



A Green Mess: Is Epa In Hot Water Over Alaska's Bristol Bay?

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Alaska's Pebble Partnership, which owns the rights to the second-richest copper-gold deposit on earth, is at the center of one of the premier resource issues of our time. Environmentalists and sportsmen are concerned that mining the deposit will despoil Bristol Bay, home of the world's largest sockeye salmon fishery. Investors in Pebble obviously want the site developed, which has been zoned for mining by the State of Alaska. The Obama Administration's 54.5mpg fuel economy mandate for 2025 may not be met without a substantial shift towards pure-electric and advanced hybrid cars, whose motors will require massive amounts of copper wiring and hardware. Unemployment in south coastal Alaska is epidemic, and the mine will surely provide relief, if not a cure.

This many passionate and competing interests, coupled with sheer size of this deposit, are a recipe for the intrigue and controversy which have been going on for years.

In 2010, before Pebble even submitted an application for a mining permit, the EPA used a specific provision (section 404(c)) of the federal Clean Water Act, to preempt one. In a clearly unintended consequence, the EPA veto called into question the legality of preempting the issuance of a permit before said permit application is even submitted for review, as required under the same Clean Water Act.

Couple all of these interests with an administration largely committed to the greens among us. It doesn't have to tell EPA what to do, as the Agency has similar sympathies, resulting in regulatory enthusiasm. This was the conclusion, last October, of Washington's prestigious Cohen Group (headed by Bill Clinton's Secretary of Defense, William Cohen), in a detailed report that EPA's use of the Clean Water Act veto prior to Pebble's filing of a permit application was "not fair" to the Alaska-based mine and its investors.

In its defense, EPA claims that the veto was based on "scientific evidence" presented in the Bristol Bay Watershed Assessment, commissioned in early 2011 and published by the agency in January 2014, to ascertain the impacts of Pebble's proposal on Alaska's Bristol Bay. Because there was never any mining permit application, and therefore no submission of a mine plan design, EPA charged a senior biological scientist (not a mining engineer) named Philip North to design a worst case scenario open-pit "hypothetical mine" that would never be approved. In fact,

Pebble's real intentions for mining have never been determined. North then proceeded to "model" the maximum deleterious impact of the nonexistent, unplanned, imaginary mine on Bristol Bay.

All along, Pebble knew that, along with the application, it would be required to file a detailed environmental impact statement for the entire proposed mining operation. Consequently, it spent approximately \$150 million in a massive study of the biology, ecology, and dynamics of the Bristol Bay watershed. EPA and North simply ignored this remarkable repository of information before admitting, during the entire time that the Bristol Bay Watershed Assessment was being written (2011-2014), that it was never really intended to provide a scientific foundation for regulatory decision-making, after all.

While he was creating his hypothetical open pit mine, Mr. North also coached anti-Pebble activists on how to petition his own Agency to stop the real mine permit application. It appears he even wrote the petitions. When all this bubbled up, in early 2013, the House Oversight Committee asked him to come in and chat; he delayed, bobbed, weaved, and suddenly pulled his children out of school and fled the country. Last August, a federal judge issued a subpoena, commanding him to appear before the Committee, and Mr. North, currently in Australia, was served last month (January, 2016) with instructions to appear before the House Oversight Committee — details of his appearance are now being worked out. If he does not comply within 60 days he will go to jail — in Australia.

There are nearly ten years of emails and internal memos that purportedly indicate collusion between EPA and environmentalist activists who staunchly opposed Pebble, some of which may be found in discovery. In the meantime, EPA's Regional Administrator for Alaska, Mr. Dennis McLaren, who is also thought to have played some role in Pebble's application denial, will likely be deposed this spring. Clearly, much more needs to be learned about how individuals within EPA and the agency at large handled the Pebble Partnership.

EPA's veto of Pebble has a deeper meaning that should disturb environmentalists much more than the mine: it preempted the NEPA process (National Environmental Protection Act) — 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 may have issued their veto to avoid the "risk" of a possible NEPA-approved mining operation that they did not want, and perhaps the discovery process will shed light on that possibility. If so, EPA has set a very negative precedent by circumventing NEPA — which is responsible for its very existence.

To date, the discovery process has found that EPA incorporated studies produced by paid opponents of the Pebble Project into their Bristol Bay assessment, relying heavily on that material to reach their dire conclusions. These actions by EPA were sufficient that the U.S. District Court judge in Anchorage, in May, determined that Pebble is more likely to win its case than is the EPA. The judge issued a preliminary injunction against any further efforts by EPA to deny Pebble its due process rights to develop and submit a permit application. This action would indicate that Pebble has a better than even chance of prevailing in court against the EPA.

In the latest twist to the case, EPA's Office of the Inspector General, on January 13 of this year, published its findings as prompted by last year's Cohen Group report. The IG determined that EPA "addressed guidelines and followed policies and procedures when conducting the Bristol Bay Watershed Assessment," but it also found that "an [unnamed] EPA Region 10 employee," none other than Philip North, did in fact use his personal email to interact with outside parties regarding their input to the veto language and to the watershed assessment. For this, the EPA Senior Council for Ethics agreed that the "employee" (Mr. North) had "misused his position".

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 NEPA."

EPA will likely attempt to continue to run out the clock on Pebble, i.e. to bankrupt the non-producing project. As the legal discovery and deposition processes drag on, and considering the 2010 date of the original EPA veto — it is clear that for Pebble and its investors, justice delayed is justice denied.

Meanwhile, the same highly charged atmosphere of competing interests will continue to haunt Pebble. People in the lower 48 want their wild-caught Sockeye. People in southern Alaska want jobs, and everyone wants more efficient cars that need more and more copper

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