature