



THE STATE
of **ALASKA**
GOVERNOR SEAN PARNELL

Department of Law

Office of the Attorney General

1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501-5903
Main: 907.269.5100
Fax: 907.269.5110

February 3, 2014

Via First Class U.S. Mail and Email to Elkins.arthur@Epa.gov

Mr. Arthur A. Elkins, Jr.
Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (2410T)
Washington, DC 20460

Re: Request for Investigation of EPA's Actions in Preparing the Bristol Bay
Watershed Assessment

Dear Mr. Elkins:

I write on behalf of the State of Alaska to request an investigation of the EPA's preparation of the Bristol Bay Watershed Assessment. You received a similar request for investigation from Northern Dynasty Minerals Ltd., dated January 9, 2014.

The State is concerned that actual bias within the agency induced EPA to invoke a novel interpretation of its statutory authority to conduct the assessment and led to the development of an assessment that contains findings likely tainted by that bias, which raises serious questions about the scientific and technical integrity of the document.

Beyond that, the State views with alarm the threat posed by a federal agency that can effectively preempt legitimate and lawful State regulatory authority over proposed activities on State lands.¹

The EPA's unprecedented actions have already had a chilling effect. Facing what appears to be the EPA's pre-determined outcome, one of the partners in the company that has been gathering the costly information and preparing the development and protection plans necessary to apply for permits withdrew from the Pebble project. Another partner is also contemplating withdrawal. The effect on the many other projects in Alaska and throughout the nation that may be assailed by the EPA as a result of its unique interpretation of its authority remains to be seen. This is all the more reason why an immediate investigation is warranted.

¹ "Congress does not casually authorize administrative agencies to interpret a statute to push the limits of congressional authority (citation omitted). This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 173-74 (2001).

Evidence indicates that even before the EPA announced it would conduct an assessment of the Bristol Bay watershed, its employees collaborated with non-governmental organizations opposed to the Pebble project to devise an analytical process to culminate in EPA's preemptive veto of future applications to develop the Pebble project. The January 9 letter from Northern Dynasty references some of this evidence. We attach additional evidence. We particularly draw your attention to the following examples:

- The U.S. Fish and Wildlife Service appears to have created a document in September 2010 to the effect that EPA had already determined it would veto the Pebble project pursuant to Section 404(c), not only in the Pebble project area, but apparently "a much larger area in southwest Alaska." *See* NDM Exhibit 13, at 1.
- The relative ease and frequency with which EPA staff communicated with representatives of those advocating for a 404(c) veto gives a disconcerting appearance of bias. *See, e.g.*, NDM Exhibits 13-15, 17-19, 22-24; Attachment A. Representatives of non-governmental groups (e.g., Shore Brown with Trout Unlimited, Wayne Natri with Dutko Worldwide, Jon Devine with Natural Resources Defense Council, Geoffrey Parker, attorney for the tribes on their petition) appear to have coordinated with federal personnel to help EPA create an assessment process that would culminate in a preemptive 404(c) veto for lands in and adjacent to the Pebble project area. *Id.* For example, when Governor Parnell wrote EPA in September 2010 regarding the petitions, it appears EPA's Palmer Hough (who was a key contributor on the final assessment and lead co-author of Appendix J in Vol. III of the assessment) coordinated with Trout Unlimited regarding the timing and logistics for response. Attachment B. Several of the documents reflect arrangements to talk by phone or in person regarding Pebble and 404(c) issues. Attachment A.
- The bias of former EPA employee Phil North against the development of both Pebble and a separate project on state lands called the Chuitna Coal Project has been well documented. *See, e.g.*, NDM Exhibit 1-4 and 8-10; Attachment C. At the same time as Mr. North advocated for EPA's preemptive veto of the Pebble project, the EPA tasked him to serve as a principal employee to develop, author, and edit the assessment. U.S. Fish and Wildlife Service biologist Phil Brna, who appears to have similarly advocated for a preemptive veto, was also assigned significant roles in the development of the assessment. *See, e.g.*, NDM Exhibits 10 and 12 ; final assessment, at Vol. I, Executive Summary, at xxvi and Volume III, Appendix C.
- In a string of emails sent in December 2010, with a subject line reading "A new development," Trout Unlimited and EPA coordinated what appeared to be a key meeting at the Nature Conservancy's office in Anchorage. Mr. North indicated that at the meeting "[The Conservancy] will be presenting their risk assessment to EPA" and that this was just before "my proposed time to meet to discuss our own

Arthur A. Elkins, Jr., Inspector General
U.S. Environmental Protection Agency
Re: Request for Investigation of EPA's Actions in Preparing
the Bristol Bay Watershed Assessment

February 3, 2014

Page 3 of 3

risk assessment." The Conservancy provided EPA an "embargoed" copy of the assessment prior to the December presentation with a request that EPA not circulate the report beyond the agency. At or around the same time, David Chambers, who was retained as an expert for various organizations opposed to the Pebble project, was making recommendations to EPA about individuals that EPA could use to develop EPA's assessment. Attachment D.

All of these communications occurred before EPA's announcement in February 2011 that it would be conducting the assessment. Information from EPA's records shows that even after EPA determined that it would conduct the assessment, communications on significant legal, factual, and policy issues were also taking place between key EPA staff who were working on the assessment (e.g., Mr. North, Mr. Hough, and others) and representatives of third parties opposed to Pebble project (e.g., Jeff Parker, Becca Bernard). Attachments E - I.

The actual or apparent bias demonstrated by the EPA, and its solicitation and coordination with the various groups opposed to the Pebble project is serious enough. However, the State's concerns are magnified by the fact that, in preparing the assessment, the EPA (1) failed to make available all of the underlying reports upon which it relied, even though the State has made repeated requests for this information, including that it be posted to EPA's website; (2) failed to comply with the Information Quality Act; (3) failed to comply with its own peer review process with respect to the peer reviews conducted for the assessment; and (4) relied on material that has not been peer-reviewed or which was prepared by individuals or organizations actively opposed to a potential Pebble Mine. The State has on several occasions documented the above concerns and others in its submittals to the EPA.

We ask that you commence an immediate investigation into this matter. Should you need additional information from the State in considering this request, please do not hesitate to contact me.

Sincerely,



Michael C. Geraghty
Attorney General

Attachments A-I

cc: w/attachments by email

Gina McCarthy, EPA Administrator
Dennis McLerran, Regional Administrator, EPA Region X
The Honorable Lisa Murkowski
The Honorable Donald Young
The Honorable Mark Begich
The Honorable Sean Parnell
Commissioner Larry Hartig, ADEC