

**TESTIMONY OF THOMAS C. COLLIER  
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THE PEBBLE PARTNERSHIP  
“INVESTIGATING THE APPROPRIATE ROLE  
OF NEPA IN THE PERMITTING PROCESS”  
BEFORE THE COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES  
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Good morning Chairman Bishop, Ranking Member Grijalva, and Members of the Committee. Thank you for the opportunity to be here today to discuss the actions of the US Environmental Protection Agency (EPA) with respect to a proposed mineral development project on state-owned lands in southwest Alaska.

The Pebble deposit is among the most significant accumulations of metals ever discovered in this country. It is the largest undeveloped copper deposit and the largest undeveloped gold deposit on the planet, and contains commercially significant quantities of other strategic metals as well – including molybdenum, silver, platinum and rhenium. Its future development will generate significant economic benefits for generations of Americans and, in particular, for the Alaskan economy, where depressed oil prices and a lack of economic diversity have created serious fiscal strains. It will create much needed jobs and economic activity in one of our country’s most economically depressed regions.

But we’re not here to talk about the Pebble mine today. Indeed, development at Pebble will not occur for many years in the future, inasmuch as the project’s proponent – the Pebble Limited Partnership, of which I serve as Chief Executive Officer – has yet to propose a development plan or initiate federal and state permitting, or the associated National Environmental Policy Act (NEPA) review process. As I will reference later in my remarks, NEPA requires that an Environmental Impact Statement (EIS) be completed to guide permitting reviews of major development projects like Pebble. The EIS process is scientifically rigorous. It is objective and transparent, utilizing independent, third-party scientists and technical experts. It is exhaustive, often stretching over multiple years of study and revision. It is inclusive, providing ongoing opportunities for public participation. And it is time-proven, having facilitated responsible, science-based regulatory decisions in this country for more than 40 years.

It’s my view that the EIS process under NEPA is the appropriate means by which Pebble – and every other major development project in the nation – should be assessed by federal and state regulators, and the public. I am not here today to discuss the relative merits of the Pebble mine, as I believe there is a well-defined and time-proven process for doing so under U.S. law. What I am here to speak to you about is EPA’s failure to follow the NEPA process with respect to Pebble, and the significant negative implications of that decision for my company and its shareholders, for the State of Alaska and its people, for any development interest seeking to secure permits under the Clean Water Act, and for future investment in the US economy. I recognize that EPA has a critical role to play in permitting and I do not intend for my comments to be perceived as an attack on EPA. My focus here today is to explain why EPA would be a

much more effective agency if it fulfilled its statutory mandate by faithfully following the well-established NEPA process, rather than by creating its own ad hoc process for implementing a preemptive veto.

In evaluating the proposed Pebble Project, EPA has decided to set aside the NEPA process and instead sought to implement the first-ever pre-emptive veto in the 43-year history of the Clean Water Act at Pebble, utilizing a little used provision, Section 404(c), in a novel and unprecedented way. They have sought to do so in the absence of the Pebble Partnership filing a permit application with the US Army Corps of Engineers (USACE or the Corps), or the completion of an EIS under NEPA. In so doing, EPA has cut the Corps out of the permitting process and has upset the delicate balance of power that Congress imposed on EPA and the Corps in Section 404.

There is also evidence that EPA may be taking these actions against Pebble, at least in part, to extend its own authority to pro-actively ‘zone America’ – to place its conservation-first footprint over not just federal lands, but state, private and tribal lands throughout the country.

And, while it is not the focus of my testimony today, there is evidence that EPA set out to take this action before undertaking any scientific inquiry, contrary to its goal of scientific integrity and transparency.

Mr. Chairman, I believe the actions taken by EPA to be unlawful, fundamentally unfair, and profoundly unwise. I will address those concerns today, but first I would like to reiterate five fundamental points that my testimony is intended to emphasize:

1. There is a well-established and time proven process in this country by which major development projects are assessed and regulatory decisions are made. It is the EIS process under NEPA, a process supported and even lauded by the environmental community as rigorous, science-based, objective and protective of the public interest.
2. When EPA deviates from well-worn regulatory paths like the NEPA EIS process, particularly with significant and contentious projects like Pebble, then the potential for bias and abuse is sure to follow.
3. Rather than following NEPA’s requirements, EPA undertook a scientific study – the Bristol Bay Watershed Assessment (BBWA) – that would ensure that EPA could veto the project. This scientific record that EPA is relying upon to support its pre-emptive veto is not only substantially less exhaustive and definitive than an EIS completed under NEPA (something EPA itself acknowledges), but it also suffers from serious scientific flaws and even intentional distortions, several of which I intend to review for you today.
4. The Clean Water Act, as passed by Congress in 1972, does not provide EPA with the statutory authority to take pre-emptive action as they have sought to do at Pebble. Moreover, EPA’s conduct violates a binding and longstanding

agreement with the Corps that makes clear that EPA's veto authority can only be exercised after the Corps has acted.

5. Finally, should EPA achieve its goal of vetoing the Pebble Project, it will set a dangerous precedent with far-reaching consequences. There are thousands of 404 permits applied for every year in virtually every sector of the American economy – from energy to agriculture, manufacturing to construction. Those permits represent hundreds of billions of dollars of annual investment in our country; investment that EPA's stated desire to achieve pre-emptive veto authority will undeniably place at risk.

In our case, the Pebble Partnership has committed more than \$750 million to the responsible development of the Pebble deposit. Isn't it clear that other developers will think seriously about investing in the United States when their rights to propose a development plan for consideration under well-established regulatory and permitting processes can be taken away at any time by EPA? To be sure, EPA has an indispensable role in evaluating the environmental impacts of proposed projects. But its work to safeguard the environment would be more effective if it follows the appropriate, Congressionally mandated process that ensures a fair and open process for all.

### *Project Background*

To begin, allow me to briefly introduce myself, as well as the organization I represent. I have been a regulatory lawyer here in Washington DC for more than 40 years, often representing companies seeking federal permits for resource development and similar projects throughout the country – in particular, 404 wetlands permits under the Clean Water Act. I've been personally and intimately involved in dozens of EIS processes under NEPA.

I also spent time working inside government as Chief of Staff to Bruce Babbitt during his term as Secretary of the Interior, as well as within the Department of Housing and Urban Development. There are three very important things I learned during my time at the Department of the Interior, principles that remain with me to this day:

1. It is possible to both achieve economic development and protect the environment;
2. Science must guide the process of regulatory decision-making; and
3. Following the NEPA process is absolutely critical to making responsible and defensible decisions on major development projects.

During my time in government, I also helped lead a number of science-based processes to reach important policy decisions on matters of public interest – related both to the spotted owl crisis in the Pacific Northwest and management of the Everglades. And I learned some important lessons from those experiences as well:

1. When you set out to gather the best scientific knowledge to underpin regulatory decision-making or public policy, you have to ensure that the scientists and experts you retain are entirely objective, and don't have pre-determined views or a personal interest in the subject matter they are tasked with assessing.
2. You must restrict ex parte communications between your scientific experts and the special interests involved in the matter at hand.

To achieve the best and most defensible regulatory decisions, the scientific record has to be both entirely open and objective, and it must be perceived by the public and interested parties to be so.

In February 2014, I became CEO of the Pebble Partnership, an Alaska-based corporation that owns the Pebble Project. Prior to that time, I had been working as a consultant to Northern Dynasty Minerals Ltd., a Canadian company and, at the time, one of two 50% owners of the Pebble Project, along with global metals producer Anglo American plc. Anglo American actually exited the Partnership in the fall of 2013 after expending some \$600 million at Pebble, due in some degree to EPA's hostile stance against a project that had not even been proposed. At that time, Northern Dynasty regained 100% ownership of the Pebble Partnership.

The Pebble deposit itself was first discovered in the late 1980s, but it was Northern Dynasty's work in the early part of this century that really proved it up as one of the world's great mineral resources. Northern Dynasty's acquisition costs for the Pebble property totaled about \$90 million, and the company invested a similar amount to advance the project prior to forming the Pebble Partnership with Anglo American in 2007. Total expenditures to date at Pebble exceed \$750 million.

The Pebble deposit is located on State of Alaska lands some 200 miles southwest of Anchorage, in an area specifically designated for mineral exploration and development. In fact, it's situated on lands that were part of a three-way land exchange between the US government, the State of Alaska and an Alaska Native corporation back in the 1970s, which led to the creation of Lake Clark National Park. In accepting the land swap, the State of Alaska made perfectly clear that its interest in the lands surrounding Pebble was directly related to their mineral potential, and the contribution those minerals could make to support the state's economy. The US Geological Survey has since identified the lands surrounding Pebble as the most extensive mineralized system of its type in the world.

Today, following many tens of millions of dollars of investment in geological investigations, we know Pebble is among the most significant mineral resources ever discovered. At more than 12 billion tons, it has the potential to produce strategic metals like copper, gold, molybdenum, silver, rhenium and platinum for more than 100 years, while generating much needed jobs in Alaska and throughout the country. As noted previously, it is both the largest undeveloped copper deposit and the largest undeveloped gold deposit in the world. It has the potential to produce 20% of America's copper production each year over generations of production.

Economically, Pebble has the potential to support 15,000 high-wage American jobs, while contributing nearly \$4 billion to our Gross Domestic Product each year, and nearly \$400 million

in annual government revenues. It will create a sorely needed economic engine for southwest Alaska, a region of the state plagued by low levels of employment and income, and perhaps the highest cost of living in the country. In fact, many Native villages in southwest Alaska are losing population at an alarming rate, causing schools to close, and threatening the very survival of many of these communities.

People have asked why, after more than a decade of study and investment, the Pebble Partnership hasn't yet applied for permits. There are many factors that have contributed to where we are today, as mining projects are large, complex and capital intensive ventures. But key among the drivers for Pebble not being in permitting today is the actions that EPA and its colleagues in the environmental community have taken.

EPA's actions at Pebble since 2011 have had a significant negative impact on our ability to finalize a mine plan and apply for permits. In 2011, EPA announced that it would conduct the Bristol Bay Watershed Assessment to evaluate the evidence supporting a veto of the project. With this announcement it became clear that NEPA would not be followed.

This decision had serious ramifications. The BBWA study has been used by groups like the Natural Resources Defense Council (NRDC) and others to discourage investment in the Pebble Project, and has materially reduced the financial resources available to advance the project into permitting. In addition, despite Pebble's location on State of Alaska lands designated for mineral exploration and development, EPA has now proposed extraordinary development restrictions that apply nowhere else in the country. This is an unprecedented situation that has never occurred in the 43-year history of the Clean Water Act and has not been resolved by the courts. Moving a project forward into permitting under that kind of uncertainty is, quite frankly, unrealistic.

Finally, even if we were willing to advance Pebble into permitting now, the US Army Corps of Engineers – the federal agency that typically leads 404 permitting and would initiate a NEPA EIS process at Pebble – has made it clear that governing regulations prohibit it from issuing a 404 permit to Pebble in the current circumstances. EPA's pre-emptive 404(c) regulatory action must be resolved in some manner before any Corps-led permitting process can run its course.

There are other reasons, of course. Assembling all of the geological, engineering, environmental and other technical information necessary to develop a mine plan that will meet regulatory and permitting requirements, protect the environment, achieve safe and stable operations, and provide an acceptable return on investment takes many years and tens of millions of dollars of investment. In fact, a National Mining Association study recently estimated that mining projects in the US typically take 9 – 11 years to reach the point at which permits are applied for, with large and complex projects such as Pebble taking considerably longer. There's absolutely nothing unusual about the fact that Pebble hasn't yet applied for permits when you consider that work began in earnest on the project in 2004.

Further, given the significance of the fishery resources in southwest Alaska and the high-level of scrutiny that Pebble will receive from regulators and the people of the state, we have taken a very methodical and deliberate approach to design a project to achieve the highest levels of environmental performance – including spending more money on environmental studies than any

other project in US mining history. We won't apologize for taking the time necessary to do it right, and we won't be hurried to bring this project into permitting before we have defined the optimal mine plan from an environmental, social and technical perspective.

Of the more than \$750 million invested in the Pebble Project, some \$150 million has funded environmental studies of the project area undertaken over the course of a decade. As noted, we believe this to be among the most comprehensive and exhaustive environmental data sets ever collected for a mineral development project, and it's significant for two reasons:

1. because the Bristol Bay Watershed Assessment did not evaluate this incredible site- and project-specific scientific resource; and
2. because these environmental baseline studies provide the scientific foundation upon which an environmentally sound mine can be designed, built, and operated at Pebble.

Pebble has also invested tens of millions of dollars on engineering work informed by our environmental baseline studies to ensure we can propose a development plan that both meets strict federal and state environmental regulations and fully coexists with the important fisheries resources of Bristol Bay. When it is built, Pebble will incorporate advanced engineering practices and technologies, as well as robust environmental safeguards and mitigation strategies, to maintain water quality, to protect and enhance aquatic habitat, to ensure the mine operates safely throughout its operating life and returns the land to a productive and beneficial condition after mining is done.

We are very confident that we can design, build and operate an environmentally sound and socially responsible mine at Pebble, and we are assembling the scientific and technical information necessary to demonstrate that to government regulators and the general public during the NEPA EIS process. We know this project can co-exist with a thriving Bristol Bay salmon fishery, and can make a tremendous economic contribution to the people of the region, the state and the country over generations of production. We look forward only to an open, objective and science-based permitting process to make that case.

#### *Review under the National Environmental Policy Act*

I said previously there is a well-established and time proven process for regulatory review and approval of resource projects like Pebble. In our case, it would begin by the Pebble Partnership submitting an application to the US Army Corps of Engineers for a permit under Section 404 of the Clean Water Act for the placement of dredged or fill material into waters or wetlands of the United States. The Corps' CWA 404 permit procedure is subject to NEPA, which requires that an EIS be completed for "major federal actions significantly affecting the quality of the human environment." Significant mining projects are generally deemed to be major federal actions that require an EIS.

At Pebble, as at other major development projects, the Environmental Impact Statement will be prepared by an independent, third-party expert contractor working under the direction of the Corps. The third-party contractor will rely upon the 'Project Description' and 'Environmental

Baseline Document’ provided by the project proponent, but it will also demand that an ‘alternatives assessment’ be undertaken to ensure that the project being proposed utilizes the best available technologies and options to avoid, minimize and mitigate environmental and social effects. The contractor will also independently verify the proponent’s environmental studies, and even conduct its own, to ensure that the scientific basis for assessment is sound. It is a very robust and intensive process that takes multiple years to complete.

The EIS process is also open, transparent and participatory. It provides for the involvement of multiple federal, state and local regulatory agencies. It provides ongoing opportunities for public involvement, including public meetings. Ultimately, it will produce a scientific and administrative record upon which the USACE will reach its ‘Record of Decision’ on Pebble’s 404 permit application, and upon which scores of other federal and state regulatory agencies will base their decisions on the dozens of other permits that the Pebble Partnership requires to build and operate a mine. Again, it is a well-established and time proven process for making science-based decisions on major development projects that benefit all Americans.

The EIS process will provide valuable information on the potential impacts of the Proposed Pebble project, including a comprehensive review of impacts to water quality, wetlands, and other aquatic resources. The EIS will also evaluate potential project- and site-specific mitigation measures, social and economic impacts, and alternatives. All of this information is critical to a full understanding of the potential impacts of a mine project. An EIS also typically accounts for the positive benefits created by the project—for example, economic growth for a community.

When it comes to CWA 404 permits, in particular, EPA has a special role as authorized by Congress. Under the statute, the USACE is clearly provided the authority to review CWA 404 permit applications and grant 404 permits, often following completion of a NEPA EIS process. However, Section 404(c) authorizes EPA to veto a USACE 404 permit if it determines that the project as permitted “will have an unacceptable adverse effect” on certain aquatic resources, including fish habitat.

When the Clean Water Act was passed into law in 1972, Congress agreed to a framework of ‘checks and balances’ for authorizing 404 dredge and fill permits between the USACE and EPA, with the former provided authority to grant permits and the latter granted authority to veto them. However, it is clear that Congress intended to allow EPA to rule on specific 404 permits as granted by the Corps only, rather than to use the statute to impose *a priori* blanket restrictions on development over large areas of land.

The United States Supreme Court has agreed with this interpretation, concluding that the Clean Water Act “gives EPA authority to ‘prohibit’ any decision by the Corps to issue a permit for a particular disposal site.” *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009).

While rigorous and time-intensive, the system of CWA 404 permitting and NEPA review has worked exceedingly well over many decades. The NEPA EIS process has played an enormous role in guiding resource development in this country in a way that protects the environment and the public interest, and has been widely praised by the environmental community. Indeed, the

NRDC – one of the loudest campaigners against Pebble – has also been one of the staunchest supporters of NEPA as the gold standard for environmental protection, calling it the “Magna Carta” of environmental law. Here’s what NRDC has to say about the statute:

NEPA is democratic at its core. In many cases, NEPA gives citizens their only opportunity to voice concerns about a project's impact on their community. When the government undertakes a major project such as constructing a dam, highway, or power plant, it must ensure that the project's impacts – environmental and otherwise – are considered and disclosed to the public. And because informed public engagement often produces ideas, information, and even solutions that the government might otherwise overlook, NEPA leads to better decisions – and better outcomes – for everyone. The NEPA process has saved money, time, lives, historical sites, endangered species, and public lands while encouraging compromise and cultivating better projects with more public support.

According to NRDC, the EIS process is a fundamental aspect of the NEPA’s democratic character: “Much like the Magna Carta protected people from the dangers of monarchical rule, NEPA protects people by providing transparency in federal projects.. Both the Magna Carta and NEPA espouse the ideals of public participation and democracy by giving citizens a voice in government decisions.” The NRDC has noted that “EISs are first released in draft form, allowing the public and other agencies and levels of government to comment on decisions they care about, provide outside scientific opinion, and ask for improvements. In final EISs, agencies have to respond to reasonable input and explain any rejection of outside expert views.” These multiple levels of review and scrutiny ensure an open and fair process. Thus, NRDC has held up the EIS process as a model for other nations to follow.

The National Academy of Sciences agrees, telling Congress: “The NEPA process is the key to establishing an effective balance between mineral development and environmental protection. The effectiveness of NEPA depends on the full participation of all stakeholders throughout the NEPA process. . . . [A]gencies should continue to rely to the maximum extent possible on the flexible, comprehensive NEPA evaluation process for making permitting decisions.”

In the normal course of events, Pebble would have submitted a 404 permit application to the US Army Corps of Engineers by now, and an EIS process under NEPA would have been well underway – perhaps even completed. Without a doubt, that process as endorsed by the NRDC and the National Academy of Sciences would have provided greater scientific certainty as to whether Pebble can be built and operated in a way that protects the important fisheries and aquatic resources of southwest Alaska than the EPA’s pre-emptive efforts to date.

### *The Dangers of Abandoning NEPA*

NEPA was specifically drafted by Congress to produce thorough, accurate science and ensure full and fair decision-making, taking into account the true costs and benefits of a proposed project. Thus, the NEPA process offers a much broader view of the impacts of a project, allowing the agency to examine all the possible merits of a project as well as potential environmental impacts. EPA’s substitute process – the BBWA – did not consider all of the



impacts, both positive and negative, of the Pebble project, and thus should not have formed the basis of any agency decision making.

The dangers of not following NEPA are plenary. To begin with, the NEPA process is scientifically rigorous, offering a full view of the potential impacts of a project. Other processes may not be as complete. For example, the EIS process includes a comprehensive review of impacts to water quality, wetlands, and other aquatic resources. The EIS also evaluates potential project- and site-specific mitigation measures, social and economic impacts, and alternatives. Moreover, because the NEPA process examines an actual permit application, the process is focused on more detailed, and more accurate data, to determine the actual (not the hypothetical) effects of a project. All of this information is critical to a full understanding of the potential impacts of a mine project. If an Agency fails to follow NEPA, it may feel compelled to rely on unfounded assumptions or contested facts to fill in the gaps. The result is bad science.

NEPA has many other benefits not afforded by other processes like the BBWA. For instance, NEPA requires significant public input, creating an open and transparent process in which all stakeholders can weigh in equally. In addition, the NEPA process also serves an important procedural role. Historically, EPA has only utilized Section 404(c) after the NEPA process for the proposed project, if applicable, has concluded. Commenting on the draft and final EIS allows EPA to voice its concerns about impacts of a particular project, as proposed by the applicant. It also allows the Corps and applicant to respond meaningfully to EPA's stated concerns about the potential environmental impacts by amending the project or increasing mitigation. Without this give-and-take, an agency can develop tunnel vision, or worse, be influenced by ex parte communications with biased parties, as happened with respect to Pebble.

In short, abandoning the NEPA framework mandated by Congress creates the potential for an agency to engage in a faulty process that is both scientifically unsound and biased. When secrecy replaces the transparency of NEPA, outside influences with predetermined agendas can seep in. This undermines the public's confidence that the Agency will provide due process and a fair decision for future development projects.

Indeed, the Pebble story demonstrates the consequences that follow when NEPA is abandoned. To start with, EPA's decision not to follow NEPA allowed certain employees to design a process that would achieve their personal, desired outcome – a veto. Pebble has uncovered evidence showing that EPA employees intended to use its authority under CWA 404(c) to halt development at Pebble long before the Agency completed the Bristol Bay Watershed Assessment study upon which its proposed regulatory action is purportedly based – in fact, before it had conducted any scientific inquiry at all. Indeed, we have documented evidence that beginning in 2008, perhaps even as far back as 2005, officials within EPA Region 10 were already ruminating about using the agency's 404(c) veto authority to stop Pebble. By January 2010, those considerations had reached the highest office in the agency, when Region 10 briefed then Administrator Lisa Jackson about the Pebble Project and the option of advancing a “pre-emptive” veto under Section 404(c).

In May of that year, EPA staff began circulating an “Options Paper” that evinces their bias and pre-determination to stop Pebble before a development plan was proposed, before a 404 permit

application was submitted and even before any scientific inquiry had been undertaken. A June 2010 draft of the Options Paper contains the following statement: “Region 10’s Aquatic Resources Unit (ARU) believes that [the already available] information, as it relates to Bristol Bay and its watersheds, is sufficient to make a 404(c) determination now,” and that “[w]aiting to make the determination does not seem necessary or a prudent use of anyone’s resources.” It also describes Pebble as “a project EPA ARU program staff believe should be vetoed in the end, “and reports that “NMFS [(National Marine Fisheries Service)], NPS [(National Park Service)] and FWS [(Fish and Wildlife Service)] staff in Alaska have unofficially endorsed EPA initiating a 404(c) action.” The clear question being addressed in EPA’s “Options Paper” is not if the Pebble Project should be vetoed, but when and how.

By the fall of 2010 – again, six months before the Bristol Bay Watershed Assessment study would be launched and more than three years before its final publication – it appears the agency had answered its own question about when, not if, to veto the Pebble Project. An EPA budget document for Fiscal Year 2011 confirms EPA’s veto decision, and calls for the requisite funds to “[i]nitiate the process and publish a CWA 404(c) ‘veto’ action for the proposed permit for the Pebble gold mine.”

At the risk of repeating myself, it is critically important for the Committee to appreciate that all of the internal EPA deliberations and decision-making described in these documents occurred before the agency had undertaken any scientific inquiry into the impacts of mine development in southwest Alaska, or even understood what a Pebble mine proposal could look like. If EPA had followed the NEPA process, the agency would have started with a scientific analysis, not ended with one.

Moreover, if EPA had followed the NEPA process, it would not have been allowed to rely on information received through *ex parte* contacts with interested stakeholders. The process designed by EPA for Pebble, however, allowed scores of back door meetings with anti-mine activists.

EPA granted astonishing access to its decision-making process at Pebble to a cadre of environmental and anti-mine activists – access that was assiduously denied to the Pebble Partnership and allied parties, including certain Alaska Native tribes. For instance, on June 22, 2010, Trout Unlimited flew in a team of anti-mine scientists and activists to confer with EPA Region 10 Administrator Dennis McLerran, as well as Director of the Office of Water and Watersheds (OWOW), legal counsel and others to discuss the “[r]ationale for 404 ‘veto.’” In September 2010, EPA held a two-day strategy session with anti-mining activists concerning the proposed veto.

Anti-mining groups’ access to EPA included direct input on the design and substance of the BBWA study. For instance, EPA met with The Nature Conservancy (TNC) in December 2010 and again in January 2011 for briefings on its October 2010 study, entitled “An Assessment of Ecological Risk to Wild Salmon Systems from Large-scale Mining in the Nushagak and Kvichak Watersheds of the Bristol Bay Basin.” Subsequent to those meetings, EPA had the agency’s Office of Research and Development (ORD) conduct an analysis of the TNC report so it could be used in the BBWA. At the same time, in February 2011, EPA set up a meeting with TNC and

the Bristol Bay Assessment Team regarding “Scenario Building for Bristol Bay,” suggesting TNC had direct input into the initial design of the BBWA.

In fact, over the course of the Bristol Bay Watershed Assessment study process, EPA regularly spoke and met with anti-Pebble campaign leaders and scientists to share campaign information, technical studies and other intelligence relevant to EPA’s 404(c) strategy. EPA and anti-mine proponents have communicated – by phone, in writing, via webinar, or in person – almost 1,000 times since 2009. For example, Trout Unlimited’s Shoren Brown communicated with EPA officials regarding Pebble (usually in private) on more than 200 occasions, an average of once every week for four years, including numerous face-to-face meetings, and Jeff Parker communicated with EPA in excess of 100 times. Moreover, EPA regularly sought reports and other input from anti-Pebble activists outside of formal BBWA public comment windows, while refusing to do so for parties with opposing points of view.

In the end, EPA constructed its own scientific process to review the proposed Pebble project, which did not include the rigors of NEPA and an EIS. EPA’s substitute process – the BBWA – was fraught with problems that would have been avoided by NEPA.

For example, the BBWA was led by Region 10 Associate Director Richard Parkin, who voiced his support for a pre-emptive veto before any scientific work was conducted. And Phil North led the technical team for the BBWA, despite having agitated for a 404(c) veto within the agency as far back as 2009.

With Parkin and North in charge, it is not surprising that many of the BBWA’s authors and contributors held anti-Pebble views. For example, Phil Brna, of the U.S. Fish and Wildlife Service, co-authored a major appendix to the BBWA, despite his longstanding opposition to Pebble. In a September 2010 email, Brna reflected on the likelihood of a pre-emptive veto of the Pebble Project, stating “this is going to happen and it’s going to get bloody. I am looking forward to it!”

Other BBWA authors and contributors were outspoken opponents of the Pebble Project, and some worked for organizations actively campaigning against the project. Alan Boraas, a professor of anthropology at Kenai Peninsula College, co-authored an appendix to the BBWA despite his long-standing opposition to the project, as expressed in vehement anti-Pebble editorials published in Alaska newspapers. And, Ann Maest of Stratus Consulting was regularly consulted by the BBWA study team and contributed several studies for early drafts of the assessment. EPA relied on Maest even though she confessed in a different litigation to ignoring scientific evidence unfavorable to her pre-determined conclusions and to ghost writing a scientific report for a court appointed expert who was supposed to evaluate the case and conduct his own scientific assessment. Despite being aware of Maest’s alleged role in the Chevron fraud since at least 2011, it was not until after Maest finally admitted her role in a sworn declaration in 2013 that EPA finally omitted references to her work from the final version of the BBWA, but, nonetheless, continued to rely on her conclusions.

Not only did EPA select anti-mine scientists for the BBWA team, it also selected anti-mine science to rely upon. I mentioned earlier that EPA largely ignored the most detailed,

comprehensive and relevant environmental information with respect to the Pebble Project site – that is, the \$150 million worth of environmental data and analysis synthesized by the Pebble Partnership over the course of a decade.

At the same time, however, EPA quietly peer reviewed seven studies prepared by paid critics of the Pebble Project so that they might cite these studies in the BBWA. The peer reviewers of these studies roundly condemned them as insufficiently supported by scientific evidence, methodologically flawed and biased. Despite this, the studies prepared by Pebble opposition groups and peer reviewed by EPA are cited throughout the BBWA, whereas the Pebble Partnership’s ‘Environmental Baseline Document’ is largely ignored.

These are not the only problems with the BBWA. As I mentioned earlier, Pebble has not filed a CWA Section 404 permit application yet. Because of this, EPA had to devise its own ‘hypothetical mining scenarios’ to evaluate – an outcome that would never fly under NEPA. That task fell to EPA’s Phil North – not a mining engineer, but a biologist, as well as an avowed critic of the project and perhaps the strongest proponent of a 404(c) veto. North subsequently admitted that his ‘hypothetical mining scenarios’ did not employ “state of the art [mining] practices.”

To be sure, these ‘hypothetical mines’ as presented and assessed in the BBWA do not reflect modern mining practices. In fact, they are demonstrably ‘un-permittable’ under both US and Alaska environmental regulations. This is the case for a number of technical reasons, principal among them:

- EPA’s ‘hypothetical mines’ do not employ the seepage and water management features and functions that are regularly installed at modern mines in the US to protect water quality;
- EPA’s ‘hypothetical mines’ do not employ compensatory mitigation for residual project effects on wetlands and aquatic habitat. Mitigation is not just a common feature at every mine development permitted and built in the US in the last 40 years; it is a statutory requirement of NEPA and the Clean Water Act. In its Bristol Bay Watershed Assessment, EPA elected to ignore that requirement altogether.

In certain instances, the ‘hypothetical mining scenarios’ seem designed to maximize environmental harm. For instance, the Pebble Project is located in a relatively wet region of southwest Alaska, such that the precipitation and groundwater in the project area is surplus to the project’s needs. This is a good thing, as we will be in a position to collect, treat and release surplus water to mitigate the project’s effects on downstream water courses. Nevertheless, EPA’s estimate of the volume of water available for release is some 80% lower than the Pebble Partnership’s superior hydrological information would dictate.

EPA in its ‘hypothetical mining scenarios’ set out to define a ‘surplus water release strategy’ for this excess treated water. They chose to release 50% of the water into one small stream near the Pebble deposit and the other 50% into another small stream near the deposit, while leaving a third small stream with no surplus water whatsoever. They chose to release these surplus waters at a steady rate throughout the year, and (in the case of one of the streams) elected to release

surplus water into a small tributary not used by local fish populations, rather than at the upper reaches of the main stem stream. Because EPA utilized a 50:50:0 surplus water release strategy, it maximized the environmental harm associated with its “hypothetical mining scenarios.”

EPA’s surplus water release strategy doesn’t reflect the approach that would be taken at a modern mine like Pebble. In reality, a modern mine like Pebble will employ sophisticated stream flow habitat modeling to release surplus water to local streams at variable rates, times and locations throughout the year to achieve the optimal effect on downstream habitat for the fish species present. Pebble possesses both the scientific data and the stream flow habitat modeling capability to develop a highly protective surplus water release strategy.

In addition to inappropriate project design and operating assumptions, and missing and inferior data, the Bristol Bay Watershed Assessment’s scientific integrity is further confounded by EPA’s application of simplistic and flawed methodologies for assessing environmental impacts. A large majority of BBWA peer reviewers agreed that important information about the potential effects of mine development on the natural resources of southwest Alaska is lacking in EPA’s study, and must be examined during a more rigorous and comprehensive NEPA EIS process.

For instance, aquatic ecology expert Dr. Phyllis Weber-Scannell said, “There are many aspects of the development of a large mine project that need thorough review to ensure that habitats are protected. These include, but are not limited to: classification and storage of waste rock, lower grade ore, overburden, and high grade ore; development and maintenance of tailings storage facilities; development and concurrent reclamation of disturbed areas, including stripped areas and mine pits; collection and treatment of point and non-point source water; quantity and timing of discharges of treated water; monitoring of ground water, seepage water and surface water; and biomonitoring. The transportation corridor will require review and permitting of every stream crossing of fish-bearing waters.”

EPA agreed with Dr. Weber-Scannell, responding: “EPA agrees that these aspects would need to be subject to a thorough review during the development and approval of a detailed mining plan.” Dr. Weber-Scannell replied: “The reviewer agrees . . . . The comment was initially made to highlight the importance of a rigorous regulatory review.” Unfortunately, due to its rush to finalize a 404(c) veto, EPA is now seeking to foreclose any such opportunity for a ‘rigorous regulatory review’ of the Pebble Project under NEPA.

EPA’s response to Dr. Weber-Scannell is not the only time the agency agreed with its peer reviewers that the Bristol Bay Watershed Assessment provides an insufficient scientific basis for regulatory decision-making. On more than 50 occasions, EPA acknowledged the BBWA is insufficiently comprehensive and definitive to support a regulatory action.

Much has been written and said about the various ways in which EPA contravened its own ‘peer review guidelines’ in advancing the BBWA, including bypassing the independent third-party group retained to manage the peer review process and engaging directly with peer reviewers itself, as well as significantly constraining the scope and extent of the peer review process.

Even so, BBWA peer reviewers raised significant concerns about the study, including:

- “The resulting risk assessment can be at best characterized as preliminary, screening level, or conceptual. There are both technical and process issues that must be addressed before this risk assessment can be considered complete or of sufficient credibility to be the basis for a better understanding of the impacts of mining in the Bristol Bay watershed.”
- “This document is somewhat unique in that no actual mine has been proposed and few site- or project-specific data are available .... It is also unclear why EPA undertook this evaluation, given that a more realistic assessment could have been conducted once an actual mine was proposed and greater detail about operational parameters available .... Unfortunately, because of the hypothetical nature of the approach employed, the uncertainty associated with the assessment, and therefore the utility of the assessment is questionable.”
- “[T]he soundness of the conclusions are somewhat compromised by a lack of information.”

EPA did not address these criticisms, often noting that the reviewers’ concerns were irrelevant since the Bristol Bay Watershed Assessment is not a ‘decision document.’ Inasmuch as the BBWA has, by all accounts, now become a ‘decision document,’ these serious scientific flaws, shortcomings and biases must be acknowledged.

It is only through the completion of an open, objective and rigorous EIS process under NEPA that the true impacts and potential benefits of a future Pebble Project will become known.

#### *EPA Actions are Unlawful*

In January 2014, EPA published the final draft of its Bristol Bay Watershed Assessment (BBWA) study. Just six weeks later, and despite repeated assurances that the BBWA would not be used as the basis for any regulatory action, EPA initiated an action under Section 404(c) to veto or restrict development of the Pebble Project – despite the fact that no development plan for the project had yet been proposed or 404 permit applied for. The pre-emptive use of EPA’s 404(c) authority is unprecedented in the 43-year history of the Clean Water Act, as EPA itself acknowledged in a ‘Bristol Bay 404(c) Discussion Matrix’ prepared in 2010, which states that such an action has “(n)ever been done before in the history of the CWA.”

In fact, in the past, EPA has used its 404(c) veto authority very judiciously. In total, just 13 such vetoes have been issued by the agency in more than four decades. In all but one of those cases, the project in question had been fully detailed in a public proposal, 404 permit applications had been filed delineating a specific disposal site and the Corps had proposed a permit decision.

The sole instance in which EPA vetoed a project that had not yet filed a 404 application occurred in Florida in 1988, when an agricultural developer had proposed substantially similar development proposals on three adjacent plots of land. The proponent filed development plans

for all three sites and permit applications for two of them. When EPA moved to veto the USACE's pending 404 permit for the first two projects, it vetoed the third at the same time.

This is a fundamentally different set of circumstances than we have at Pebble, where EPA's preemptive use of its 404(c) authority, if permitted to stand, will prevent the USACE, other federal and state agencies, and the general public from evaluating the true impacts and benefits of an actual Pebble mine proposal through an objective, rigorous and science-based process.

Thus, the Pebble Partnership has made the case in its submissions to EPA, and in federal court filings, that EPA does not have the statutory authority to do what it is doing here – that is, to preemptively use its 404(c) authority to veto development projects before they have been proposed, submitted permit applications or been reviewed under NEPA. This interpretation is supported by a plain reading of the statute, its application since 1972, and a Memorandum of Agreement signed by EPA and the Corps.

Section 404 of the Clean Water Act is explicitly and entirely about permits. Thus, section 404(c) cannot apply in the absence of the US Army Corps of Engineers-led permitting process referenced in sections 404(a) and (b).

The D.C. Circuit explained that Section 404(c) “affords EPA two distinct (if overlapping) powers to veto the Corps’ specification: EPA may (1) ‘prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site’ or (2) ‘deny or restrict the use of any defined area for specification (including the withdrawal of the specification).” And EPA may take such action only after determining “that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”

The legislative history also confirms this view. Originally, the Senate bill proposing the regulation of dredge or fill activities delegated complete authority to issue permits to EPA, as it does for discharges of other pollutants under the Clean Water Act. A subsequent House amendment proposed delegating permitting authority to the USACE. The House and Senate later agreed to allocate decisions on dredge or fill projects between the Corps and EPA.

The Senate Debate on the Conference Report explains that the Committee found EPA “should have the veto over the selection of the site for dredged soil disposal and over any specific soil to be disposed of in any selected site.” Under the enacted bill, EPA’s duties to evaluate the permit application would not be duplicative of the Corps’ duties “because the permit application transmitted to [EPA] for review will set forth both the site to be used and the content of the matter of the soil to be disposed. The Conferees expect the Administrator to be expeditious in his determination as to whether a site is acceptable or if specific soil material can be disposed of at such site.” The House Debate on the Conference Report similarly provides that “it is expected that disposal site restrictions or prohibitions shall be limited to narrowly defined areas.”

Further, the Section 404 process triggers NEPA requirements, such as the preparation of an Environmental Impact Statement that fully evaluates all aspects of a major development project.

This comprehensive and detailed review process is clearly what Congress intended when it passed the Clean Water Act.

Congress's intention to have a Corps-led permitting process is made even clearer if you examine the history following the enactment of the CWA.

### *The 1992 Memorandum of Agreement*

EPA and the Corps have jockeyed with each other for decades over which agency has final say over the regulation of wetlands. In 1989, the two agencies came to an agreement, but that agreement fueled controversy, with critics claiming that it expanded the regulatory jurisdiction of both entities. By 1990, opposition to the aggressive implementation of federal wetlands policies was being expressed to Congress and at high levels in President George H.W. Bush's administration. It finally took Congress to force a resolution.

Congress began to consider several pieces of legislation that would have stripped EPA's veto authority from Section 404, leaving the Corps with the first and last say in the permitting process. For example, in 1992 Congress considered legislation (H.R. 1330) that proposed entirely eliminating the existing Section 404 program and replacing it with a new section that removed all EPA oversight and vested the Secretary of the Army with sole responsibility for Section 404. At the same time, then Senator Breaux introduced an identical bill in the Senate (S.1463). When S. 1463 was introduced, Senator Breaux stated: "Another important area of concern is the dual role section 404 creates for the EPA and the" Corps. He explained that "[t]his arrangement has led to confusion, inordinate delays, and wasted resources." Senator Breaux emphasized that the Corps was better equipped to take on the lead role in wetlands regulation and noted that "what [the Corps] need[s] is clear policy guidance from Congress, not the threat of a veto by the EPA."

To respond to growing legislative interest, EPA began cooperating with the Corps to reach an agreement about EPA's role in the permitting process. Indeed, during Congressional hearings in July 1991, then EPA Administrator William Reilly provided a written statement, telling the Senate that EPA and the Corps were working together to improve efficiency, and noted that the two agencies "now have joint agreements ... spelling out procedures and steps ... for resolving cases in instances where the two agencies are not in agreement."

In the end, EPA and the Corps entered into a binding memorandum of agreement – the "Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and The Department of the Army" (the 1992 MOA). EPA agreed to a regulatory scheme under which the Corps would act first on Section 404 permits and would be "responsible for reviewing and evaluating information concerning all permit applications." The 1992 MOA also provides that EPA has the authority to issue Section 404(c) vetoes, but "[t]o assist the EPA in reaching a decision whether to exercise its Section 404(c) authority," the Corps will provide to EPA its Statement of Findings/Record of Decision "prepared in support of a permit decision." Thus, the MOA makes clear that the Corps is entitled to act first and EPA second. Notably, the MOA states that it "will continue in effect until modified or revoked by agreement of both



parties, or revoked by either party alone upon six months written notice.” To date, the parties have neither modified nor revoked the agreement.

Since then, EPA has consistently adhered to this Congressionally prompted Agreement. Indeed, time and time again, EPA has confirmed the binding nature of the 1992 MOA, issuing field memoranda to guide the Agency as it applies the MOA. For example, in 2006, EPA issued a memo “to facilitate improved communication, and ensure a more effective and consistent approach for implementing CWA Section 404(q).” That memo specifically noted that “[t]he coordination provisions articulated in this memorandum do not modify the Section 404(q) Memorandum of Agreement (MOA), but supplement the MOA’s field level procedures as they apply to EPA.” And again in 2008, EPA issued a field memo “to modify EPA’s internal coordination procedures for the review of proposed section 404(q) actions under the” 1992 MOA. EPA explained that modifications were “intended to continue to facilitate effective communication ... while ensuring timely implementation of the 404(q) MOA.”

In short, the MOA is a binding obligation that EPA assumed in order to forestall Congressional intervention. EPA and USACE have both abided by it faithfully for almost 25 years. If EPA has silently decided not to honor this Agreement, it is left to Congress to ensure cooperation between these two agencies.

#### *A Dangerous Precedent*

If EPA is permitted to expand its statutory authority under the Clean Water Act to veto projects that have yet to be proposed, there will be significant implications that go well beyond the Pebble Project. Such a precedent would cut the Corps out of the process and essentially give EPA the authority to engage in pro-active land use planning. In fact, we have discovered evidence of EPA’s ambition in this regard. EPA’s ‘Discussion Matrix’ states that one of the benefits of enacting a pre-emptive 404(c) veto of the Pebble Project is that it “(c)an serve as a model of proactive watershed planning.” In my view, this interpretation is an unconstitutional violation of the established position that land use planning is a matter generally reserved to the states, not the federal government.

Should EPA achieve its ultimate goal – a pre-emptive CWA 404(c) veto of southwest Alaska’s Pebble Project – the denial of due process will not just affect private interests that have invested hundreds of millions of dollars with the expectation of a fair, objective hearing under the law. The State of Alaska, the owner of the Pebble deposit, and the people of the region and the state will also be substantially and unfairly impoverished.

Perhaps more important for this body is the dangerous precedent and far-reaching consequences that a pre-emptive veto will have across the country.

There are some 60,000 projects that apply for CWA 404 permits each year in the United States, representing some \$220 billion of investment in our economy. If a precedent is established whereby EPA can veto any of these projects before they are proposed, before they have applied for permits and before they have been comprehensively and objectively reviewed through an EIS process under NEPA, the chilling effect on our economy will be profound. We will have

substantially reduced the regulatory certainty that investors expect from an advanced legal system, and further eroded our competitiveness as a nation.

The American Exploration & Mining Association has warned that EPA's actions at Pebble are "sending a chilling message to the business and investment community, and has had a negative impact on exploration and mining projects not only in Alaska, but the entire United States. In fact, the world and its investment community are watching. EPA's action at Pebble will clearly indicate whether the United States is open for investment, or closed to innovation, opportunity and job creation."

The precedent becomes even more alarming if EPA intends to use Section 404(c) to undertake pro-active land use planning – including of state, private and tribal lands. Such actions could impact not only mineral development, but energy, agriculture, manufacturing, construction, infrastructure development, among other sectors, in every region of the country.

In our case, the State of Alaska has already developed a comprehensive land use plan for the Bristol Bay region. Drafted in 1985 and updated in 2005 following extensive public consultation, the Bristol Bay Area Plan "determines management intent, land-use designations, and management guidelines that apply to all state lands in the planning area." EPA's attempt to use the 404(c) process in the Bristol Bay area will effectively preempt Alaska's plans for the state lands surrounding Pebble, which are currently specifically designated for mineral exploration and development.

I'd like to close today by reminding the Committee of the six fundamental points with which I opened my testimony.

1. There is a well-established and time proven process in this country by which major development projects are assessed and regulatory decisions are made. It is the EIS process under NEPA, a process supported and even lauded by the environmental community as rigorous, science-based, objective and protective of the public interest.
2. When EPA deviates from well-worn regulatory paths like the NEPA EIS process, particularly with significant and contentious projects like Pebble, then the potential for bias and abuse is sure to follow.
3. Rather than following NEPA's requirements, EPA undertook a scientific study – the Bristol Bay Watershed Assessment (BBWA) – that was designed to ensure that EPA could veto the project. This scientific record that EPA is relying upon to support its pre-emptive veto is not only substantially less exhaustive and definitive than an EIS completed under NEPA (something EPA itself acknowledges), but it also suffers from serious scientific flaws and even intentional distortions.
4. The Clean Water Act, as passed by Congress in 1972, does not provide EPA with the statutory authority to take pre-emptive action as they have sought to

do at Pebble. Moreover, EPA's conduct violates a binding and longstanding agreement with the Corps that makes clear that EPA's veto authority can only be exercised after the Corps has acted.

5. Finally, should EPA achieve its goal of vetoing the Pebble Project, it will set a dangerous precedent with far-reaching consequences. There are thousands of 404 permits applied for every year in virtually every sector of the American economy – from energy to agriculture, manufacturing to construction. Those permits represent hundreds of billions of dollars of annual investment in our country; investment that EPA's stated desire to achieve pre-emptive veto authority will undeniably place at risk.

Allowing the NEPA permitting process to proceed as intended by Congress poses absolutely no risk of harm to the environment or the public interest, inasmuch as mine construction and operations cannot proceed prior to the conclusion of an EIS, a positive Record of Decision from the Corps of Engineers (which EPA will have an opportunity to veto, if justifiable), as well as dozens of other permits granted by other federal and state regulatory agencies

*Conclusion:*

Mr. Chairman and members of the Committee, for the reasons I've outlined in my testimony, I strongly believe that Congress needs to thoroughly review the actions, motivations and potential policy implications associated with EPA's efforts to veto the Pebble Project. I believe that EPA has employed a process that is fundamentally unfair, and undercuts the integrity of government's science-based approach to regulatory decision-making.

If allowed to stand, the precedent established will threaten every major development project in the United States. For these reasons, I believe this matter merits further inquiry, and if necessary, changes to current law to ensure this result is avoided in the current situation, and in similar situations in the future.